(24)

No. 96-1581-CFX
Status: GRANTED

Title: South Dakota, Petitioner
v.
Yankton Sioux Tribe, et al.

Docketed:
April 7, 1997

Court: United States Court of Appeals for the Eighth Circuit

Counsel for petitioner: Barnett,Mark W.

Counsel for respondent: Abourezk,James G., Cotton,Kenneth W., Solicitor General

Ptn due 4-6-97, Sunday, rcd 4-7-97. 10 copies of lodging filed (2 unpublished opinions).3

Entry	Date	Note	Proceedings and Orders
1	Apr 7 1997	G	Petition for writ of certiorari filed. (Response due May 7, 1997)
2	Apr 28 1997		Brief of respondent Southern Missouri Waste Management District in support of petition filed.
3	May 7 1997		Brief amicus curiae of Charles Mix County, South Dakota filed.
4	May 7 1997		Brief amici curiae of Cities of Dante, Geddes, Lake Andes, Pickstown, et al. filed.
5	May 7 1997		Brief amici curiae of California, et al. filed.
6	May 7 1997	G	Motion of Montana Association of Counties for Reservation Counties for leave to file a brief as amicus curiae filed.
7	May 7 1997		Brief of respondents Yankton Sioux Tribe and Darrell Drapeau in opposition filed.
10	May 15 1997		Opposition of respondents to motion of Montana Association of Counties for Reservation Counties for leave to file a brief as amicus curiae filed.
9	May 16 1997		Reply brief of petitioner South Dakota filed.
8	May 20 1997		DISTRIBUTED. June 5, 1997 (Page 2)
11	Jun 9 1997		Motion of Montana Association of Counties for Reservation Counties for leave to file a brief as amicus curiae GRANTED.
12	Jun 9 1997		Petition GRANTED. SET FOR ARGUMENT December 8, 1997. **********
14	Jul 2 1997		Order extending time to file brief of petitioner on the merits until August 7, 1997.
15	Aug 7 1997		Brief of respondent Southern Missouri Waste Management District in support of petition filed.
16	Aug 7 1997		Joint appendix filed.
17	Aug 7 1997		Joint appendix in three volumes.
18	Aug 7 1997		Brief of petitioner South Dakota filed.
19	Aug 7 1997		Brief amicus curiae of Charles Mix County, South Dakota filed.
20	Aug 7 1997		Brief amici curiae of Duchesne County, Utah and Uintah County, Utah filed.
21	Aug 7 1997		Brief amici curiae of Cities of Dante, Geddes, Lake Andes, Pickstown, et al. filed.

2 pp

No. 96-1581-CFX

Entry	Date	Note	Proceedings and Orders
22	Aug 7 1997		Brief amici curiae of California, et al. filed.
26	Aug 7 1997		Brief amicus curiae of Lewis County, Idaho (*AP) filed.
23	Aug 11 1997		LODGING by petitioner. Twelve (12) copies of Order of United States Court of Appeals for the Eighth Circuit (Roscoe Primeaux v. Mike Durfee).
25	Aug 21 1997		Order extending time to file brief of respondent on the merits until September 24, 1997.
27	Sep 24 1997		Brief amicus curiae of United States filed.
28	Sep 24 1997		Brief of respondents Yankton Sioux Tribe and Darrell Drapeau filed.
29	Sep 24 1997		Brief amici curiae of Standing Rock Sioux Tribe and Assiniboine and Sioux Tribes filed.
30	Sep 24 1997		LODGING consisting of ten copies of a letter from Interior Department, dated July 27, 1892, submitted by the Solicitor General.
31	Oct 3 1997	G	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
32	Oct 14 1997		Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
33	Oct 24 1997		CIRCULATED.
35	Oct 24 1997	X	Reply brief of petitioner South Dakota filed.
34	Oct 27 1997		LODGING consisting of twelve copies of an unpublished decision dated October 18.1979, U.S. Court of Claims, submitted by counsel for the petitioner
36	Nov 13 1997		Record filed.
		*	Record proceedings U.S. Court of Appeals for the Eighth Circuit and District Court of South Dakota (1 box).
37	Nov 17 1997		Record filed.
		*	Record proceedings U.S. Court of Appeals for the Eighth Circuit (1 box).
38	Nov 18 1997		Record filed.
		*	Record proceedings U.S. District Court, District of South Dakota (1 box).
39	Nov 21 1997	X	Supplemental brief of respondent Southern Missouri Waste Management District filed.
42	Nov 26 1997	G	Motion of respondent Yankton Sioux Tribe to strike supplemental brief of respondent Southern Missouri Waste Management District filed.
40	Dec 1 1997		DISTRIBUTED. December 1, 1997 (Page 13)
43	Dec 1 1997		Opposition of Southern MO Waste Mgmt. District to motion of respondent Yankton Sioux Tribe filed.
44	Dec 8 1997		Motion of respondent Yankton Sioux Tribe to strike supplemental brief of respondent Southern Missouri Waste Management District GRANTED.
45	Dec 8 1997		ARGUED.

Supreme Court, U.S.
FILED

(1)

961581 APR 7 1997

No. _____

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

STATE OF SOUTH DAKOTA,

Petitioner,

v.

YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,

Respondents,

and

SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

MARK W. BARNETT
Attorney General
State of South Dakota
Counsel of Record

JOHN PATRICK GUHIN
Deputy Attorney General
500 East Capitol Avenue
Pierre, SD 57501-5070
Telephone: (605) 773-3215
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

196 PP

QUESTION PRESENTED

WHETHER THE YANKTON SIOUX RESERVATION HAS BEEN DISESTABLISHED OR DIMINISHED BY VIRTUE OF AN 1894 ACT ADOPTING A "CESSION AND SUM CERTAIN" AGREEMENT BETWEEN THE YANKTON SIOUX TRIBE AND THE UNITED STATES AND BY VIRTUE OF ITS CENTURY LONG TREATMENT AS DISESTABLISHED OR DIMINISHED.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 11

I. THE DECISION OF THE DIVIDED PANEL OF THE COURT OF APPEALS SQUARELY CONFLICTS WITH THE SUBSEQUENT DECISION OF THE UNANIMOUS SOUTH DAKOTA SUPREME COURT ON AN IMPORTANT QUESTION OF FEDERAL LAW 12

II. THE DIVIDED OPINION CONFLICTS WITH THIS COURT'S DIMINISHMENT JURISPRUDENCE 15

III. THIS CASE RAISES ISSUES OF NATIONAL IMPORTANCE 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES CITED:

Antoine v. Washington, 420 U.S. 194 (1975) 28

Asarco, Inc. v. Kadish, 490 U.S. 605 (1989) 13

Braxton v. United States, 500 U.S. 344 (1991) 13

Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) 29

Cihak v. United States, 232 F. 551 (8th Cir. 1916) 25

County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251 (1992) 29

DeCoteau v. District County Court, 420 U.S. 425 (1975) ..... *passim*

Forman v. United States, 256 F.2d 766 (8th Cir. 1958) 24

Hagen v. Utah, 510 U.S. 399 (1994) ..... *passim*

Johnson v. Gearlds, 234 U.S. 422 (1914) 28

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) 27

Montana v. United States, 450 U.S. 544 (1981) .. 8, 10, 20

Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985) 21

Perrin v. United States, 232 U.S. 478 (1914) 9, 11, 27, 29

Primeaux v. Lee, 74 F.3d 1243 (8th Cir. 1996), *aff'g. Primeaux v. Lee*, #94-4022 (D.S.D. 1995) 25

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) ....*passim*

Solem v. Bartlett, 465 U.S. 463 (1984) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

South Carolina v. Catawba Indian Tribe, 476 U.S. 498 (1986) 21

South Dakota v. Bourland, 508 U.S. 679 (1993) 17, 29

State v. Greger, 1997 S.D. 14..... *passim*

State v. Thompson, 355 N.W.2d 349 (S.D. 1984).....3, 12

State v. Williamson, 211 N.W.2d 182 (S.D. 1973)....3, 12

State v. Winckler, 260 N.W.2d 356 (S.D. 1977).....3, 12

United States v. Forty-three Gallons of Whiskey, 93 U.S. 188 (1876) 27

United States v. Gerald Greger, 98 F.3d 1080 (8th Cir. 1996)..... 3

United States v. Grey Bear, 828 F.2d 1286 (8th Cir. 1987), *vacated on other grounds on reh'g en banc*, 863 F.2d 572 (8th Cir. 1988), *cert. denied*, 493 U.S. 1047 (1990)..... 17

United States v. Mazurie, 419 U.S. 544 (1975)..... 27

United States v. Nice, 241 U.S. 591 (1916) 28

United States v. Stands, 105 F.3d 1565 (8th Cir. 1997) 14

Weddell v. Meierhenry, 636 F.2d 211 (8th Cir. 1980) 24

Wood v. Jameson, 130 N.W.2d 95 (S.D. 1964) 12

Yankton Sioux Tribe v. United States, 623 F.2d 159 (Ct. Cl. 1980)..... 25

MISCELLANEOUS:

53 Cong. Rec. 6425 (1894).....6, 18

53 Cong. Rec. 6426 (1894).....6, 18

Supreme Court Rule 10(a) 13

TABLE OF AUTHORITIES – Continued

Page

11 Stat. 743 (1859)..... 1

22 Stat. 42 (1882)..... 20

24 Stat. 388 (1887)..... 4

26 Stat. 794 (1891)..... 4

26 Stat. 989 (1891)..... 20

27 Stat. 120 (1892)..... 4

28 Stat. 286 (1894)..... 1

29 Stat. 865 (1895)..... 6

18 U.S.C. § 1151(b) 3

18 U.S.C. § 1151(c) 3, 14

25 U.S.C. § 331..... 4

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331..... 2

PETITION FOR WRIT OF CERTIORARI

Petitioner, State of South Dakota, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled proceeding on October 24, 1996.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 99 F.3d 1439 (8th Cir. 1996) and is reprinted in the Appendix. App. 1-65.

The Memorandum Opinion and Order of the United States District Court for the District of South Dakota is reported at 890 F.Supp. 878 (D.S.D. 1995) and is reprinted in the Appendix. App. 66-97.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on October 24, 1996. The State's Petition for Rehearing and Suggestion for Rehearing En Banc were denied on January 6, 1997. App. 98. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Treaty with the Yankton Sioux, 1858, ratified, 11 Stat. 743 (1859). App. 99.

Agreement with the Yankton Sioux or Dakota Indians, in South Dakota, 1892, ratified, 28 Stat. 286, 314 (1894). App. 111.

STATEMENT OF THE CASE

A. Procedural background.

Southern Missouri Waste Management District ("District") was formed to develop a regional landfill in

southeastern South Dakota. The District selected a site on fee land owned by a non-Indian in Charles Mix County and filed an application for a state solid waste permit with the South Dakota Department of Environment and Natural Resources. A three-day administrative hearing was held before the state Board of Environment and Natural Resources. The Yankton Sioux Tribe intervened and participated in that hearing, without raising any jurisdictional claims. *See* T 303-306. At the close of the administrative hearing, the Board issued the District a solid waste permit.

The Tribe filed an action in federal court pursuant to 28 U.S.C. § 1331, inter alia, requesting injunctive relief halting construction of the District's landfill, and requesting declaratory relief that the Tribe,[1] and not the State, had jurisdiction to regulate the facility because the landfill allegedly lay within the 1858 boundaries of the Yankton Sioux Reservation. The State, brought into this action by a third-party complaint filed by the District, asserted that the 1858 reservation had been disestablished or

[1] The Tribe also asserted that the Environmental Protection Agency (EPA) had jurisdiction over the landfill based on 40 C.F.R. Part 258 and on the fact that the EPA had not delegated federal permitting and enforcement to the State over the area of the landfill. The State's solid waste plan had been approved, and federal permitting and enforcement delegated, by the EPA for all areas of the State, excluding certain "existing or former" Indian reservations. 58 Fed. Reg. 52486-52489 (Oct. 8, 1993). The district court noted, unremarkably, that the EPA retained its federal powers until it delegated them to the state or tribe. App. 94. After the entry of the district court's decision, the EPA denied the State's application for solid waste plan approval over the area at issue here. 61 Fed. Reg. 48683-48686 (Sept. 16, 1996). The State has appealed this decision in a separate action in district court.

diminished[2] as a matter of law, and de facto by treatment of the area by all governments for the last 100 years.

The district court denied the Tribe's injunctive relief, App. 90, but declared that the Yankton Sioux Reservation had not been disestablished or diminished. App. 89. The State appealed that portion of the district court's decision finding that the reservation had not been diminished or disestablished.[3]

The court of appeals affirmed, in a 2-1 decision, while acknowledging that its decision conflicted with prior decisions of the South Dakota Supreme Court. *Id.* at 26 n.19.[4] The State's Petition for Rehearing and Rehearing En Banc was denied, with Judges Magill, Loken and Bowman dissenting. *Id.* at 98.[5]

[2] The State has used the terms "disestablished" and "diminished" interchangeably to mean that the former reservation boundaries and status are terminated as in *DeCoteau v. District County Court*, 420 U.S. 425, 427-28 (1975), and that "Indian Country" status attaches only to remaining or non-extinguished "allotments," *id.* at 427 n.2; 18 U.S.C. § 1151(c), and "dependent Indian communities." 18 U.S.C. § 1151(b).

[3] The Tribe did not appeal the injunctive relief it had been denied in district court.

[4] The court of appeals simultaneously decided *United States v. Gerald Greger*, 98 F.3d 1080 (8th Cir. 1996) in which it found federal criminal jurisdiction based on the case now before this Court. Gerald Greger has indicated that he will not seek certiorari. We also note that Gerald Greger is a different person than Fred Greger who is involved in the state-federal court conflict now before this Court. *State v. Greger*, App. 125.

[5] Judge Wollman did not participate, presumably because he had three times, while a member of the South Dakota Supreme Court, found the Yankton Reservation diminished. *See State v. Williamson*, 211 N.W.2d 182, 184 (S.D. 1973) (Wollman, J. concurring specially); *see also State v. Thompson*, 355 N.W.2d 349 (S.D. 1984); *State v. Winckler*, 260 N.W.2d 356 (S.D. 1977). Judge

Subsequent to the denial of rehearing, a unanimous South Dakota Supreme Court decided *State v. Greger*, 1997 S.D. 14, App. at 125-158, finding that the reservation had been diminished, contrary to the decision of the Eighth Circuit's divided panel.

B. Critical historical developments.

In 1858, the United States entered into a treaty with the Yankton Sioux Tribe by which the Tribe "cede[d] and relinquish[ed]" certain lands. *Id.* at 100. In return, the United States agreed to protect the Yankton Tribe "in the quiet and peaceable possession" of a "tract of four hundred thousand acres,"[6] *id.* at 102, and provided that no "white person" except those in certain narrow categories could reside upon this reservation. *Id.* at 108.

In 1887, Congress passed the General Allotment Act (Dawes Act). 24 Stat. 388 (1887), codified at 25 U.S.C. § 331 et seq. Pursuant to the Act, and 26 Stat. 794 (1891), tracts within the reservation were allotted to individual Yankton Indians. In 1892, Congress enacted 27 Stat. 120, 136 (1892) which authorized funds "to enable the Secretary of the Interior in his discretion to negotiate with any Indians for the surrender of portions of their respective reservations. . . . " That same year, the United States appointed the Yankton Indian Commission to negotiate for the "cession" of the surplus lands of the Yankton Indians. Ex. 605, S. Exec. Doc. No. 27, 53d Cong., 2d Sess. at 7 (1894) (hereinafter "Negotiations"). During the negotiations, the tribal and federal negotiators effectively

---

Wollman recused himself from the original panel assigned to hear the case, and took no part in the rehearing process. App. 98.

[6] The 1858 Treaty indicated the size of the reservation was 400,000 acres; after the 1858 Treaty was ratified, the United States performed a land survey and determined it actually contained 430,495 acres. T 40.

equated the pending cession agreement with the earlier 1858 cession which had resulted in the termination of tribal authority and interest in a large block of the territory of the Tribe, *see, e.g. id.* at 54, 56, 58, 59, 66, 83. The tribal and federal negotiators also equated the pending cession with the contemporaneous Lake Traverse cession, *see id.* at 54, 68, 71, which resulted in disestablishment. *See DeCoteau v. District County Court*, 420 U.S. 425, 445 (1975).

A majority of the male tribal members and the Commission ultimately reached an agreement. The first article of the Agreement provided that the Tribe did "hereby cede, sell, relinquish, and convey" to the federal government "all their claim, right, title and interest" in "all the unallotted lands" of the "reservation set apart to said Indians as aforesaid." App. 112-113. The majority below indicated that approximately 200,000 acres were unallotted and ceded at this time.[7] App. 9. The Tribe did not itself retain a land base. Article I, App. 111-112; *see also*, Art. VIII, App. 116. Article II of the cession agreement provided for payment of a sum certain of "$600,000" to the Tribe. *Id.* at 113. Article XVII of the Agreement prohibited the sale of liquor on the ceded lands, despite the fact that existing statutory law already prohibited the introduction of alcohol into Indian country. *Id.* at 120. Article XVIII, on which the Tribe's argument has been poised, provided that nothing in the present agreement should be construed "to abrogate the treaty of April 19th, 1858," that "all provisions of the said treaty of April 19th, 1858 shall be in full force and effect, the same as though this agreement had not been made" and that "the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858." *Id.*

---

[7] The majority relied on the Court of Claims' figure of 200,000 acres; other evidence indicates 168,000 acres were unallotted and ceded. *See, e.g.*, Negotiations, at 7.

In the 1894 Act ratifying the 1892 agreement, Congress included a provision which provided that the "sixteenth and thirty-sixth sections in each Congressional township . . . shall be reserved for common-school purposes and be subject to the laws of the State of South Dakota." *Id.* at 123. During the debates, congressmen indicated that the lands in this and other agreements would be returned to the "public domain," *see* Ex. 669, 53 Cong. Rec. 6425 (1894) (Rep. McRae); *id.* at 6426 (Rep. Hermann). Another congressman stressed that Congress should honor the 1892 agreement and the others made at the time as "treaties, just as all other cessions of land have been." *Id.* at 8268 (Rep. Pickler).

In 1895, President Cleveland opened the reservation. His Proclamation stated that the Yankton Indians had "ceded, sold, relinquished and conveyed to the United States all their claim, right, title and interest in and to all the unallotted lands within the limits of the reservation" as set apart by the 1858 agreement. 29 Stat. 865 (1895).

After the Presidential Proclamation, the State assumed civil and criminal jurisdiction over the opened lands. The majority acknowledged, for example, that "state government has quite consistently exercised various forms of governmental authority over the opened lands on the Yankton reservation. State courts have exercised criminal jurisdiction over Indians on non-trust lands without objection from the tribe until recently." App. 38. The majority also found "the Tribe presented *no* evidence that it attempted until recently to exercise civil, regulatory, or criminal jurisdiction over nontrust lands" (emphasis added). App. 39. Similarly, the dissent found that "South Dakota has exercised civil and criminal jurisdiction over tribal members in the ceded land for the last century." *Id.* at 62. *See also* T 318, 330-331.

At present, nine percent of the area within the 1858 boundaries is trust land, *see* App. 42, n.25; as illustrated

by the map at App. 159[8] and 1990 federal census data indicates that non-Indians constitute over two-thirds or 68 percent of the population. *Id.* at 42; Ex. 614.

C. Proceedings below.

The district court's opinion finding the reservation not to have been diminished relied almost entirely on Article XVIII. The district court found that Article XVIII, when read with the "clear cession and sale clauses of Articles I and II, creates an internal inconsistency in the 1892 Agreement." *Id.* at 81-82. The district court found itself bound to construe the "ambiguity in favor of the Tribe" and thus found that the effect of Article XVIII was to "incorporate by reference the exterior boundaries of the Yankton Sioux Reservation as set out in the 1858 treaty." *Id.* at 82. The district court nonetheless found that the Tribe had presented "*no evidence* that, since 1894, the Tribe has exercised civil jurisdiction, particularly environmental regulation, over Indians or non-Indians beyond its trust lands" (emphasis added). *Id.* at 88.

A divided court of appeals affirmed. The most critical facet of the majority's opinion is its treatment of the "cession and sum certain" arrangement of Articles I and II of the Yankton Agreement. This Court has found that such an arrangement creates an "almost insurmountable presumption," *Solem v. Bartlett*, 465 U.S. 463, 470-71 (1984), or a "nearly conclusive presumption," *Hagen v. Utah*, 510 U.S. 399, 411 (1994) of diminishment. As pointed out by the dissenting opinion, however, "the

---

[8] App. 159 is a reduced reproduction of a land status map generated by the BIA after the district court's decision. A different coloration has been used here for clarity. The original map was introduced as Exhibit 906 in the *Greger* litigation in state court. (We understand that the phrase "Tribal fee-to-trust land" used in the Legend (the purple lands) was intended to denote lands owned by the tribe in fee for which trust applications had been made.)

majority never acknowledges that the presumption of diminishment exists, nor does it hold that the presumption of diminishment has somehow been rebutted." App. 47-48.

Relying on a prior decision of the circuit court as to a North Dakota reservation, the majority first implied that the Article I "cession" language, standing alone, did not evince a clear congressional intent to disestablish. *Id.* at 14. The majority then turned to Article II's "sum certain" language and found that its history did not indicate an intent to diminish the reservation. *Id.* at 14-16.

Having reduced the "cession and sum certain" language of Articles I and II to insignificance, the majority noted that "the signatories to the 1892 agreement state that Article XVIII has the strongest savings clause of any unallotted land sale agreement between a tribe and the government." *Id.* at 16. The majority omitted all reference to South Dakota's argument that diminishment had been acknowledged by this Court despite equally strong savings language in two agreements with the Crow Tribe. *See DeCoteau*, 420 U.S. at 439 n.22; *Montana v. United States*, 450 U.S. 544, 548 (1981). The majority held that because the language of Article XVIII was "unusually expansive," the other sections of the 1892 agreement "should be read narrowly to minimize any conflict with the 1858 treaty." App. 17. The majority concluded that

> [a]lthough the cession language in Articles I and II could be viewed as describing a transfer of tribal governmental authority as well as land, thereby changing the 1858 treaty boundaries, the narrower reading is that the 1894 act simply authorized the conveyance of real property.

Id. at 20. The majority rejected the State's argument that the specific provisions within Article XVIII for the continuation of "annuities under said treaty of April 19, 1858" indicated that a narrower reading was to be given to the Article. *Id.* at 17-18.

The majority in addition rejected the State's arguments, based on parallel legal conclusions adopted in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), that diminishment was indicated by a provision in the Yankton Agreement regarding the sale of liquor on ceded lands, *see Rosebud*, 430 U.S. at 613, *contrast* App. 23-24, and by a provision in the Act adopting the Yankton Agreement which reserved Sections 16 and 36 of the ceded lands as school land. *See Rosebud*, 430 U.S. at 599-601, *contrast* App. 24-25.

The majority rejected, by footnote, the State's arguments based on the treatment of the reservation diminished by this Court in *Perrin v. United States*, 232 U.S. 478 (1914) and by the court of appeals and the court of claims. See, App. 25, n.18. The majority cited three of the four cases of the South Dakota Supreme Court finding disestablishment but summarily rejected their analysis in a one-paragraph footnote. *Id.* at 26, n.19. The majority labeled the contemporaneous and recent history presented in the record as not " 'fully consistent with an intent to terminate the reservation. . . . ' " App. 39; *see also id.* at 40-43 (finding no de facto diminishment).

Judge Magill dissented. Relying upon *Solem*, 465 U.S. at 470-71 and *DeCoteau*, 420 U.S. at 447-478, Judge Magill found that because "Articles I and II of the 1894 Act contain language of cession of land for a sum certain, they create an almost insurmountable presumption of diminishment." App. 47. The dissent stated that the task of the court was to determine if the proponent of continued reservation status had "successfully rebutted this presumption of diminishment," *id.* (footnote omitted), and found that the

> majority . . . never makes this critical analysis. Indeed, the majority never acknowledges that the presumption of diminishment exists, nor does it hold that the presumption of diminishment has somehow been rebutted.

Id. at 47-48 (footnote omitted).

The dissent rejected the majority's analysis of Articles I and II and its inappropriate reference to legislative history which did not, in any event, support the majority's argument. The dissent found that the majority had failed "to recognize that the language actually chosen by Congress is the best indication of its intent." *Id.* at 49. The dissent asserted that the "majority seems to suggest that the plain meaning of a statute must be rejected unless positively supported by its legislative history. This approach is simply not correct." *Id.*

The dissent also rejected the majority's construction of the Article XVIII savings clause, finding that this Court had found diminishment "despite similarly 'strong' – if less verbose – savings clauses" in *Montana*, 450 U.S. at 548, and *DeCoteau*, 420 U.S. at 446. App. 50, n.31. The dissent found that literal interpretation of Article XVIII would "eviscerate the 1894 Act, nullifying its chief provisions and contradicting its entire purpose." *Id.* at 51. In particular, the Treaty of 1858 provided that the Yankton Indians would not be dispossessed of their lands and white settlers would not be allowed within the 1858 boundaries; the "undisputed purpose" of the 1894 agreement however, was to obtain Yankton Indian lands for white settlement, *id.* at 53, and to allow white persons on those lands. *Id.* at 52-53.

The dissent rejected the majority's approach to the ambiguity issue, relying upon this Court's holding in *DeCoteau*, 420 U.S. at 447, that " *'[a] canon of construction is not a license to disregard clear expressions of tribal and congressional intent.'* " App. 54, n.33 (emphasis by dissent). Because there was "no ambiguity in Articles I and II," Article XVIII could not overcome the clear expression of intent to diminish in Articles I and II. *Id.*

The dissent concluded that the majority's interpretation of Article XVIII was based "neither on the text – which referred only to annuities – nor the legislative history of the 1894 Act, and *has as its source only*, as best I can discern, *a single-minded desire to avoid diminishment at*

all costs." *Id.* at 55-56 (emphasis added). Based on the specific reference to annuities in Article XVIII, the legislative history and testimony of the historian retained by the Tribe, the dissent concluded that the purpose of Article XVIII was to protect annuities. *Id.* at 51-56.

The dissent found support for diminishment in Article XVII of the 1894 Act, noting that the inclusion of the liquor prohibition was indicative of diminishment "because standing law had already prohibited the introduction of alcohol into Indian country" (*id.* at 56); in the reservation of Sections 16 and 36 of the congressional townships for common schools (*id.* at 57-58); and in "striking passages" in the legislative history which indicated the "termination of tribal governance." *Id.* at 59.

Finally, the dissent found substantial support for diminishment in the jurisdictional history of the area, noting the area's treatment as nonreservation "for the past century" by the state courts, *id.* at 62, and the failure of the Tribe to exercise jurisdiction beyond its trust lands. *Id.* The dissent also noted the longstanding treatment of the federal courts of the area as diminished, beginning with this Court's 1914 decision in *Perrin*. *Id.* at 63-64.

Following the decision of the court of appeals and the denial of rehearing and rehearing en banc, the South Dakota Supreme Court issued its decision in *Greger*, *id.* at 125-158. In that case, a unanimous South Dakota Supreme Court found the reservation to have been diminished, notwithstanding the very recent decisions of the lower federal courts in the case at bar. The *Greger* decision is set out at App. 125-158.

REASONS FOR GRANTING THE WRIT

The 1894 Act contains express language providing for the cession of land and the payment of a sum certain for that land. This Court's precedents directly hold that such "cession and sum certain" language creates a "nearly conclusive presumption" or an "almost insurmountable presumption" of diminishment. The Eighth Circuit below

failed to apply or even acknowledge that presumption. As a consequence, that decision squarely conflicts with prior and subsequent Yankton disestablishment decisions of the South Dakota Supreme Court, with this Court's disestablishment jurisprudence and with this Court's own 1914 *Perrin* opinion. The Petition should be granted to resolve those conflicts, which have left the regulatory authority over Indians and non-Indians on roughly 390,000 acres of South Dakota lands in an uncertain state.

I

THE DECISION OF THE DIVIDED PANEL OF THE COURT OF APPEALS SQUARELY CONFLICTS WITH THE SUBSEQUENT DECISION OF THE UNANIMOUS SOUTH DAKOTA SUPREME COURT ON AN IMPORTANT QUESTION OF FEDERAL LAW.

As the divided opinion below recognized, its decision put the court of appeals in conflict with prior decisions of the South Dakota Supreme Court. App. 26, n.19. For example, in *Wood v. Jameson*, 130 N.W.2d 95, 99 (S.D. 1964), the South Dakota Supreme Court held that "the purpose of Congress was to disestablish the [Yankton] reservation." *See also State v. Thompson*, 355 N.W.2d 349, 350-51 (S.D. 1984); *State v. Winckler*, 260 N.W.2d 356, 360 (S.D. 1977); *State v. Williamson*, 211 N.W.2d 182, 183-84 (S.D. 1973); *See also* Dissent, App. 61, n.38.

Subsequent to the decision of the divided court of appeals, a unanimous South Dakota Supreme Court again found that the Yankton Sioux Reservation had long been diminished. *State v. Greger*, App. 125-158. The South Dakota Supreme Court's decision focused on the identical issue before the courts below – whether the reservation had been diminished. The State Supreme Court "thoroughly reviewed" the proceedings in the federal case

now before this Court,[9] but did not consider itself bound by the federal decisions under *Asarco, Inc. v. Kadish*, 490 U.S. 605, 617 (1989). *Greger*, App. 135, n.5. The South Dakota Supreme Court concluded at *Greger*, App. 157-158:

> For over one hundred years, federal and state authorities have treated the Yankton Sioux Reservation as diminished. . . . The United States Supreme Court in 1914 referred to the very area now in question as no longer part of the reservation, and in four separate opinions, this Court concluded diminishment occurred. Statutory language, contemporary negotiations, land ownership, population patterns and "jurisdictional history" all support diminishment. After more than a century, no other expectation is reasonable – using the Supreme Court's "clean analytical structure," the evidence is clear: the Yankton Reservation has been diminished.

This Court has explained that "[a] principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991). *See* Supreme Court Rule 10(a). The resolution of a conflict relating to the existence of a reservation has repeatedly constituted a compelling argument in favor of granting certiorari. *See, e.g., Hagen*, 510 U.S. at 409 ("We granted certiorari . . . to resolve the direct conflict . . . "); *Solem*, 465 U.S. at 466 ("Because the Supreme Court of South Dakota has issued a pair of opinions offering a conflicting interpretation . . . we granted certiorari"); *DeCoteau*, 420

---

[9] The State Supreme Court had before it the same exhibits and testimony put before the federal district court and a few additional exhibits added in the state court proceeding. *Greger*, App. 135, n.5.

U.S. at 430-31 ("We granted certiorari . . . to resolve the conflict . . .).[10]

The divided opinion creates profound difficulties for all of the governmental agencies attempting to administer the area and for all those who live in the area (over two-thirds of whom are non-Indians). Less than ten percent of the area even potentially constituted "Indian country" as trust land[11] under 18 U.S.C. § 1151(c) prior to the decision of the court of appeals. App. 42, n.25. The remaining ninety percent of the area was assuredly not "Indian country." The divided opinion below creates conflicts with regard to at least the ninety percent non-Indian land constituting approximately 390,000 acres.

If the divided decision of the panel of the Eighth Circuit correctly states the law, 100 percent of the area will be subject to the subtle and often elusive permutations of federal civil and criminal Indian law which follow the designation of an area as a "reservation"; if, on the other hand, the state courts are correct in affirming their own century-long jurisdiction, the status quo would be retained and "Indian country" status would attach only to at most nine percent of the area as "allotments" or as "dependent Indian communities." *DeCoteau*, 420 U.S. at 427, n.2.

---

[10] Indeed, in *Hagen*, the United States supported the grant of certiorari to deal with a state-federal court diminishment conflict and did so in the face of procedural and other difficulties not presented here. Brief for the United States as Amicus Curiae, On Petition for a Writ of Certiorari to the Supreme Court of Utah at 5, 12-14, and n.10, *Hagen v. Utah*.

[11] Not all "trust land" constitutes an "allotment" or "Indian country" under 18 U.S.C. § 1151(c). *See United States v. Stands*, 105 F.3d 1565, 1571-1572 (8th Cir. 1997). *See also*, n.2, *supra*.

II

THE DIVIDED OPINION CONFLICTS WITH THIS COURT'S DIMINISHMENT JURISPRUDENCE.

Because of the overwhelming importance of the issue of reservation status to all affected citizens and governments, it is critical that the lower courts scrupulously adhere to this Court's " 'fairly clean analytical structure,' " regarding diminishment questions. *Hagen*, 510 U.S. at 410-411.

In *Hagen*, 510 U.S. at 411, this Court, noting that it would not lightly find diminishment and that statutes should be construed liberally in favor of the Indians, identified three primary areas of inquiry. According to the Court:

> The most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands.

Id. Hagen also noted its reliance upon "historical context" and " 'on a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant. . . . ' " *Id.* The divided court below failed to follow this Court's analytical structure and precedents in any meaningful fashion.

A. The opinion below directly conflicts with this Court's precedent regarding "cession and sum certain" language.

This Court, in *DeCoteau*, 420 U.S. at 445, firmly established the principle of law that "cession and sum certain" language is "precisely suited" to termination of a reservation. Later cases have emphasized this principle, in exceptionally strong terms, and have found that "cession and sum certain" language creates an *"almost insurmountable presumption"* of diminishment. *Solem*, 465 U.S. at 470-71. In particular, this Court has held:

> Explicit reference to cession or other language evidencing the present and total surrender of all

> tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands. (Citations omitted.) *When such language of cession is buttressed by an unconditional commitment from Congress to compensate the Indian tribe for its opened land, there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished.*

Solem, 465 U.S. at 470-71 (emphasis added). This Court recently reiterated that binding rule of law in *Hagen*, 510 U.S. at 411, when it found that the use of cession and sum certain language creates a *"nearly conclusive presumption"* of diminishment. In addition, this Court has found that such language is "[a]t one extreme" of language which indicates diminishment. *Solem*, 465 U.S. at 469, n.10.

The "operative language," *Hagen*, 510 U.S. at 412, of the 1894 Yankton Act contained the following provisions:

> Article I. The Yankton tribe of Dakota or Sioux Indians hereby *cede, sell, relinquish, and convey* to the United States *all their claim, right, title, and interest in* and to *all the unallotted lands* within the limits of the reservation set apart to said Indians as aforesaid.
>
> Article II. In consideration for the lands *ceded, sold, relinquished, and conveyed* to the United States as aforesaid, the United States stipulates and agrees to pay to the said Yankton tribe of Sioux Indians *the sum of six hundred thousand dollars ($600,000)*, as hereinbefore provided for.

App. 112-113. (emphasis added) Articles I and II of the 1894 Act contain language of "cession" of land for a "sum certain" and therefore create the "nearly conclusive presumption," *Hagen*, 510 U.S. at 411, or the "almost insurmountable presumption" of diminishment. *Solem*, 465 U.S. at 470-71. *See DeCoteau*, 420 U.S. at 445.

As the dissent pointed out, the task of the court below, upon recognition of the presumption, was "to determine if the proponents of a continued reservation

status for the ceded lands have successfully rebutted this presumption of diminishment." App. 47 (footnote omitted). The majority failed to make this "critical analysis" however, and in fact "never acknowledges that the presumption of diminishment exists nor does it hold that the presumption of diminishment has somehow been rebutted." Dissent, App. 47-48 (footnote omitted).[12] The failure of the majority to adhere to this Court's unequivocal precedents with regard to the creation of the "almost insurmountable presumption" of diminishment amply justifies the grant of certiorari in this case. *Cf. South Dakota v. Bourland*, 508 U.S. 679, 691-92 (1993).

The majority, instead of adhering to this Court's "cession and sum certain" holdings, engaged in a "deconstruction" of Articles I and II. First, instead of construing the two terms together as this Court has indicated is appropriate, *see Solem*, 465 U.S. at 470-71, the majority separated the two terms. Second, the majority essentially ignored the "cession language," App. 13, assigning it virtually no importance.[13] The majority thus ignored not only *Hagen*, *Solem*, and *DeCoteau*, but also *Rosebud*, 430 U.S. at 597 in which this Court found that "cession"

---

[12] The dissent points out that the majority's "two passing references" to the presumption are made as "mere restatement[s] of the appellant's argument." App. 47, n.30. The dissent also correctly found that: "Nowhere in its opinion does the majority acknowledge that the appellant is correct that this almost insurmountable presumption of diminishment was created by Articles I and II." *Id.*

[13] The majority's reliance on *United States v. Grey Bear*, 828 F.2d 1286 (8th Cir. 1987), *vacated in part on other grounds on reh'g en banc*, 863 F.2d 572 (8th Cir. 1988), *cert. denied*, 493 U.S. 1047 (1990), is unavailing for *Grey Bear*, while including "cession language," did *not* include "sum certain" language and this distinction was critical in *Grey Bear* itself. *Grey Bear*, 828 F.2d at 1290. *See* Dissent, App. 48-49; *State v. Greger*, App. 142, n.7.

language *alone*, without the addition of sum certain language, was " 'precisely suited' to disestablishment."

Third, the majority "similarly discards the importance of Article II," Dissent, App. 49, and its "sum certain" language. The flaw in the majority opinion is its failure to assign primary importance to the language actually used by Congress. Instead of recognizing that the language was "precisely suited" to disestablishment, the majority looked to legislative history to determine its meaning. *See id.* at 14-16. As stated by the dissent, the majority thus incorrectly found that "the plain meaning of the statute must be rejected unless positively supported by its legislative history." *Id.* at 49. As the dissent concluded, however, even this investigation of legislative history yielded "nothing" which "betrays" an intent other than to diminish. *Id.*

The majority's apparent argument with regard to Article II sum certain language is that evidence that a tribe sought definite and substantial financial return for its lands is not supportive of diminishment. *See id.* at 15-16 (citing *DeCoteau*, 420 U.S. 447-48). The majority misreads *DeCoteau*, 420 U.S. at 448, which indicates that an agreement which did *not* provide for definite payment did not diminish but that diminishment *was* accomplished by the act which "vests in the tribe a sum certain – $2.50 per acre – in payment for the express cession and relinquishment of 'all' of the tribe's 'claim right, title and interest' in the unallotted lands." *See also* general discussion of this point at *Rosebud*, 430 U.S. at 598, n.20.

Analysis of the historical record yields additional evidence that "cession and sum certain" language, as used here, *was* intended to disestablish the reservation. For example, congressmen debating the ratification of the 1892 agreement indicated the lands in question would become part of the "public domain." *See* Ex. 669, 53 Cong. Rec. 6425 (1894) (Rep. McRae); *id.* at 6426 (Rep. Hermann). *See, Hagen*, 510 U.S. at 412-415. Further, the Indians and federal negotiators, Negotiations at 54, 56,

58, 59, 66, 83, effectively equated the 1892 cession with the 1858 cession made by the same Yankton Indians. Because the Indians and non-Indians alike knew the effect of the 1858 cession agreement, both the tribal members and the federal negotiators certainly knew that the 1892 cession agreement would diminish the reservation. The negotiators and the Indians also regularly equated the 1892 cession with the Lake Traverse cession, *see, e.g., id.* at 54, 68, 71; it cannot be disputed that this agreement disestablished the Lake Traverse Sisseton Reservation. *DeCoteau*, 420 U.S. at 427-28.

B. The opinion of the court below conflicts with this Court's treatment of savings clauses.

The divided panel below relied primarily upon a savings section to find that the reservation had not been diminished. *See* App. 16-21. Article XVIII, as set out at App. 120, states as follows:

> Article XVIII: Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement, and its ratification by Congress, all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858.

1. Diminishment has been found by this Court in the two cases in which language at least equal in strength to the Yankton language was employed.

As the dissent noted, this Court has "found diminishment despite similarly 'strong' – if less verbose – savings clauses in two other allotment-era statutes." Dissent,

App. 50, n.31. An agreement with the Crow Tribe at 22 Stat. 42 (1882), states that: "all the existing provisions of May seventh, eighteen hundred and sixty-eight, shall continue in force." This language is at least as powerful as that of the Yankton agreement but this Court, in *Montana*, 450 U.S. at 548, referred to this act as one of four which "reduced the reservation to slightly fewer than 2.3 million acres." Similarly, this Court noted diminishment with regard to an Agreement found at 26 Stat. 989, 1039-1040, § 31, Act of March 3, 1891, which stated:

> That all existing provisions of the Treaty of May 7th, Anno Domini eighteen hundred and sixty-eight, and the agreement approved by act of congress dated April eleventh, eighteen hundred and eighty-two, shall continue in force.

Despite this language, this Court acknowledged that this Agreement also diminished the Crow Reservation. *DeCoteau*, 420 U.S. at 439, n.22, 446; *Montana*, 450 U.S. at 548. While neither *Montana* nor *DeCoteau* directly set forth the savings language of the two agreements, this Court's opinions in these two cases strongly indicate diminishment. The majority below, however, did not cite or deal with this Court's opinions in this respect.

2. The savings section is internally ambiguous.

In assigning the savings section in this case unprecedented force, the majority failed to credit the internal ambiguity of the section itself – an ambiguity which makes a broad construction of the section unavailable. Article XVIII states both that "all provisions of the said 1858 treaty of April 19th, 1858, shall be in full force and effect" and *also* that the annuity provisions "under the said treaty of April 19, 1858" remain in effect. App. 120. The section therefore gives inconsistent signals as to what is preserved; i.e., if the language were actually intended to protect "all" provisions of the 1858 agreement, certainly the 1858 annuity provisions would be protected.

Furthermore, if a literalistic interpretation of the first portion of the savings section is adopted, it effectively negates the 1894 agreement. Article 4 of the 1858 Treaty guaranteed the tribe "quiet and peaceable possession" of 400,000 acres "for their future home." App. 102. Article 10 of the 1858 agreement excluded settlement by any "white person" on the reservation, except certain narrow categories. *Id.* at 108. Indeed, under the literalistic interpretation of the 1894 savings clause, *the entirety of the 1858 Treaty remains in effect, and the cession of land provided for by Articles I and II of the 1894 Act is negated.*

The canons of construction do not allow an ambiguous Article XVIII to overcome the crystal clear provisions of Articles I and II. This Court held in *DeCoteau*, 420 U.S. at 447, that a "canon of construction is not a license to disregard clear expressions of tribal and congressional intent." *See also South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 506 (1986); *Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 766-770 (1985). As this Court has definitively established, "cession and sum certain" language identical to that used in the 1894 Yankton agreement constitutes a clear and unequivocal expression of tribal and congressional intent to disestablish. Under *DeCoteau*, *Catawba* and *Klamath*, the canons of construction do not allow the ambiguous language of Article XVIII to overcome the definitively established expression of tribal and congressional intent created by the "cession and sum certain" language of Articles I and II. *See* Dissent, App. 54, n.33.

Finally, the effect of the majority opinion is to negate the "operative language," *Hagen*, 510 U.S. at 512, of Articles I and II, in favor of the savings language. *Hagen*, 510 U.S. at 514, indicated the priority to be given to "operative language" in construing a "congressional purpose to terminate reservation status." The majority's failure to assign the correct priority to the "operative language" of Articles I and II infected its decision with error.

3. The majority failed to properly deal with the ambiguity of Article XVIII.

The proper mode of analysis of the ambiguous text of Article XVIII is to examine its history and its place with regard to the remainder of the Agreement, *see* Dissent, App. 51-56. An analysis of the legislative history of the article reveals no support for the construction of the majority. The dissent states,

> nowhere in Article XVIII nor in the legislative history of the 1894 Act is there any suggestion that the 1858 boundaries were to remain intact, nor that the tribe was to have continuing authority over ceded lands.

Id. at 54 (footnote omitted.) *See also Greger*, App. 149.

The history of the article reveals that its focus and intent were to preserve annuities, as set forth in the language of the article. The historian retained by the Tribe testified, for example, that "it's my opinion the Yanktons would have believed that the government might cut off the annuities, and that would have been disastrous." T 54-55. *See* Dissent, App. 55; *Greger*, *id.* at 147-148. Furthermore, the report of the negotiators to Congress regarding Article XVIII specifically stated that "nothing in the agreement shall be construed to abrogate the Treaty of April 19, 1858 and that the Yankton Indians shall continue to receive their annuities under said treaty." Negotiations at 4. Annuities were the only claims thought important enough to specifically include in the agreement or in the commentary to the agreement.[14] In sum, nothing in the history of Article XVIII supports the

---

[14] As the South Dakota Supreme Court has implied, the article may well have been broad enough to encompass the other monetary claims raised by the Yankton Indians at that time. *Greger*, App. 148-149. *See, e.g.*, Negotiations at 21 ("The Indians, . . . presented a long list of claims and grievances. They claim they had not received their dues under the Treaty of 1858. . . . "); *id.* at 55 (tribal member's claims relating to "this [1858] treaty," Pipestone and other claims); *id.* at 58, 74.

sweeping and unprecedented interpretation given it by the majority below.

4. The majority failed to address whether the savings section overcame the "almost insurmountable presumption" of diminishment.

Finally, we note the significant error of the majority in failing to set the ambiguous savings clause against the "almost insurmountable presumption," *Solem*, 465 U.S. at 470-71, or the "nearly conclusive presumption," *Hagen*, 510 U.S. at 411, of diminishment established by this Court. The result is, in any event, clear. The ambiguous savings clause cannot overcome the powerful presumption of diminishment, especially when that presumption is aided, as here, by other substantial evidence.

C. The decision below conflicts with this Court's conclusion that the "justifiable expectations" of residents of the area should be honored.

This Court has strongly indicated that it gives substantial deference to the "justifiable expectations" of people living in the area in determining whether diminishment has occurred. *See Hagen*, 510 U.S. at 420-21; *Rosebud*, 465 U.S. at 604-605. It is appropriate that this should be so, for it cannot be the function of the law to lightly upset century old jurisdictional arrangements. In determining the nature of the "justifiable expectations" of the inhabitants of the area, this Court has looked to the jurisdictional history, land ownership pattern and population of the area. All three factors argue strongly both for de jure, *Rosebud*, 430 U.S. at 603-605, and de facto, *Solem*, 465 U.S. at 471, disestablishment.

1. Jurisdictional history.

In *Rosebud*, 430 U.S. at 603, this Court indicated, with respect to jurisdictional history, that the "single most salient fact is the unquestioned actual assumption of state jurisdiction over the unallotted lands in Gregory County since the passage of the 1904 Act. . . . " As in *Rosebud*, the State here immediately assumed jurisdiction over the unallotted lands in the former Yankton Reservation area after the President's Proclamation. Even the majority below found that state government

> has quite consistently exercised various forms of governmental authority over the opened lands on the Yankton reservation. State courts have exercised criminal jurisdiction over Indians on nontrust lands without objection from the tribe until recently.

App. 38. Similarly the dissent, *id.* at 62, found that "South Dakota has exercised civil and criminal jurisdiction over tribal members in the ceded lands for the past century." *See also Greger, id.* at 154-155: "Since 1895, the year the reservation was opened, South Dakota courts have consistently maintained, without intervention by federal or tribal authorities, civil and criminal jurisdiction within the former reservation boundaries."

State jurisdiction has been, moreover, exclusive. The federal courts have not exercised criminal jurisdiction over nonmembers or non-Indians on the nontrust lands of the alleged reservation. *See, e.g.*, Testimony of Tribal Chairman Drapeau. T 318, 330-331; *Greger*, App. 154. Indeed, the United States admits that as late as 1985, it had stated in a brief to the Eighth Circuit Court of Appeals that the "reservation had been diminished by the 1894 treaty." *See* Brief of the United States as Amicus Curiae in Support of Plaintiffs-Appellees, *Yankton Sioux Tribe v. Southern Missouri Waste Management District*, No. 95-2647, at 18, n.8. Similarly, the federal courts have consistently treated the area as disestablished. *See Weddell v. Meierhenry*, 636 F.2d 211, 213, n.2 (8th Cir. 1980); *Forman v.*

United States, 256 F.2d 766, 767 (8th Cir. 1958); *Cihak v. United States*, 232 F. 551 (8th Cir. 1916). The court of claims in 1980 stated "the 1892 agreement changed those boundaries by the cession at issue in this case." *Yankton Sioux Tribe v. United States*, 623 F.2d 159, 165 (Ct. Cl. 1980). Indeed, the same district court which decided the case now before this Court entered a decision in 1995 treating the Yankton reservation as disetablished and that decision was affirmed, per curiam, by the court of appeals. *Primeaux v. Lee*, Civ. 94-4022, (D.S.D. June 14, 1995), *aff'd.*, No. 95-2943 (8th Cir. Jan. 3, 1996) (per curiam). (Unpublished opinions lodged with Clerk). See also *Primeaux v. Lee*, 74 F.3d 1243 (8th Cir. 1996) (Table).

Finally, the *Tribe* has not exercised civil or criminal jurisdiction on the nontrust lands of the area for the last century. As the majority stated, "The tribe presented no evidence that it has attempted until recently to exercise civil, regulatory, or criminal jurisdiction over nontrust lands." App. 39. *Indeed, neither of the tribe's own constitutions claims jurisdiction over non-Tribal lands.* The latest constitution, adopted in 1962 by tribal members after examination of other tribal constitutions, claimed territorial effectiveness only as to "all original Tribal lands now owned by the Tribe under the Treaty of 1858." Ex. 652; Art. IV, § 1. *See* App. 39. Thus the tribe, as of today, limits its constitutional assertion of jurisdiction to *tribal lands only* and claims no external boundaries. The effect of the ruling of the court below is to grant the tribe far greater jurisdiction than it claims in its own BIA-approved constitution. No precedent has been cited to support such an anomalous result.[15]

---

[15] In both *DeCoteau*, 420 U.S. at 443, and *Rosebud Sioux Tribe*, 430 U.S. at 616 n.1 (Marshall, J. dissenting), the tribe claimed reservation boundaries based in part on assertions in their own constitutions. Even *with* such provisions, the Tribe's claims were *rejected*. This makes the ruling below all the more remarkable.

2. Land ownership and population.

The district court found that "[w]hite settlers rapidly entered and settled the opened areas of the reservation." App. 86. In fact, by 1930, the Yankton Indians owned only 43,358 acres and had divested themselves of ownership of approximately 90 percent of the lands or 387,047 acres. *Greger*, App. 156. As of today, the United States holds *less than nine percent* of the acreage within the purported reservation in trust. *Id.* at 42, n.25; *Greger*, *id.* at 156. See Map, App. 159. Furthermore, there are now six state chartered municipalities within the area claimed to be a reservation: Wagner, Lake Andes, Pickstown, Dante, Marty, and Ravinia. *Greger*, App. 156. As of the 1990 census, over two-thirds, or approximately 68 percent,[16] Ex. 614, p. 2, of those residing in the area of the former reservation were non-Indian.[17]

---

[16] The majority quotes the Bureau of the Census statistics but notes that the tribe "claims" that the census data are not accurate. App. 42. Apparently believing the controversy to be unimportant, the majority does not resolve the question. Reliance on the tribal "claims" would be, in any event, improvident. The basis of the tribal "claim" is apparently Exhibit 31, p. 1. The author of the exhibit stated that the demographic statistics were received by "calling the tribal office." T 81. The tribal chairman openly admitted that the number of residents at issue was arrived at simply by taking the total number of tribal members and dividing by two, T 314; he stated, "I assume it probably isn't" based on an actual count. T 314-315.

[17] The majority opinion's treatment of several other issues also directly conflicts with this Court's disestablishment jurisprudence. For example, although *Rosebud*, 430 U.S. at 602-603, indicates that a Presidential Proclamation which contained cession language was an "unambiguous" statement of "perceived disestablishment," the Yankton Proclamation, which likewise contains cession language is virtually ignored by the majority. Second, although the liquor provision of Article XVII of the Yankton Agreement is parallel to that found to

D. The majority opinion conflicts with this Court's decision in *Perrin v. United States*.

The decision of the divided court below conflicts with *Perrin v. United States*, 232 U.S. 478 (1914). *Perrin* involved the prosecution of a non-Indian for selling liquor on lands ceded by the 1894 agreement. This Court found, in effect, that the reservation had been disestablished by referring to the lands as "ceded lands *formerly* included in the Yankton Sioux Indian Reservation. . . . " *Id.* at 480 (emphasis added). The Court contrasted the "original reservation," of 400,000 acres with a 1914 acreage of about 100,000 acres. *Id.* at 486. This Court noted " '[i]f liquor is injurious to [the Indians] inside of a reservation, *it is equally so outside of it*. . . . ' " *Id.* at 484 (quoting *United States v. Forty-three Gallons of Whiskey*, 93 U.S. 188, 195 (1876) (emphasis added)).

The court below erroneously assumed that the issue of disestablishment was not actually before the Court in *Perrin*. App. 25, n.18. In fact, the United States argued that Petitioner "challenged the jurisdiction of the Court on these grounds: (1) the sale was on his property and *not on a reservation*." Brief of United States, *Perrin v. United States*, No. 707, p. 2 (January 1914) (emphasis added). Cases citing to *Perrin* have interpreted it as finding the Yankton Reservation has been diminished. *See, e.g., United States v. Mazurie*, 419 U.S. 544, 554 (1975) (*Perrin* involved lands which "originally had been included in the Yankton Sioux Indian Reservation, but had been ceded to the United States"); *Mescalero Apache Tribe v.*

---

indicate diminishment in *Rosebud*, 430 U.S. at 613, the majority slights its importance. *See* App. 56-57. Third, the majority fails to give proper deference to the importance of the school lands provision in the Act of Congress adopting the Yankton Agreement, *see* App. 57-58, although a similar provision in *Rosebud*, 430 U.S. at 599-601, strongly indicated diminishment.

Jones, 411 U.S. 145, 159 (1973) (Douglas, J., dissenting). ("In the liquor cases the Court held that it reached acts even off Indian reservations. . . . "). *See also Antoine v. Washington*, 420 U.S. 194, 203 (1975) (relying on *Perrin* in off-reservation regulation controversy); *United States v. Nice*, 241 U.S. 591, 597-598 (1916); *Johnson v. Gearlds*, 234 U.S. 422, 444-45 (1914).

III

THIS CASE RAISES ISSUES OF NATIONAL IMPORTANCE.

The question presented is of exceptional importance in two interrelated ways. First, the question is important because it directly affects the daily lives of all those who live in the area of the alleged reservation (and all those who live in the area of other alleged reservations). Prior to the decision of the federal courts below, criminal matters occurring on nontrust lands were regularly prosecuted in state, not federal, court. With the advent of the new regime imposed by the divided court of appeals, a tribal membership based analysis will be employed to determine which cases are parceled to federal, state, or tribal court. That law enforcement will be adversely affected is virtually preordained.

The effect on civil jurisdiction will be similarly dramatic. Prior to the recent decision of the divided court of appeals, the State exercised general civil jurisdiction over all persons within the 91 percent non-Indian area, and the tribe had never exercised such jurisdiction. Under the regime imposed by the divided court of appeals, a civil dispute between two tribal members would presumably be subject to only tribal court jurisdiction (whether the parties so desired or not) and a dispute involving an Indian and a non-Indian would generally be heard in tribal court (unless the Indian plaintiff desired to bring an action in state court). This Court now has before it the

issue of whether a dispute involving two non-Indians should be heard in state or tribal court. *Strate v. A-1 Contractors*, No. 95-1872 (Argued Jan. 7, 1997). The over 6,000 residents of the area can also expect constant unsettling litigation to determine which entity has jurisdiction over civil regulatory matters such as hunting and fishing, *see, e.g., South Dakota v. Bourland*, 508 U.S. 679 (1993); taxation, *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992); zoning, *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) and environmental regulation (such as prompted this litigation).

Second, the opinion of the court below puts into question whether reliance may be had on this Court's decisions in disestablishment questions. In particular, the decision below has the effect of undermining this Court's finding that "cession and sum certain" language creates an "almost irrebuttable presumption" of disestablishment. In addition, the decision below lightly dismissed this Court's findings with regard to the importance of "justifiable expectations" of those who themselves, and whose families, have lived in the area for very long periods, in this case as long as a century. As the State Supreme Court pointed out, this Court's 1914 *Perrin* decision itself "created considerable reliance." *Greger*, App. 157 n.13. The question presented is thus important to those who will face litigation in the future on these issues and to those who might be encouraged to undertake litigation because of the decision below. Grant of the Petition would send a strong message that this Court's precedents with regard to diminishment cases must be honored.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MARK W. BARNETT
Attorney General
Counsel of Record

JOHN PATRICK GUHIN
Deputy Attorney General
500 East Capitol Avenue
Pierre, SD 57501-5070
(605) 773-3215

APPENDIX

APPENDICES

Opinion of the United States Court of Appeals for the Eighth Circuit, Oct. 24, 1996 .....App. 1

Memorandum Opinion and Order of the United States District Court for the District of South Dakota, Southern Division, June 14, 1995 ....App. 66

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc of the United States Court of Appeals for the Eighth Circuit, Jan. 6, 1997 .....App. 98

Treaty with the Yankton Sioux, 1858 .....App. 99

Agreement with the Yankton Sioux or Dakota Indians, in South Dakota, 1894 .....App. 111

Opinion of the Supreme Court of the State of South Dakota in *State v. Greger*, Feb. 19, 1997 .....App. 125

Map.....App. 159

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-2647

Yankton Sioux Tribe, a federally recognized tribe of Indians, and its individual members; Darrell E. Drapeau, individually, a member of the Yankton Sioux Tribe, Plaintiffs - Appellees, v. Southern Missouri Waste Management District, a non-profit corporation, Defendant - Third party plaintiff - Appellee, v. State of South Dakota, Third party defendant - Appellant. --- Charles Mix County, South Dakota; Flandreau Santee Sioux Tribe, Inc.; United States of America; Amicus Curiae	*	Appeal from the United States District Court for the District of South Dakota

Vine Deloria, Jr.; Philip S. Deloria; Philip Lane, Sr.; Philip Lane, Jr.; James Weddell, Descendants of Francois Deloria, Signatory to the Treaty of 1858, and descendants and relatives of Philip J. Deloria, Chief of Band Eight of the Yankton Sioux Tribe, at the time of the negotiation and ratification of the agreement of December 31, 1892.

Amici Curiae

Submitted: May 13, 1996

Filed: October 24, 1996

Before RICHARD S. ARNOLD, Chief Judge, MAGILL and MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

This case raises questions about the extent to which an 1894 act of Congress affected the reservation of the Yankton Sioux Tribe in South Dakota. That statute ratified and incorporated an 1892 agreement between the tribe and the United States. The tribe brought this declaratory judgment action to enforce its claimed right to approve and regulate a landfill site over which the state claims

jurisdiction on the basis that the 1894 statute disestablished or diminished the Yankton reservation. After a trial the district court[1] ruled that the site was still part of the Yankton reservation so federal environmental laws applied, but that the tribe did not have regulatory authority over the project, which it declined to enjoin. The state appealed from the judgment, and we affirm.

I.

The Southern Missouri Waste Management District (Waste District) is a non-profit corporation which was established by several South Dakota counties to develop a regional solid waste landfill, for which it purchased land within the boundaries of Charles Mix County. The proposed site had been owned by a non-Indian but was within the Yankton Sioux Indian Reservation as defined by the 1858 treaty between the tribe and the United States.

The Waste District filed an application with the South Dakota Department of Environment and Natural Resources for a solid waste permit to construct the landfill on the site. The Yankton tribe was concerned about possible effects of the project, and it intervened and participated in the December 1993 administrative hearing on the permit application.

---

[1] The Honorable Lawrence L. Piersol, United States District Judge for the District of South Dakota.

After the state granted the permit, the tribe[2] sued the Waste District in federal court to stop construction until it could review and regulate the project. It sought a declaratory judgment that the boundaries established in the 1858 treaty still define the extent of the reservation. The Waste District joined the state as a third party defendant, and the state argued that the tribe had no jurisdictional authority over the 200,000 noncontiguous acres ceded to the United States in 1894.

The case was tried to the court over five days. The tribe's expert on Yankton Sioux history, Professor Herbert Hoover, testified that his research revealed no historical reason to believe the boundaries of the reservation had been changed by the 1894 act. Several witnesses testified for each side as to the potential impact of the landfill on tribal activities, the political organization and history of the tribe, and their perception of the reservation's boundaries. Much of the trial focused on technical issues relating to the construction and integrity of the landfill.

After considering post-trial briefing by the parties which focused on the legal significance of a savings clause in the 1892 agreement, the district court entered a declaratory judgment. It concluded that the 1894 act ratifying the 1892 agreement did not disestablish or diminish the

---

[2] The tribe sued on behalf of itself and its individual members, one of whom, tribal chairman Darrell E. Drapeau, also sued individually (collectively referred to as "the tribe").

The United States, the Flandreau Santee Tribe, and various descendants of two nineteenth century Yankton Sioux filed amicus briefs supporting the tribe on this appeal, and amicus Charles Mix County has supported the position of the state.

size of the reservation. *Yankton Sioux Tribe v. Southern Missouri Waste Management District*, 890 F. Supp. 878, 891 (D.S.D. 1995). The landfill site was therefore still part of the reservation, and regulations of the Environmental Protection Agency (EPA) applied, including the requirement that a synthetic liner be installed in each of the landfill cells to prevent leakage.[3] The court also concluded that the tribe had not shown a right to regulate the landfill site since it had not established either exception to the general rule that Indian tribes cannot regulate the activities of non-Indians, even on a reservation. *Montana v. United States*, 450 U.S. 544, 564-66 (1981); *see also*, *A-1 Contractors v. Strate*, 76 F.3d 930 (8th Cir. 1996) (en banc), *cert. granted*, 64 U.S.L.W. 3795 (U.S. Oct. 1, 1996) (No. 95-1872) (matters affecting tribal self-government and consensual relations with the tribe are excepted). The court also declined to enjoin the landfill project so long as it complied with the EPA liner requirement.

On appeal South Dakota argues that the district court erred as a matter of law in concluding that the 1858 tribal boundaries remain in effect despite the 1892 agreement, its ratification in 1894, and the subsequent sale of unallotted land. It contends that the language of the agreement, its ratifying statute, and surrounding circumstances show that Congress intended that the boundaries established

---

[3] South Dakota had approved the project plan to use only a two foot compacted clay liner to contain the garbage. Since the EPA had granted authority to the state to approve projects within its jurisdiction, synthetic liners would not have been required if the site were not on the Yankton reservation.

by the treaty of 1858 be disestablished or diminished.[4] The tribe responds that the intent and interest of Congress was in purchasing land for resale to non-Indian settlers, not in eliminating tribal authority in the area reserved in the treaty of 1858.[5]

II.

In the 1858 treaty between the Yankton Sioux and the United States the tribe surrendered over 11 million acres, and the United States in turn agreed "[t]o protect the said Yanctons [sic] in the quiet and peaceable possession" of a 430,000 acre reservation in southern South Dakota and a much smaller reservation in southwestern Minnesota.[6] 11 Stat. 743. The tribe also received $1.6 million to be paid in

---

[4] "Diminished" and "disestablished" seem to be used interchangeably in some cases. *See, e.g., Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977). "Disestablishment" appears to be more precisely used to describe the relatively rare elimination of a reservation, *see, e.g., DeCoteau v. District County Court*, 420 U.S. 425 (1975), as opposed to reduction in the size of a reservation or "diminishment." *See, e.g., Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977).

South Dakota uses both terms in stating its position without really distinguishing between them, but its core argument is that the 1894 act eliminated the reservation, leaving the tribe and federal government with jurisdiction only over remaining trust lands.

[5] The tribe did not appeal the district court's denial of an injunction against the project or its conclusion that the tribe did not have regulatory authority over it.

[6] Evidence at trial disclosed that the Yankton Sioux had previously given up some 2 million acres in the 1830s and had historically been one of the most peaceful Indian tribes.

annuities over 50 years, as well as funds for a mill, schools, houses, and other expenses related to establishing the reservation.

The decades following the signing of the treaty brought significant changes in federal Indian policy as more settlers moved westward, increasing the demand for places to homestead. *Solem v. Bartlett*, 465 U.S. 463, 466 & n.6 (1984). Congress was also confronted with how to deal with tribes whose reservations had once been isolated but were located in areas in which states were then being formed.

In 1887 Congress passed the General Allotment Act (Dawes Act). 24 Stat. 388 (1887), codified at 18 U.S.C. § 331 *et seq.*. The Dawes Act permitted the federal government to allot plots of reservation land to individual Indians. Once the members of a tribe had received their individual allotments ("allotted lands") from the government, the surplus land ("unallotted lands") could be sold to non-Indian settlers. It was the government's policy until the early 1900s to sell reservation lands to settlers only after negotiating an agreement with the relevant tribe.[7]

The Dawes Act was intended both to advance the "civilization" and welfare of Indians and to provide land for settlement. *See DeCoteau*, 420 U.S. at 432. Although it did not mandate the elimination of reservations, it was

---

[7] In 1903 the Supreme Court ruled that Congress could unilaterally abrogate treaties with Indian tribes. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903); *see also Solem*, 465 U.S. at 470 n.11.

hoped that under the allotment policy Indians would benefit from individual ownership and responsibility, abandon their communal notions of property and social organization, and learn to farm from their non-Indian neighbors. *Hagen v. Utah*, 114 S. Ct. 958, 961 (1994). Individual members of the Yankton tribe eventually received allotments totalling about 230,000 acres scattered throughout the reservation. *Yankton Sioux Tribe v. United States*, 623 F.2d 159 (Ct. Cl. 1980).

By 1892 there was considerable pressure from settlers for more land in South Dakota, and a three member commission was appointed to negotiate with the Yankton Sioux about their unallotted lands. The commission was charged with reaching an agreement that would allow the United States to buy as much of the unallotted land as the tribe would sell. The record shows that some tribal members were interested in selling because of a severe drought and because of concerns for the elderly and infirm, the status of the Pipestone quarry in Minnesota, and compensation owed tribal members for their service in the United States Army. The government hoped that the new policy would help the Yankton Sioux assimilate. The Senate Committee on Indian Affairs reported that "close contact with the frugal, moral, and industrious people who will settle there will stimulate individual effort and make their progress much more rapid than heretofore." S. Rep. No. 196, 53d Cong., 2d Sess. 1 (1894).

The commission eventually succeeded in securing the signatures of a majority of the male members of the tribe

in favor of sale of the unallotted lands. Under the agreement, dated December 31, 1892,[8] the federal government would pay $600,000 with interest for some 200,000 acres within the boundaries of the reservation that had been established by the treaty of 1858.[9] The government intended then to sell plots of this land to settlers.

The agreement of 1892 contained several key provisions. In Article I the tribe agreed to "cede, sell, relinquish, and convey" all its right and title to transferred land, but Article XVIII stated that "Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858" and that all provisions of that treaty "shall be in full force and effect, the same as though this agreement had not been made. . . . " Consistent with the Dawes Act, the agreement also stated that lands allotted to tribal members were to be trust lands of the United States for twenty-five years, rather than grants to the Indians in fee simple. Articles IV, IX.

Congress incorporated the agreement into the ratifying statute in 1894 which passed without significant

---

[8] The required number of signatures was not obtained until several months after the date of the agreement.

[9] There is conflicting evidence in the record regarding the number of acres allotted to Indians and the number of unallotted acres sold to the United States. The Court of Claims later determined that roughly 230,000 acres were allotted to tribal members and some 200,000 unallotted acres were sold in 1894. *Yankton Sioux Tribe*, 623 F.2d at 174.

amendment.[10] 28 Stat. 286, 314. President Cleveland opened the unallotted lands for settlement by proclamation on May 16, 1895.

Congressional policy later changed when it became clear in the first decades of the twentieth century that the allotment policy was failing. *Solem*, 465 U.S. at 468 n.9; *Mattz v. Arnett*, 412 U.S. 481, 496 n.18 (1973). A significant number of Indians had not become self-sustaining farmers, and many allotments had been sold off when the allottees died. On the Yankton reservation for instance, only 100,000 of over 200,000 acres originally allotted remained in Indian hands by 1914. *United States v. Perrin*,

---

[10] The following are the relevant provisions Congress added to enact the agreement:

> Therefore, Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That said agreement be, and the same hereby is, accepted, ratified, and confirmed.
>
> That for the purpose of carrying the provisions of this Act into effect there is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of six hundred thousand dollars, or so much thereof as may be necessary. . . .
>
> That the lands by said agreement ceded, to the United States shall, upon proclamation by the President, be opened to settlement, and shall be subject to disposal only under the homestead and town-site laws of the United States, excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common-school purposes and be subject to the laws of the State of South Dakota: Provided, That each settler on said lands shall . . . pay to the United States . . . three dollars and seventy-five cents per acre. . . .

232 U.S. 478 (1914). Critics concluded that the policy of integration by means of allotment had resulted in even greater poverty for Indian people. *See* Felix Cohen, *Handbook of Federal Indian Law* 215-17 (1988 ed.)

Congress responded with the Indian Reorganization Act of 1934, 48 Stat. 984 (1934), codified as amended at 25 U.S.C. § 461 *et seq.*, which once again placed primary emphasis on reservations in its Indian land policy. *Id.* Congress authorized the Secretary of the Interior to exchange lands held by Indians and non-Indians within each reservation in an attempt to consolidate tribal lands. *Id.* at § 463e. Nevertheless, the lands owned by Yankton Sioux tribal members remain scattered throughout the area of the 1858 reservation. Most of these lands are held in trust by the United States. Although the trust period was only to run twenty-five years, it was extended by executive order in 1920, Exec. Order April 16, 1920, and then apparently indefinitely by the Indian Reorganization Act in 1934. 48 Stat. 984, § 2.

III.

Certain basic principles are part of the legal framework for the issues raised by the parties. Once a reservation is created by Congress through a ratified treaty or agreement, only Congress can reduce or eliminate it, and it must "clearly evince" its intent to do so. *Solem*, 465 U.S. at 470. Opening a reservation to settlement is not inconsistent with the preservation of existing boundaries, *Id.*, and some agreements and treaties preserved reservation boundaries, *see, e.g., Id.; Mattz v. Arnett*, 412 U.S. 481 (1973); *Seymour v. Superintendent*, 368 U.S. 351 (1962),

while others caused them to be diminished. *See, e.g., Hagen v. Utah*, 114 S. Ct. 958 (1994); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District County Court*, 420 U.S. 425 (1975). Ambiguity at any point is to be resolved in favor of the Indians, and diminishment should not be found lightly. *Hagen*, 114 S. Ct. at 965. Since federal policy towards Indians has changed over time, cases dealing with disestablishment and diminishment issues present difficult questions of statutory intent. *Solem*, 465 U.S. at 468; *see also, Hagen*, 114 S. Ct. at 973 (Blackmun, J., dissenting).

Each agreement with Indian tribes is different and must be evaluated in light of all the circumstances. *Hagen*, 114 S. Ct. at 965-66. The Supreme Court has devised a "fairly clean analytical structure" for diminishment cases; this requires consideration of the language of the statute and any agreement it incorporated, the historical context surrounding its passage, and how the land in question has been used since. *Id.* The parties disagree about the significance of some of the sections of the Yankton agreement and the historical evidence.

A.

The most important factor in determining whether Congress intended to disestablish or diminish the Yankton reservation is the 1894 statute, which incorporated the text of the 1892 agreement. *Id.* at 965. The state believes the language used to describe the conveyance in Articles I and II is particularly relevant, while the tribe focuses on the savings clause in Article XVIII. Each side

claims that other sections in the agreement also support its respective position.

South Dakota argues that the language in Articles I and II of the 1892 agreement makes it clear that Congress intended to disestablish or diminish the Yankton reservation. The full text of Article I is:

> The Yankton Tribe of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation as set apart to said Indians [in the Treaty of 1858].

Article II provided that the tribe was to receive $600,000 for conveyance of the land.[11] The state argues that the Supreme Court has construed similar language as indicating congressional intent to diminish or disestablish reservations. *DeCoteau*, 420 U.S. at 445.

The tribe responds that the cession language in Article I alone is not controlling. It says that the savings clause in Article XVIII must be considered together with Articles I and II and that the negotiation and legislative

---

[11] Article II read:

> In consideration for the lands ceded, sold, relinquished, and conveyed to the United States as aforesaid, the United States stipulates and agrees to pay to the said Yankton tribe of Sioux Indians the sum of six hundred thousand dollars ($600,000) as hereinbefore provided for.

The act also provided for a twenty dollar gold piece for each male adult member of the tribe, payment of monies due some tribal members for services as Army scouts in the 1860s, and various other forms of support.

histories show that the first two articles were not intended to reduce the size of the reservation.

This court reviewed almost identical language to that in Article I in *United States v. Grey Bear*, 828 F.2d 1286 (8th Cir. 1987), *vacated in part on other grounds on rehearing en banc*, 863 F.2d 572 (8th Cir. 1988), *cert. denied*, 493 U.S. 1047 (1990). In that case the Indians had agreed they would "for the consideration hereinafter named, . . . hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest" in their unallotted lands. *Id.* at 1290. The court concluded that the reservation had not been diminished because the agreement, "standing alone, does not evince a clear congressional intent to disestablish the Devils Lake Reservation." *Id.* In reaching this conclusion, the court followed the Supreme Court's practice of looking at a number of factors other than cession language to consider disestablishment issues, including surrounding circumstances such as whether there was a lump sum payment or express acknowledgement by the tribe that its reservation would be diminished. *Id.* at 1290 n.5.

The state argues that the $600,000 sale price in Article II, in conjunction with the "cede, sell, relinquish, and convey" language in Article I, gives rise to "an almost insurmountable presumption" that Congress intended to diminish the reservation. *Solem*, 465 U.S. at 470-71. The tribe asserts that the history behind Article II suggests that the payment provision in this statute did not indicate intent to diminish the reservation.

Article II passed in the Senate without modification, but the House of Representatives amended the agreement

to provide for payment to the tribe only as portions of the unallotted lands were sold to settlers. 53 Cong. Rec. 8268 (1894). Some believed it inappropriate for the government to make large cash payments when there was no guarantee that all land would be sold. *Id.* The House later withdrew its amendment apparently to avoid any charge of bad faith for changing the agreed terms. *See id.* at 8268-71. There was no discussion showing any understanding that a sum certain payment would express an intent that the reservation be diminished.

The commission negotiations indicated that both sides had been interested in seeing that unallotted lands were appraised and sold as individual plots to settlers. Tribal members believed they would receive a higher price if the lands were sold in this manner rather than as a whole to the government. *See, e.g.*, Negotiations at 77. The instructions to the commission from the Commissioner of Indian Affairs, dated July 27, 1892, stated in part: "It is understood that some of these lands are very valuable and will be eagerly sought after. It is therefore suggested the agreement provide for their appraisement and sale to the highest bidder." The Yankton commissioners apparently believed, however, that the tribe would receive more money from a single sale directly to the government so they adopted the approach taken in Article II. *See, e.g.*, S. Exec. Doc. No 27, 53d Cong., 2d Sess. at 68 (1894) ("Negotiations").

Although a lump sum payment can in some circumstances indicate congressional intent to diminish a reservation, *see, e.g., DeCoteau*, 420 U.S. at 447-448, the record in this case does not support that conclusion. The commission's instructions, the stated desires of the Indians,

and the House debate all show that a sum certain price was included for reasons other than issues of jurisdiction and sovereignty.

In their briefs the signatories to the 1892 agreement state that Article XVIII has the strongest savings clause of any unallotted land sale agreement between a tribe and the government. It states:

> Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement, and its ratification by Congress, all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858.

A number of savings clauses in other agreements also state that earlier agreements and treaties will "be in full force and effect," but none include such a strong phrase as "the same as though this agreement had not been made," and most include language explaining that prior treaties will remain in force so long as they are "not inconsistent" with the later agreement. *See, e.g., Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 760-61 (1985) ("nothing in this agreement shall be construed to deprive [the tribe] of any benefits to which they are entitled under existing treaties not inconsistent with the provisions of this agreement."); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 623 (1977) (Marshall, J., dissenting) (benefits of existing treaties and agreements continue unless "inconsistent with the provisions of this

agreement."); *United States v. Southern Ute Tribe or Band of Indians*, 402 U.S. 159, 162 (1971) (all treaty provisions "not altered by this agreement shall continue in force"); *Dick v. United States*, 208 U.S. 340, 352 (1908) (treaty provisions "not inconsistent with the provisions of this agreement are hereby continued in full force and effect").

Article XVIII contains no similar limitation. It does not state that only consistent aspects of the earlier treaty are to continue. It states simply that the provisions of the 1858 treaty are to remain in effect regardless of the contents of the agreement, "as though this agreement had never been made."

The rules of statutory construction require that all clauses of an agreement be read together in a way that will make them consistent and give all parts force. *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). Article XVIII should be read together with the other sections of the 1892 agreement to see whether all parts can be interpreted consistently, and the unusually expansive language of Article XVIII suggests that other sections should be read narrowly to minimize any conflict with the 1858 treaty.

The state does not dispute the strength of the language of Article XVIII, but argues that the savings clause in this case was meant only to reassure the tribe that it would continue to receive annuities under the 1858 treaty.[12] Interpreting Article XVIII to cover more than

---

[12] The state believes that clauses such as Article XVIII should not play any role in the statutory analysis because the *Rosebud* majority did not discuss them. There may be various

annuities would render the 1892 agreement largely meaningless, it says. The treaty of 1858 required the United States to "protect the said Yanctons [sic] in the quiet and peaceable possession of the said tract of four hundred thousand acres of land so reserved for their future home." If their possession were intended to continue "in full force and effect" after the 1892 agreement, sale of the unallotted lands would conflict with that intent by terminating the possessory rights of Indians. Article XVIII should therefore be read as covering only annuities.

The record shows that the tribe had been concerned about its annuities during the negotiations, but many concerns of a more general nature were also expressed. One of these concerns was the failure of the United States

---

reasons why they were not discussed, but the *Rosebud* clauses were significantly weaker than the Yankton savings clause. For example, one representative provision read:

> Each Act states, in almost identical terms, that "nothing in this 'agreement shall be construed to deprive the . . . Indians of the Rosebud Reservation, South Dakota, of any benefits to which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this agreement.' "

430 U.S. at 623 (Marshall, J., dissenting). Not only do the *Rosebud* provisions contain the "not inconsistent" language absent in Article XVIII, but they also focus on benefits rather than "all provisions" of a specific treaty.

Savings clauses were noted in other Supreme Court cases but not explicitly considered. *See Klamath*, 473 U.S. 753; *Chippewa Indians of Minnesota v. United States*, 301 U.S. 358 (1937); *Shoshone Tribe of Indians v. United States*, 299 U.S. 476 (1937).

to uphold its obligations under past treaties. *See, e.g.*, Negotiations at 55, 57-58.

Article XVIII is written in broad language, stating in the first sentence that nothing in the agreement "shall be construed to abrogate" the 1858 treaty and in the second sentence that "all provisions" of that treaty shall continue "in full force and effect." Only the second independent clause of the second sentence mentions annuities. The interpretation proposed by the state would give effect to only one of the independent clauses in one of the sentences. Other agreements specifically protected Indian annuities, but they did not use broad language apparently encompassing all treaty provisions.[13] These other examples show Congress knew how to limit the reach of an annuities provision, but it did not enact that type of limited provision in Article XVIII. Giving effect to the plain language and all parts of the article leads to the conclusion that it covers more than annuities.

It is possible to give meaning to all sections of the 1894 statute by examining them to see if they can be fairly reconciled, as the Supreme Court has directed. *Colautti*, 439 U.S. at 392. The key question in interpreting the 1894 statute and agreement is whether Congress intended that the tribe's governmental authority be transferred with the land sale. Amicus United States argues that the 1858 treaty gave the tribe governmental authority within the treaty boundaries and that Article XVIII requires that the

---

[13] *See, e.g., Shoshone Tribe v. United States*, 299 U.S. 476, 489 (1937) ("Nothing in this agreement shall be construed to deprive the Indians of any annuities or benefits to which they are entitled under existing agreements or treaty stipulations.")

agreement be read to preserve that right. Although the cession language in Articles I and II could be viewed as describing a transfer of tribal governmental authority as well as land, thereby changing the 1858 treaty boundaries, the narrower reading is that the 1894 act simply authorized the conveyance of real property. The Supreme Court has found the sale of lands to homesteaders not inconsistent with the preservation of existing reservation boundaries. *Rosebud*, 430 U.S. at 586. The Yankton treaty of 1858 acknowledged the authority of the tribe over the reservation, and Article XVIII of the 1894 statute indicated that as much of that treaty as possible was to be preserved. The narrower reading of Articles I and II gives consistent meaning to Article XVIII and the agreement as a whole.

This court has previously given effect to a savings clause in determining that the Fort Berthold reservation was not diminished. *City of New Town v. United States*, 454 F.2d 121 (8th Cir. 1972). The savings clause in the agreement between the Three Affiliated Tribes and the United States read:

> That nothing in this Act shall be construed to deprive said Indians of Fort Berthold Indian Reservation of any benefits under existing treaties or agreements not inconsistent with the provisions of this Act.

Id. at 125. The court concluded that opening the reservation to settlement was not inconsistent with maintaining existing reservation boundaries. *Id.* (citing *Seymour v. Superintendent*, 368 U.S. 351 (1962)). Although the state

attacks the continued validity of *New Town*, it is consistent with subsequent Supreme Court precedent. *See Duncan Energy*, 27 F.3d 1296-97; *see also, United States v. Standish*, 3 F.3d 1207 (8th Cir. 1993). Article XVIII should be given due weight in interpreting the Yankton agreement just as in *New Town*.

Articles I, II, and XVIII may be read together to give meaning to them all, and we conclude that in combination they reveal an intent to preserve the 1858 reservation boundaries.[14] Moreover, to the extent there could be any ambiguity perceived in the statute, it would have to be resolved in favor of the tribe.[15] *Hagen*, 114 S. Ct. at 965.

---

[14] The Supreme Court has suggested that the jurisdictional pattern that results from a conclusion of diminishment or disestablishment may also be used to indicate what Congress had in mind. Where there is a "checkerboard pattern" of Indian trust land scattered over an area and a finding of disestablishment would terminate the entire reservation, it is less likely that Congress intended to change the boundaries. *Rosebud*, 430 U.S. at 598 n.20. Checkerboard jurisdictional arrangements are generally disfavored by both Congress and the courts. *See Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 478 (1976); *Seymour*, 368 U.S. at 358; *United States v. Long Elk*, 565 F.2d 1032, 1039 (8th Cir. 1977).

A checkerboard pattern of jurisdiction would have been the result if the Yankton reservation had been diminished by the 1894 act. The Yankton Sioux retained the majority of the land within the 1858 boundaries (more than was retained by the Cheyenne River Sioux on their undiminished reservation). *Solem*, 465 U.S. at 464, 466 n.6. These facts distinguish this case from *DeCoteau* where Congress must have known it was creating an area composed mostly of non-Indian settlers. 420 U.S. at 435 n.16.

[15] The preamble to the 1892 agreement contains language that may be relevant to ascertain congressional intent. The

Several other articles in the agreement also have some relevance on the issue of congressional intent. For example, Article VIII reserves from sale to settlers "[s]uch part of the surplus lands hereby ceded and sold to the United States as may now be occupied by the United States for agency, schools, and other purposes . . . until they are no longer required for such purposes." An almost identical clause was considered by a unanimous Supreme Court in *Solem* to show that Congress foresaw continuation of the reservation there. 465 U.S. at 474 ("It is difficult to imagine why Congress would have reserved lands for such purposes if it did not anticipate that the opened area would remain part of the reservation.").[16]

---

entire agreement, including the preamble, was incorporated into the ratifying statute in 1894. The preamble stated that the Yankton tribe was "willing to dispose of a portion of the land set apart and reserved to said tribe." The Supreme Court has concluded that the phrase "sell and dispose" indicates congressional intent to maintain existing reservation boundaries. *Solem*, 465 U.S. at 472-474; *see also Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1297 (8th Cir. 1994), *cert. denied*, 115 S.Ct.779 (1995). Where there is a potential conflict between sections of the statute, the preamble can be used to understand the intent of Congress. *Jurgensen v. Fairfax County*, 745 F.2d 868, 885 (4th Cir. 1984).

[16] Article VIII also appears to refute the argument that diminishment is indicated by the failure of the agreement to reserve land for the tribe's use. Evidence at trial indicated that the tribe had expected government of the reservation to continue through the Greenwood agency so no land needed to be reserved for that purpose. The reservation of agency land in Article VIII is consistent with an expectation on the part of the tribe that the reservation would continue as before. As in *Solem*, the United States has continued to hold lands in trust for the Yankton Sioux, and the day that federal services to the Yankton Sioux would be unnecessary has not yet come.

South Dakota suggests that Article XVII indicates that Congress intended to diminish the reservation. That article provided that no liquor should be sold or given away on either the lands ceded and sold to the United States or "upon any other lands within or comprising the reservations of the Yankton Sioux."[17] The district court found that this provision was included at the insistence of the Yankton Sioux, who were concerned that white saloons would attract tribal members "to the great injury of their people." 890 F. Supp. at 882. The state argues, however, that the inclusion of such a provision shows that the Indians knew that the unallotted lands would no longer be on reservation land after the sale. It cites *Rosebud* where the Supreme Court concluded that a similar clause in an agreement gave rise to an inference that Congress intended to diminish the Rosebud reservation in 1910. 430 U.S. at 613. A statute passed in July 1892 had outlawed the sale of intoxicants in Indian Country so it appeared the clause would not be needed in 1910 if the lands still were in Indian country. Act of July 23, 1892, 27 Stat. 260; *Rosebud*, 430 U.S. at 613.

---

[17] The full text of the article reads:

> No intoxicating liquors nor other intoxicants shall ever be sold or given away upon any of the lands by this agreement ceded and sold to the United States, nor upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the treaty between the said Indians and the United States, date April 19th, 1858, and as afterwards surveyed and set off to the said Indians. The penalty for the violation of this provision shall be such as Congress may prescribe in the act ratifying this agreement.

The negotiations with the Yankton tribe were conducted shortly after the 1892 liquor act had passed, and there is no evidence that any party was aware of it at the time the agreement was negotiated. The Yankton agreement provided that the prohibition on liquor would continue forever, while the agreement in *Rosebud* was only for twenty-five years. The 1892 liquor statute would have ceased to apply if the Yankton reservation were eliminated at some future point, but the liquor provision the tribe insisted on would remain. Article XVII in the Yankton agreement is therefore not surplusage in the same manner as the liquor provision in *Rosebud* and is not inconsistent with an intent to preserve the 1858 boundaries. The presence of a similar alcohol clause was found not to demonstrate an intent to diminish in *New Town*. 454 F.2d at 127.

The state argues that one other provision in the statute ratifying the 1892 agreement supports a finding that the reservation was diminished. Congress added the provision that "the sixteenth and thirty-sixth section in each Congressional township . . . shall be reserved for common-school purposes and be subject to the laws of the State of South Dakota." Similar language in the *Rosebud* agreement was interpreted as having been intended to conform to the enabling act which admitted North and South Dakota to the United States. 25 Stat. 679 (1889). Under that act, the sixteenth and thirty-sixth sections in each township were granted to the state for common schools, but permanent federal reservations were excepted. *Id.*; *Rosebud*, 430 U.S. at 599-600. The Supreme Court reasoned that by using the same provision in the Rosebud

surplus land act as was used in the statehood act, Congress indicated its intent to diminish the Rosebud reservation. *Id.* at 600-01. South Dakota argues that the same reasoning should be applied here.

The rationale from *Rosebud* has considerably less force in this case, however, because the 1894 Yankton act makes the common school sections "subject to the laws of the State of South Dakota." If Congress had intended to diminish the Yankton reservation, those common school sections would have been subject to the laws of the state in any event and the grant of jurisdiction would have been unnecessary. The language is at least equally consistent with a reading that Congress wished to insure that the infrastructure would exist for common schools for all future residents of the assimilated area.

South Dakota argues that analysis of the statute and the agreement is unnecessary because certain federal and state cases should control the result here. Whether the Yankton reservation was diminished or disestablished has never been squarely litigated and decided in federal court, however.[18] The South Dakota cases were criminal

---

[18] The state claims that the Supreme Court established in *Perrin v. United States*, 232 U.S. 478 (1914), that the reservation was diminished by the 1894 act. In *Perrin* the Court concluded that Congress had authority to criminalize liquor sales on lands ceded by tribes and upheld a conviction for sales made within the 1858 Yankton treaty boundaries. The argument of the United States in *Perrin* focused on the plenary authority of Congress with regard to Indians and on the perpetual nature of the liquor ban; it did not claim that the town where Perrin sold liquor was still on reservation land. There was no discussion of diminishment.

In *Weddell v. Meierhenry*, 636 F.2d 211 (8th Cir. 1980), *cert. denied*, 451 U.S. 941 (1981), an Indian arrested in Wagner, South

prosecutions in which the tribe was not involved and do not show full development of the issues or the analytical approach required by the United States Supreme Court.[19] *See Solem*, 465 U.S. at 470. Moreover, the Supreme Court has indicated that federal courts are not necessarily bound by earlier state court conclusions about disestablishment issues.[20]

Dakota, which is within the 1858 boundaries, was convicted in state court and claimed he was entitled to habeas relief because his crime was committed in Indian Country. Diminishment was not litigated, and the court specifically noted that neither party raised the issue. *Id.* at 213 n.2.

In *Yankton Sioux Tribe v. United States*, 623 F.2d 159 (Ct. Cl. 1980), the Yankton tribe sought and received an award from the United States because, among other things, the $600,000 price fixed by the 1892 agreement was alleged to have been unconscionably low. The focus of the case was on the fair market value of the unallotted lands sold by the tribe, and comments the court made related to diminishment were dicta.

[19] The South Dakota Supreme Court has concluded that the Yankton reservation was diminished by the 1894 act, *see State v. Thompson*, 355 N.W.2d 349 (S.D. 1984); *State v. Williamson*, 211 N.W.2d 182 (S.D. 1973); *Wood v. Jameson*, 130 N.W.2d 95 (S.D. 1964), but it appears that the issues regarding diminishment were not fully presented to the court. The cases do not address the legislative history or the surrounding circumstances of the 1894 act or the savings clause in Article XVIII. They rely almost exclusively on the language of Articles I and II.

[20] The United States Supreme Court granted certiorari after an Eighth Circuit decision, *Bartlett v. Solem*, 691 F.2d 420 (1984), concluded that the Cheyenne River Reservation had not been diminished. *Bartlett* was in conflict with two South Dakota Supreme Court cases (*State v. Janis*, 317 N.W.2d 133 (S.D. 1982); *Stankey v. Waddell*, 256 N.W.2d 117 (S.D.1977)). The Court affirmed the Eighth Circuit decision in *Solem*. 465 U.S. at 466.

We conclude after examining the statutory language that Congress did not express in the 1894 act an intent to diminish or disestablish the reservation. Also relevant in the required analysis is review of the legislative history and the events near the time of its passage, *Hagen*, 114 S. Ct. at 965, and we turn now to this review.

B.

South Dakota contends that the legislative history indicates that the unallotted lands on the Yankton reservation were restored to the public domain and that this shows Congress intended to diminish the reservation. While "the existence of [public domain] language in the operative section of a surplus land Act indicates that the Act diminished the reservation," *Hagen*, 114 S. Ct. at 67, there is no mention of restoring the land to the "public domain" in the 1894 act or the 1892 agreement. South Dakota claims that even though there is no public domain language in the act itself, comments on the House floor about returning reservation lands to the public domain suggest an intent to diminish the Yankton reservation. The tribe responds that the debate was inconclusive at best.

Comments in Congress can be evidence of an intent to diminish, *see DeCoteau*, 420 U.S. at 446, but the legislative history does not demonstrate such an intent here. Several surplus land sales were included in a single Indian appropriations bill in 1894, including land purchases from the Yankton Sioux, Nez Perce, Yuma, Alsea-Siletz, Coeur d'Alene, and Yakima reservations. 26 Stat. 286 (1894). South Dakota points to two instances where

representatives mentioned the public domain. One stated that the various provisions in the agreements "change the methods of disposing of the lands that will become part of the public domain. . . . " 53 Cong. Rec. 6425 (1895). A second commented that the unallotted lands opened by the various agreements "are not governed by the public land laws until they become segregated from the Indian lands and become in fact a part of our public domain." *Id.* at 6426. Both comments were made in the context of a debate about whether the lands were to be furnished to settlers at no cost under the Homestead Act.

The comments cited by the state were made in reference to a group of agreements with some half dozen tribes. The different agreements were all included in one appropriations bill, but Congress used varying enacting sections for each.[21] For example, two of the six mentioned the public domain in the enacting section. Another explicitly referred to the fact that a new boundary would have to be drawn. Floor comments about multiple agreements which differ in their distinctive language and negotiation histories are of less value in evaluating congressional intent about any individual agreement than comments dedicated to that agreement alone.

The history of the commission to the Yankton Sioux and its negotiations with the tribe also suggests that

---

[21] At least one of the reservations under discussion has been found not to have been diminished. *Ute Indian Tribe v. State of Utah*, 773 F.2d 1087, 1090-93 (10th Cir. 1985) (en banc), *cert. denied*, 479 U.S. 994 (1986). The Tenth Circuit concluded that the "surrounding events concerning the 1894 and 1897 Acts are ambiguous." *Id.* at 1093.

Congress did not intend to disestablish the reservation. The commission was instructed: "If [the Yankton Sioux] are unwilling to cede all the surplus land you will endeavor to obtain the relinquishment of such part thereof as they may be willing to part with."[22] These instructions are consistent with the mission to secure land for settlement and to expose the tribe to settlers. Had the intent been the elimination of the reservation, it would have been necessary that all surplus lands be purchased.

The state points to a number of passages from the negotiations between the commission and the tribe which it believes show that the reservation would be disestablished, but the statements are consistent with a simple sale of the surplus lands and do not necessarily imply a transfer of sovereignty. For example, one of the commissioners said to tribal members:

> This reservation alone proclaims the old times and the old conditions. But even here the means of your former mode of life have vanquished [sic]. The tide of civilization is as resistless as the tide of the ocean, and you have no choice but to accept it and live according to its methods or be destroyed of it. To accept it requires the sale of these surplus lands and the opening of this reservation to white settlement.

Negotiations at 81. The commissioner talks of a "sale" of surplus lands and the "opening of this reservation," but

---

[22] The October 11, 1995 motion of South Dakota to enlarge the record with the instructions from the Commissioner of Indian Affairs to the Yankton commission is granted.

makes no mention of reduction or elimination of boundaries or any surrender of jurisdiction.

In another passage relied on by the state, a commissioner stated:

> The Great Father desires and seeks in this transaction the benefit of the tribe, and what you may receive in this matter will be for this tribe alone, to help elevate you to citizenship, and as soon as you become the equals and assistants of the white man in making the laws, to be near him and learn his ways, you will learn to farm, to do all kinds of business, to be citizens in the true sense of the word. It might be, after you have sold your lands, you could have this reservation organized as a separate county. If this could be done – I do not say it can – you could govern your own people in your own way, so long as you obeyed the laws of the State.

Negotiations at 48. This passage shows that possible future state jurisdiction over the Indians was contemplated, but it does not indicate when any such jurisdiction would attach and under what circumstances. The passage clearly appears to envision continuity of the reservation, with the possibility it could be transformed into a county at some later date.

The tribe argues that these comments are very weak when compared to statements made by, or to the Indians, in cases where diminishment was found. In *Rosebud*, for example, the tribe was specifically told that "[t]he cession of Gregory county . . . will leave your reservation a compact, and almost square tract, and would leave your reservation about the size and area of Pine Ridge Reservation." 430 U.S. at 593. In *Hagen*, the tribe was informed:

> You say that [the reservation boundary] line is very heavy and that the reservation is nailed down upon the border. That is very true as applying to the past many years and up to now, but congress has provided legislation which will pull up the nails which hold down that line and after next year there will be no boundary line to this reservation.

Hagen, 114 S. Ct. at 968 (internal citations omitted). In *DeCoteau*, a spokesman for the tribe stated:

> Now that South Dakota has come in as a state we have some one to go to, to right our wrongs. The Indians have taken their land in severalty. They are waiting for patents. The Indians are anxious to get patents. We are willing the surplus land should be sold. We don't expect to keep reservation." [sic]

DeCoteau, 420 U.S. at 433. The Indians on these three reservations were thus clearly aware that their reservations would be smaller after the sale of lands. Neither the commissioners nor the tribal members made like comments in this case.

The negotiations between the Yankton Indians and the commissioners sent to secure the sale of unallotted lands do not support a finding of diminishment. Despite a long series of negotiations, most of which were recorded and included in the commission's report to Congress, there is no statement that clearly indicates that Congress intended to change the reservation boundaries or remove tribal sovereignty over the opened areas. There are also no statements by members of the tribe that demonstrate an understanding that the reservation boundaries would change.

In addition to the history of the negotiations and the legislation, there is other evidence to examine which might indicate the contemporary understanding of the 1894 act. The tribe believes the most significant piece of contemporary evidence is in an 1896 statute passed by Congress. The statute began: "Be it enacted . . . [t]hat all settlers who made settlement under the homestead laws *upon lands in the Yankton Indian Reservation,* in the State of South Dakota, during the year eighteen hundred and ninety-five are hereby granted leave of absence from such homestead for one year. . . . " 29 Stat. 16 (Feb. 26, 1896) (emphasis added). Section 3 of the statute extends "the time for making final proof and payment for all lands located under the homestead laws of the United States upon any *lands of any former Indian reservation* in the State of South Dakota. . . . " *Id.* (emphasis added).

Congress thus continued in 1896 to refer to the unallotted lands as being in the Yankton reservation, a year after President Cleveland had opened the reservation lands for settlement. South Dakota argues that the 1896 statutory reference is entitled to little weight because the Commissioner of Indian Affairs used the word "former" in a document included in the legislative history. In the statute itself, however, Congress used "former" in section 3 when referring to a number of unspecified reservations in South Dakota, but not when referring to the Yankton reservation in section 1.

The state argues that other contemporaneous evidence indicates that the reservation was diminished. For example, it points to several statements by the Commissioner of Indian Affairs as being particularly relevant. Shortly after passage of the 1894 act, the commissioner

stated that the Yankton agreement in 1892 and two others would result in a significant amount of land being "restored to the public domain." Annual Report of the Commissioner of Indian Affairs 26 (1894). Two years later the commissioner referred to the "former" Yankton reservation. H.R.Rep. No. 100, 54th Cong., 1st Sess. at 2 (1896). These appear to be isolated references, however. The tribe's Yankton Sioux history expert testimony at trial was unrefuted that in the many thousands of documents he had read regarding the reservation, references to the former reservation or lands originally within the reservation were infrequent.

South Dakota also states that it began exercising jurisdiction over the areas no longer held in trust by the United States shortly after the lands were opened. An 1895 criminal case, *State v. Andrew War,* First Judicial Circuit Court, Charles Mix County, supports this claim, as do several other cases cited by the state. The exercise of jurisdiction by a state over opened lands can be an indication of congressional intent, but it is not dispositive. *See Solem,* 465 U.S. at 472.

Some other evidence is simply inconclusive. Both sides introduced a number of maps, many of them from within several years of the opening of the lands. These maps ultimately prove little except that there was some confusion both inside and outside the government as to the status of the reservation. The General Land Office of the Department of the Interior showed the reservation with only a dotted line on a 1901 map. The legend did not specify what a dotted line meant, but it is not the demarcation shown for a reservation. On the other hand the Bureau of Indian Affairs, also in the Interior Department,

continued to show the outline of the reservation on its maps. The type of outline used was identified in the legend to signify an Indian reservation, but the Yankton reservation was left unshaded while some other reservations were shaded. Study of the pattern of shading on these maps suggests that reservations opened to settlement were left unshaded. Because of these conflicting treatments and because an opened reservation is not necessarily diminished, these and similar maps are not particularly helpful.

Commercial maps have also differed. For example, *The Atlas of Charles Mix County, South Dakota*, published in 1906, does not appear to show the reservation. Exh. 631. A very detailed map of South Dakota in one 1895 atlas does show it. *Rand McNally World Atlas* 277 (1895). The confusion is perhaps best exemplified by *Andrees' Hand Atlas*, published in Germany. In both the 1899 and 1904 editions of the German atlas, a map of the United States shows the reservation (pages 160-61 in both editions), while a regional map on the next plate does not (pages 162-63).

These examples of confusion about the status of the lands are not enough to show that Congress expressly intended to diminish the reservation, and the 1896 statute is more probative of congressional intent than this more attenuated evidence. The statute is a statement by Congress itself and should guide the appraisal of the contemporaneous evidence. It suggests that Congress did not intend to diminish the Yankton reservation.

IV.

A.

The pattern throughout the twentieth century is similar to the contemporaneous evidence. Congress has continued to refer to the reservation as a continuing entity, but the treatment by other governmental bodies is mixed. Although less persuasive than evidence from the time surrounding an act's passage, later evidence is still relevant. *Hagen*, 114 S. Ct. at 965.

Congress has repeatedly referred to the Yankton Reservation as ongoing. In 1920, for example, Congress provided "[t]hat the Secretary of the Interior be . . . authorized and directed to convey to the trustees of the Yankton Agency Presbyterian Church, by patent in fee, the following-described premises situate [sic] *within the Yankton Indian Reservation*, county of Charles Mix, State of South Dakota." 41 Stat. 1468 (1920) (emphasis added). In 1932, Congress divided the United States District Court for the District of South Dakota into four divisions. "The territory embraced . . . in the counties of Aurora, Beadle, . . . Charles Mix, . . . Yankton, and *in the Yankton Indian Reservation*, shall constitute the southern division of said district." 47 Stat. 300 (1932) (emphasis added). More recently, a water project approved by Congress will "irrigate not more than approximately three thousand acres *of Indian-owned land in the Yankton-Sioux Indian Reservation*. . . . " Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575 § 2005(b) (1992) (emphasis added).

The state has not directed the court to a single enactment of Congress in which a reference was made to

indicate the reservation had been diminished. The statutory references demonstrate that Congress believes the Yankton reservation continues to exist.

The executive branch has been less consistent, but there is considerable evidence from it in support of an undiminished reservation. In its brief the tribe points to testimony before Congress by the superintendent of the Yankton Agency in 1914 that the reservation was "[a]bout 26 by 35 or 36 miles," the area encompassed by the 1858 boundaries. In 1916, President Woodrow Wilson ordered "that the trust period on the allotments of Indians on the Yankton Sioux Reservation, South Dakota, which expires during the calendar years 1916 and 1919, be, and is hereby, extended for a period of ten years from dates of expiration, with the exception of the following. . . . " (Exec. Order April 20, 1916).

Perhaps the foremost authority on federal Indian law, Felix Cohen wrote an opinion in 1941 while he was Acting Solicitor of the Department of the Interior that concluded the reservation was intact. It read in part:

> The circumstances which influenced the Indian Office decision [that the reservation had been diminished] are the large amount of reservation land which has been fee patented and the existence of towns within the reservation. These circumstances may be persuasive in reaching an administrative conclusion, but I cannot agree with the conclusion as a matter of law.
>
> The agreement of 1892 provided for the sale of such lands within the reservation as were not allotted or used for designated purposes. It did not provide for the sale of a particular designated part of the reservation. The act should be distinguished from other cession acts which ceded a definite part of the reservation and treated the remaining area as a diminished reservation. The lands allotted on the Yankton Reservation were scattered over all the reservation. . . . Since the 1892 agreement there has been no redefinition by Congress of the Yankton Reservation nor determination that the reservation no longer exists. On the contrary, the reservation was referred to as a still existing unit in the acts of April 29, 1920 (41 Stat. 1468) and June 11, 1932 (47 Stat. 300).

Letter of August 7, 1941, *Opinions of the Solicitor, Department of the Interior* 1063 (1979).

Others within the executive branch have taken varying positions. In 1969 an Associate Solicitor wrote that "the effect of the 1894 Act was to eliminate reservation boundaries and terminate the tribe's authority to establish a tribal court." Memorandum M-36783 from Associate Solicitor, Indian Affairs, to Commissioner of Indian Affairs, 1 (September 10, 1969).[23] An employee of the Bureau of Indian Affairs in its Aberdeen, South Dakota office testified at trial that his office considers the 1858 boundaries to be intact, and the 1990 census includes figures for the "Yankton Reservation" as defined by the 1858 boundaries. *See, e.g.*, Bureau of the Census, U.S. Dep't of Commerce, Pub. No. 1990 CPH-1-43, Summary

---

[23] The parties introduced scores of documents to show how the reservation has been treated. Only representative samples are discussed here; others were addressed in the district court's opinion.

Population and Housing Characteristics – South Dakota 175 (1991). The United States as amicus in this case (and also a party to the treaty of 1858 and the 1892 agreement) argues that "the 1892 Agreement, as ratified by Congress, did not diminish or disestablish the exterior boundaries of the Yankton Sioux Reservation."

The state government has quite consistently exercised various forms of governmental authority over the opened lands on the Yankton reservation. State courts have exercised criminal jurisdiction over Indians on nontrust lands without objection from the tribe until recently. *See, e.g., supra* note 19. The state has also exercised some civil jurisdiction, at least over divorces between tribal members. *See, e.g., Redbird v. Redbird*, First Judicial Circuit Court, Charles Mix County (1916). The state has also played a significant regulatory role in mining, underground storage tanks, agriculture, air emissions, solid and hazardous waste, and other environmental activities in the area. The county and municipalities employ law enforcement personnel and maintain over 500 miles of roads within the 1858 boundaries, while the Bureau of Indian Affairs maintains only 20 miles of roads.

The state's treatment of the reservation has not been uniform, however. Ronald Catlin, a state witness and an employee of the South Dakota Department of Game, Fish, and Parks recalled seeing a memorandum instructing state employees how to refer to the reservation. Catlin remembered that the memo was written by Governor William Janklow sometime between 1978 and 1986 and directed employees to refer only to the "former Yankton Sioux Reservation." A reasonable inference to be drawn is

that at least some state employees had been referring to the reservation as if it still existed.

The state argues that the tribe itself has not asserted jurisdiction over the opened areas and that some documents indicate that tribal members believed that the reservation boundaries had been reduced. The tribe's 1932 constitution was silent on the issue of jurisdiction, but the amended 1962 constitution claimed jurisdiction over "all original Tribal lands now owned by the Tribe under the Treaty of 1858." The tribe presented no evidence that it has attempted until recently to exercise civil, regulatory, or criminal jurisdiction over nontrust lands. Undisputed evidence at trial indicated that the tribe's effectiveness at self-government has also varied considerably over time.

Modern maps and atlases seem to show the reservation as extending to the 1858 boundaries. *See* U.S. Department of Commerce, *1990 Census of Population: Social and Economic Characteristics, South Dakota* G-6 (1993); U.S. Department of the Interior Bureau of Indian Affairs, *Indian Land Areas (General)* [map] (1987); *National Geographic Historical Atlas of the United States*, 47 (Centennial Edition 1988) (*see also*, loose map entitled "Northern Plains" included with the atlas); Waldman & Braun, *Atlas of the North American Indian* 196-97 (Facts on File Publications 1985).

Considering all of the evidence submitted by the parties and amici regarding the subsequent history of the reservation, we cannot say that the surrounding circumstances are "fully consistent with an intent to terminate the reservation, and inconsistent with any other purpose." *See DeCoteau*, 420 U.S. at 448.

B.

South Dakota argues that "[t]he Supreme Court has decreed that even in a case where de jure diminishment may not have occurred, 'de facto' diminishment may nonetheless have occurred." The tribe and the United States respond that de facto diminishment has never been applied in the absence of congressional intent to diminish.

Solem contains the Supreme Court's most complete discussion of de facto diminishment. It recognized there that:

> who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land act diminished a reservation. Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that de facto, if not de jure, diminishment may have occurred.

Solem, 465 U.S. at 471. South Dakota argues that this permits a finding of diminishment even in the absence of congressional intent.

The Court in *Solem* cautioned, however, that subsequent demographic data are only "one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers." *Id.* at 471-72.

> When both an Act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening.

Id. at 472. Subsequent demographic data and jurisdictional history regarding the opened lands may therefore be useful evidence of congressional intent, but cannot substitute for it.

The demographic facts related to the Yankton reservation are somewhat incomplete. Between 1890 and 1900, the population of Charles Mix County doubled, but it is not clear from the census data how many of those people settled on the open lands within the 1858 boundaries.[24] Of the 8,498 persons in the county in 1900, 1,483 were Indians. Assuming that people were distributed evenly throughout the county (which is not clear from the record), roughly 4,000 people would have lived within the 1858 boundaries. The Indian population would have made up about 40 percent of the reservation.

Demographic shifts that happen soon after an act is passed would appear to be stronger evidence of congressional intent than later population changes because those closer in time might have been better anticipated by Congress. The contemporaneous evidence suggests that the area did not lose its "Indian character," *see Solem*, 465

---

[24] There is an additional source of uncertainty in these data. South Dakota points out that the Census Bureau did not provide a separate category for the Yankton reservation in the 1900 census. It is therefore possible that almost half of the increase in population during this decade can be attributed to adding the Yankton Sioux population in with the non-Indians.

U.S. at 471, because more than 53 percent of the land was allotted to tribal members who composed at least 40 percent of the population. After 1900 the Indian population apparently declined somewhat. *Southern Missouri*, 890 F. Supp. at 887.

There is some dispute in the record about precisely how many Yankton Sioux now live within the 1858 boundaries. According to the 1990 census, there were 1,994 American Indians and 4,275 non-Indians living on the "Yankton Reservation," which the Census Bureau defined as being within the 1858 boundaries.[25] Bureau of the Census, U.S. Dep't of Commerce, Pub. No. 1990 CP-1-43, General Population Characteristics – South Dakota 29 (1992). The tribe claims that the census data do not accurately reflect the population of the area and that some 3,400 enrolled members of the tribe resided on the reservation as of 1993. These two sets of figures indicate that between 32 and 44 percent of the people within the 1858 boundaries are Indians.[26] (In contrast, the 1990

---

[25] South Dakota points out that the United States holds in trust for Indians some 37,000 acres within the 1858 boundaries. This is less than ten percent of the total number of acres. Property ownership appears to be an unreliable indicator of the character of the area, however, because census data from 1990 reveal that almost two-thirds of the Indian households on the reservation rent their homes.

[26] Even if the lower 32 percent figure is used for the Indian population in the old treaty area, it is much higher than that of the Lake Traverse Indian Reservation which the Supreme Court found had been disestablished in *DeCoteau*. On that reservation, only 3,000 of 33,000, or nine percent, of the people within the original treaty boundaries were Indians. *DeCoteau*, 420 U.S. at 428.

census reports that of the Indians living in Charles Mix County, only eight live outside the 1858 treaty boundaries.)

Finally, the evidence shows that the Indian population and influence in the area is increasing quite rapidly, a trend which appears likely to continue. The tribe opened the Fort Randall casino in 1991 which has provided both jobs and financial resources to tribal members and is apparently now the largest employer in Charles Mix County. The tribe has also announced its intention to use some of the casino proceeds to reacquire title to lands which have passed from Indian hands since 1894. Meanwhile the non-Indian population is decreasing.

The historical and demographic evidence does not show that Congress intended to change the 1858 boundaries. Only Congress can reduce or eliminate a reservation, *see, e.g., Solem*, 465 U.S. at 470, and it is "totally inappropriate" to rely only on de facto diminishment to reduce the size of a reservation. *Duncan Energy*, 27 F.3d 1294, 1298 (8th Cir. 1994). The Yankton Sioux make up a significant portion of the population of the treaty area, and their numbers and economic influence are increasing. Thus, even if de facto diminishment were possible in spite of the lack of substantial evidence of congressional intent in the 1894 act and its legislative history, *see Solem*, 465 U.S. at 472, the record would not support it here.

V.

In sum, application of the factors deemed relevant by the Supreme Court leads to the conclusion that Congress intended by its 1894 act that the Yankton Sioux sell their

surplus land to the government, but not their governmental authority over it. Close examination of the agreement, the act, and the historical record does not reveal the "[s]ubstantial and compelling evidence of a congressional intention to diminish Indian lands" necessary for disestablishment or diminishment, but instead indicates the 1858 treaty boundaries were to be preserved. *Solem*, 465 U.S. at 472. The judgment of the district court is affirmed.

MAGILL, Circuit Judge, dissenting.

I believe that the district court erred in holding that the Yankton Sioux Reservation had not been diminished. *See Yankton Sioux Tribe v. Waste Management Dist.*, 890 F. Supp. 878, 879 (D.S.D. 1995). The August 15, 1894 Act opening the Yankton Sioux Reservation to white settlement, an Act fulfilling treaty stipulations with and support of indian tribes, Ch. 290, 28 Stat. 314 (1894) (1894 Act), which ratified the 1892 agreement between the United States and the Yankton Sioux Tribe (1892 Agreement), contained language of cession of land for a sum certain, which created "an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished." *Solem v. Bartlett*, 465 U.S. 463, 470-71 (1984) (citing *DeCoteau v. District County Court*, 420 U.S. 425, 447-48 (1975)).[27] Because this presumption has not been rebutted in this case, I must respectfully dissent.

---

[27] The boundaries of the Yankton Sioux Reservation were established by a treaty between the United States and the Yankton Sioux Tribe in 1858. *See* Act of April 19, 1858, 11 Stat. 743 (1858) (Treaty of 1858).

I.

Although "the Congresses that passed the surplus land Acts anticipated the imminent demise of the reservation and, in fact, passed the Acts partially to facilitate the process," *Solem*, 465 U.S. at 468, we may not "extrapolate from this expectation a specific congressional purpose of diminishing reservations with the passage of every surplus land Act." *Id.* at 468. Instead, "some surplus land Acts diminished reservations," *id.* at 469, while "other surplus land Acts did not." *Id.* The United States Supreme Court, which has frequently addressed this issue,[28] has provided the proper analysis for determining if diminishment has occurred:

> Our analysis of surplus land Acts requires that Congress clearly evince an intent to change boundaries before diminishment will be found. The most probative evidence of congressional intent is the statutory language used to open the Indian lands. *Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands. When such language of cession is buttressed by an unconditional commitment from Congress to compensate the Indian tribe for its*

---

[28] In addition to *Solem* and *DeCoteau*, the Supreme Court has considered the issue of diminishment in *Hagen v. Utah*, 114 S. Ct. 958 (1994), *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), *Mattz v. Arnett*, 412 U.S. 481 (1973), and *Seymour v. Superintendent*, 368 U.S. 351 (1962). In *Hagen*, *Rosebud*, and *DeCoteau*, the Court found diminishment based on an allotment-era statute.

> *opened land, there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished.*

Solem, 465 U.S. at 470-71 (citations and quotations omitted, emphasis added). In addition to creating this "almost insurmountable presumption" of diminishment, *id.* at 470, specific language of cession coupled with payment for a sum certain is an "extreme" example of Congress's express intent to diminish a reservation, *see id.* at 469 n.10, which is "precisely suited to disestablishment" purposes. *Id.* at 473 n.15 (quotations omitted). *See also DeCoteau*, 420 U.S. at 445 (express language of cession combined with payment of a sum certain "was precisely suited to this purpose" of terminating reservation).

The 1894 Act contained the following provisions:

> Article I.
>
> The Yankton tribe of Dakota or Sioux Indians hereby *cede, sell, relinquish, and convey* to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said Indians as aforesaid.
>
> Article II.
>
> In consideration for the lands ceded, sold, relinquished, and conveyed to the United States as aforesaid, the United States stipulates and agrees to pay to the said Yankton tribe of Sioux Indians *the sum of six hundred thousand dollars ($600,000)*, as hereinbefore provided for.

Ch. 290, 28 Stat. at 314-15 (emphasis added).

Because Articles I and II of the 1894 Act contain language of cession of land for a sum certain, they create an almost insurmountable presumption of diminishment. The task of this Court is therefore to determine if the proponents of a continued reservation status for the ceded lands have successfully rebutted this presumption of diminishment.[29] The majority, however, never makes this critical analysis. Indeed, the majority never acknowledges that the presumption of diminishment exists,[30] nor

---

[29] Although the United States Supreme Court has never found that this presumption of diminishment has been rebutted, its choice of the phrase, "*almost* insurmountable presumption," *Solem*, 465 U.S. at 470 (emphasis added), suggests it is at least theoretically possible, although difficult, to rebut this presumption of diminishment. The Court has not, however, enunciated what quanta of evidence is necessary to achieve this feat. Because an "almost insurmountable presumption" is obviously not to be lightly discarded, it would seem that one challenging it should have the burden of presenting evidence which, at a minimum, clearly and convincingly demonstrates that Congress intended to maintain tribal governance over ceded lands despite its enactment of provisions precisely suited to diminishment.

[30] While the majority makes two passing references to this critical presumption, it couches each reference as a mere restatement of the appellant's argument. *See* Maj. Op. at 11 ("The state argues that the Supreme Court has construed similar language [as that in Articles I and II] as indicating congressional intent to diminish or disestablish reservations. *DeCoteau*, 420 U.S. at 445."); *id.* at 12 ("The state argues that the $600,000 sale price in Article II, in conjunction with the 'cede, sell, relinquish, and convey' language in Article I, gives rise to 'an almost insurmountable presumption' that Congress intended to diminish the reservation. *Solem*, 465 U.S. at 470-71."). Nowhere in its opinion does the majority acknowledge that the appellant is correct that this almost insurmountable presumption of diminishment was created by Articles I and II.

does it hold that the presumption of diminishment has somehow been rebutted.

Rather than addressing the presumption created by Articles I and II together, the majority considers each Article separately. Citing to *United States v. Grey Bear*, 828 F.2d 1286 (8th Cir. 1987), *vacated in part on other grounds on reh'g en banc*, 863 F.2d 572 (8th Cir. 1988), *cert. denied*, 493 U.S. 1047 (1990), which construed an allotment-era statute which contained a provision similar to Article I, the majority states that Article I's cession language "alone is not controlling." Maj. Op. at 11. Unlike the instant case, however, *Grey Bear* did not involve an allotment-era statute which provided for a sum certain payment for ceded land. *See Grey Bear*, 828 F.2d at 1290. This lack of a sum certain payment was critical to this Court's analysis in *Grey Bear*, where we stated:

> The Supreme Court has held that such explicit reference to cession suggests that Congress intended to divest the reservation of its land. *See Solem*, 465 U.S. at 470. The Court has further held that "[w]hen such language of cession is buttressed by an unconditional commitment from Congress to compensate the Indian tribe for its opened land, there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished." *Id.* at 470-71. We agree with the district court's analysis that although the "cede, surrender, grant, and convey" language of the Act suggests congressional intent to disestablish the reservation boundaries, *see Rosebud*, 430 U.S. at 597; *DeCoteau*, 420 U.S. at 445, the Act does not contain an *unconditional* commitment by Congress to pay the tribe for the ceded lands. [*United States v. Grey Bear*, 636 F. Supp. 1551, 1554 (D.N.D. 1986)]. Compensation for the lands was not set at any fixed price and the tribe was guaranteed reimbursement only for the lands actually disposed of by the government. Thus, the "almost insurmountable presumption" of disestablishment urged by defendants is not present in this case.

Id. at 1290 (emphasis in original). The 1894 Act *does* contain the critical language of an "*unconditional* commitment by Congress to pay the tribe for the ceded lands," *id.* (emphasis in original), and consequently places the instant case on an entirely different footing than *Grey Bear*. Rather than supporting the majority's decision to ignore the presumption of diminishment created by Articles I and II, therefore, *Grey Bear* strongly supports adhering to United States Supreme Court precedent.

The majority similarly discards the importance of Article II by asserting that "[a]lthough a lump sum payment can in some circumstances indicate a congressional intent to diminish a reservation, *see, e.g., DeCoteau*, 420 U.S. at 447-48, the record in this case does not support that conclusion." Maj. Op. at 13. The majority fails to recognize that the language actually chosen by Congress is the best indication of its intent. *See Citicasters v. McCaskill*, 89 F.3d 1350, 1354-55 (8th Cir. 1996) (citing cases). Rather than turning to the legislative history only to clarify an ambiguous statute, the majority seems to suggest that the plain meaning of a statute must be rejected unless positively supported by its legislative history. This approach is simply not correct. In Article II, Congress chose language "precisely suited" to diminishment, *DeCoteau*, 420 U.S. at 445, and the majority has pointed to nothing in the legislative history that betrays a contrary intent. *See* Maj. Op. at 12-13 (discussing legislative history).

Without acknowledging the almost insurmountable presumption of diminishment created by the interplay of Articles I and II, the majority relies on the savings clause in Article XVIII to support its conclusion that the reservation was not diminished by the 1894 Act.[31] Article XVIII

---

[31] The majority indicates that "[i]n their briefs the signatories to the 1892 agreement state that Article XVIII has the strongest savings clause of any unallotted land sale agreement between a tribe and the government." Maj. Op. at 13. Assuming that this refers to the appellee and to amicus the United States, I am at a loss as to why the majority finds the assertions of these parties so significant; surely, the "strength" of a savings clause is a question of law for this Court to determine, and is independent of the parties' historical relationship to the legislation. To the extent that Article XVIII represents an unusual savings clause, however, I note that the United States Supreme Court found diminishment despite similarly "strong" – if less verbose – savings clauses in two other allotment-era statutes. In *Montana v. United States*, 450 U.S. 544, 548 (1981), the Court concluded that 22 Stat. 44 reduced a reservation to 2.3 million acres, despite a savings clause that provided that "all the existing provisions of May seventh, eighteen hundred and sixty-eight, [establishing an 8,000,000 acre reservation] shall continue in force." An Act accepting and ratifying agreement for sale of a portion of the Crow Indians of Montana reservation, Ch. 74, 22 Stat. 42 (1882). Similarly, in *DeCoteau*, 420 U.S. at 446, the United States Supreme Court found diminishment despite a savings clause in an allotment-era statute which provided that an earlier treaty's provisions, which established a reservation's boundaries, "shall continue in force." An Act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes, Ch. 543, 26 Stat. 989, 1042 (1891). Thus, while I agree that savings clauses may have a role in our statutory interpretation, *see, e.g., City of New Town v. United States*, 454 F.2d 121, 125 (8th Cir. 1972), they should not have the talismanic significance proffered by the majority.

provides:

> Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement, and its ratification by Congress, all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, *and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858.*

Ch. 290, 28 Stat. at 318 (emphasis added). Disregarding that the cession of land for a sum certain provided by Articles I and II constitute an "extreme" example of Congress's express intent to diminish a reservation, *see Solem*, 465 U.S. at 469 n.10, which is "precisely suited to disestablishment" purposes, *id.* at 473 n.15 (quotations omitted), the majority states that "Articles I, II, and XVIII may be read together to give meaning to them all, and we conclude that in combination they reveal an intent to preserve the 1858 reservation boundaries." Maj. Op. at 17 (note omitted). I disagree.

Based on the language of Article XVIII, legislative history, and the purpose of the 1894 Act, the only reasonable interpretation of Article XVIII is that it extended to annuities, and no farther. No one, including the district court, any party or amici, or the majority, suggests that we interpret Article XVIII literally, because to do so would eviscerate the 1894 Act, nullifying its chief provisions and contradicting its entire purpose.[32] Under the

---

[32] The Treaty of 1858, between the United States and the Yankton Sioux Tribe, provided that:

Act of April 19, 1858, 11 Stat. 743 (1858) (Treaty of 1858), the Yanktons were not to be dispossessed of their lands,

---

Article 1.

The said chiefs and delegates of [the Yankton Sioux] tribe of Indians do hereby cede and relinquish to the United States all the lands now owned, possessed, or claimed by them, wherever situated, except four hundred thousand acres thereof, situated and described as follows, to wit – [describes boundaries of reservation].

. . . .

Article 4.

In consideration of the foregoing cession, relinquishment, and agreements, the United States do hereby agree and stipulate as follows, to wit:

1st. *To protect the said Yanctons [sp] in the quiet and peaceable possession of the said tract of four hundred thousand acres of land so reserved for their future home, and also their persons and property thereon during good behavior on their part.*

2d. To pay to them, or expend for their benefit, the sum of sixty-five thousand dollars per annum, for ten years, commencing with the year in which they shall remove to, and settle and reside upon, their said reservation – forty thousand dollars per annum for and during ten years thereafter – twenty-five thousand dollars per annum for and during ten years thereafter – and fifteen thousand dollars per annum for and during twenty years thereafter – and fifteen thousand dollars per annum for and during twenty years thereafter; *making one million and six hundred thousand dollars in annuities in the period of fifty years* . . . .

Article 10.

No white person, unless in the employment of the United States, or duly licensed to trade with the Yanctons, [sp] or members of the families of such persons, shall be permitted

and white settlers were not allowed within the 1858 boundaries of the reservation. The undisputed purpose of the 1894 Act, however, was to obtain Yankton land for white settlement; the 1894 Act specifically dispossessed the Yanktons of a substantial portion of their reservation and allowed white settlers to purchase them. The 1858 Treaty's provisions cannot be reconciled with the 1894 Act, and Article XVIII of the 1894 Act therefore cannot mean what it says. *See Perry v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966) (" 'There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. *When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act.*' " (emphasis added) (quoting *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940))); *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 333 (1938) ("to construe statutes so as to avoid results glaringly absurd, has long been a judicial function"). *See also United States v. Granderson*, 114 S. Ct. 1259, 1268-69 (1994) (using "a sensible construction" to interpret a Sentencing Guideline "that avoids attributing to the legislature either an unjust or an absurd conclusion" (citations and quotations omitted)); *Colautti v. Franklin*, 439 U.S.

---

to reside or make any settlement upon any part of the tract herein reserved for said Indians, nor shall said Indians alienate, sell, or in any manner dispose of any portion thereof, except to the United States. . . .

(emphasis added).

379, 392 (1979) (describing "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative").

Although a literal interpretation of Article XVIII is not possible without absurd results, it is still this Court's task to determine the intent of the 53rd Congress in crafting this provision of the 1894 Act. Determining the legislative intent of a bygone Congress is not a license to redraft poorly constructed legislation to achieve a result more in harmony with modern sensibilities, however, and the majority should have forsaken this opportunity to do so. Contrary to the majority's inventive interpretation of the savings clause, nowhere in Article XVIII nor in the legislative history of the 1894 Act is there any suggestion that the 1858 boundaries were to remain intact, nor that the tribe was to have continuing authority over ceded lands.[33] Rather, Article XVIII specifically reassured tribal

---

[33] The majority asserts that "to the extent there could be any ambiguity perceived in the [1894 Act], it would have to be resolved in favor of the tribe." Maj. Op. at 17-18. In *DeCoteau*, the United States Supreme Court commented on the temptation to misuse this canon of construction that ambiguities are to be resolved in favor of the tribe:

> For the courts to reinstate the *entire* reservation, on the theory that retention of mere allotments was ill-advised, would carry us well beyond the rule by which legal ambiguities are resolved to the benefit of the Indians. We give this rule the broadest possible scope, but it remains at base a canon for construing the complex treaties, statutes, and contracts which define the status of Indian tribes. *A canon of construction is not a license to disregard clear expressions of tribal and congressional intent.*

members that annuities would continue, and the issue of annuities was of foremost importance in the negotiations for the cession of land. *See, e.g.*, S. Exec. Doc. 27, 53rd Cong., 2d Sess. at 17-19 (Mar. 31, 1893 Report of the Yankton Indian Commission). Indeed, even historian Herbert Theodore Hoover, the Yankton tribe's expert witness, testified that, at the time of the negotiations preceding the 1894 Act, there existed

> a rumor that [the Yanktons] believed that if they didn't sell the surplus land, the government of the United States was going to cut off their annuities. . . . So there was a belief in the tribe that it's plausible the government might shut these [annuities] down if we resist [selling land], because the resistance had led to the loss of annuities in the past. And one should not have the opinion that tribal members didn't communicate with each other, because Yanktons ran a lot with government support to hunt west of the Missouri River. So it's my opinion that the Yanktons would have believed that the government might cut off the annuities, and that would have been disastrous. . . . I believe that they believed that they were threatened by the loss of the annuities.

Trial Tr. at 53-55.

The majority's assertion that "Article XVIII of the 1894 statute indicated that as much of [the 1858] treaty as possible was to be preserved," Maj. Op. at 17, is based neither on the text – which referred only to annuities –

---

420 U.S. at 447 (emphasis added). The majority, therefore, may not use a canon of construction to create ambiguity where there is none, and there is no ambiguity in Articles I and II.

nor the legislative history of the 1894 Act, and has as its source only, as best as I can discern, a single-minded desire to avoid diminishment at all costs. Because Article XVIII extended only to annuities, it could not rebut the powerful presumption that the Yankton Sioux Reservation was diminished.

II.

Other provisions of the 1894 Act are also relevant to a diminishment analysis. First, Article XVII of the 1894 Act prohibited the sale of liquor on the ceded lands. The inclusion of a liquor prohibition provision in an allotment statute is indicative of an intent to diminish the reservation, because standing law had already prohibited the introduction of alcohol into Indian country. *See Rosebud*, 430 U.S. at 613, 613-15 n.47. *But see Solem*, 465 U.S. at 475-76 n.18 (describing this provision as being "obviously of secondary importance to our decision" in the *Rosebud* case).[34] Second, Article VIII of the 1894 Act, which reserved parcels of ceded land for agency and school use, is similar to a provision the *Solem* Court found indicative of a continued reservation status. *See* 465 U.S. at 474. The *Solem* Court, however, did not consider what impact, if

[34] Apparently assuming that neither tribal members nor government negotiators kept abreast of significant legislation affecting Indian country, the majority dismisses Article XVII by asserting that "there is no evidence that any party was aware of [the 1892 liquor act] at the time the agreement was negotiated." Maj. Op. at 20. I am sure that, if Congress had been aware that the plain language of its legislation was insufficient to convey its meaning to future courts, the legislative history in this case would have been much more complete.

any, such a provision could have on the almost insurmountable presumption of diminishment created by Articles I and II.

Finally, the 1894 Act reserved the sixteenth and thirty-sixth sections in each "Congressional township" of the ceded lands for common schools, which were to "be subject to the laws of the State of South Dakota." Ch. 290, 28 Stat. at 319. A virtually identical provision in the statute opening the Rosebud Sioux Reservation was found by the Supreme Court to be strongly indicative of diminishment. *See Rosebud*, 430 U.S. at 599-601. The Court reasoned that the grant of land for common schools was based on § 10 of the Act of February 22, 1889, 25 Stat. 679 (admitting Act), which admitted North and South Dakota into the Union. The admitting Act provided that:

> [U]pon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed States . . . are hereby granted to said States for the support of common schools . . . : *Provided*, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants . . . of this act, *nor shall any land embraced in Indian, military, or other reservations of any character be subject to the grants . . . of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain.*

Reprinted in Rosebud, 430 U.S. at 599-600 (emphasis added). The *Rosebud* Court reasoned that, because the admitting Act specifically excluded a grant of land in an Indian reservation until after the reservation had been

extinguished, the congressional grant of land based on § 10 of the admitting Act necessarily implied that the Rosebud reservation had been diminished. *See id.* at 599-601. This precise logic applies in this case, as well: the grant of land for common schools in the 1894 Act – which contains the identical language as § 10 of the admitting Act – could not have been based on § 10 of the admitting Act if the Yankton reservation had not been diminished. This provision, therefore, strongly supports diminishment.[35]

III.

The United States Supreme Court has found diminishment of a reservation even where Congress has not made its intent to diminish explicit by including language of cession of land for a sum certain in an allotment statute. In *Solem*, the Court stated that

> explicit language of cession and unconditional compensation are not prerequisites for a finding of diminishment. When events surrounding the passage of a surplus land Act – particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress – unequivocally reveal a widely held, contemporaneous

[35] The majority asserts that this provision has "considerably less force" because the reserved sections were explicitly made " 'subject to the laws of the State of South Dakota.' " Maj. Op.at 21 (quoting 1894 Act). I disagree, and find it somewhat illogical to infer a grant of jurisdiction to a tribe over ceded lands because of an explicit grant of jurisdiction to the State of South Dakota over the ceded lands.

> understanding that the affected reservation would shrink as a result of the proposed legislation, we have been willing to infer that Congress shared the understanding that its action would diminish the reservation. . . .

465 U.S. at 471 (citations omitted). The legislative history of the 1894 Act contains striking passages which clearly anticipated the termination of tribal governance; *see, e.g.*, S. Exec. Doc. 27 at 19 ("and now that [the Yankton Indians] have been allotted their lands in severalty and have sold their surplus land – the last property bond which assisted to hold them together in their tribal interest and estate – their tribal interests may be considered a thing of the past") (Report of the Yankton Indian Commission, recommending that South Dakota be given funds to ensure access by Yankton Indians to state courts). *See also id.* at 48 ("It might be, after you sold your lands, you could have this reservation organized as a separate county. If this could be done – I do not say it can – you could govern your own people in your own way, *so long as you obeyed the laws of the State.*") (statements by government negotiator to Yankton tribal members, emphasis added).[36]

[36] Even assuming that mere legislative history could rebut the almost insurmountable presumption of diminishment created by Articles I and II of the 1894 Act, there is nothing in the legislative history which contradicts the diminishment of the reservation. Although the district court referred to a letter in the legislative history which it believed to support the continued reservation status of the ceded lands, *see Yankton Sioux*, 890 F. Supp. at 883-86 (quoting S. Exec. Doc. No. 27 at 5), it is apparent that the district court made an erroneous interpretation. The letter relied on by the district court stated

In addition, "events that occurred after the passage of a surplus land Act" may support a finding of diminishment. *Solem*, 465 U.S. at 471. These "events" include how "local judicial authorities dealt with unallotted open lands." *Id.*[37] In this case, the South Dakota Supreme Court

---

that " 'the treaty makes no provision regarding the cession or relinquishment of the reservation or any portion thereof.' " *Id.* at 883-84 (quoting S. Exec. Doc. 27 at 5). It is clear, and the parties agree, *see* Appellant's Motion to Enlarge Record at 1-2; Appellee's Response to Motion to Enlarge Record at 2, that this letter referred to the Treaty of 1858. The district court, however, misinterpreted this as a reference to the 1892 Agreement: "Most importantly, Armstrong also observed that the Agreement 'makes no provision regarding the cession or relinquishment of the reservation or any portion thereof.' " *Yankton Sioux*, 890 F. Supp. at 885-86 (emphasis deleted) (quoting S. Exec. Doc. No. 27 at 5). The only "Agreement" involved in this case, the 1892 Agreement, contained Article I, which expressly provided for the cession of a portion of the Yankton reservation. This fundamental error in the district court's interpretation of the legislative history of the 1894 Act substantially undermines its determination that the Yankton Sioux Reservation was not diminished.

[37] Treatment of the area by Congress and the Executive may also have some interpretive value. *See Solem*, 465 U.S. at 471. The United States Supreme Court has, however, typically held this evidence in low regard. In *Hagen*, the Court noted that "the views of a subsequent Congress form a hazardous basis of inferring the intent of an earlier one." 114 S. Ct. at 970 (citation and quotations omitted). In *Solem*, the United States Supreme Court noted that:

> The subsequent treatment of the Cheyenne River Sioux Reservation by Congress, courts, and the Executive is so rife with contradictions and inconsistencies as to be of no help to either side. . . . [Ample] examples pointing in both directions leave one with the distinct impression that subsequent

has consistently held that the Yankton Sioux Reservation has been diminished. *See, e.g., State v. Thompson*, 355 N.W.2d 349 (S.D. 1984); *State v. Winckler*, 260 N.W.2d 356 (S.D. 1977); *State v. Williamson*, 211 N.W.2d 182 (S.D. 1973); *Wood v. Jameson*, 130 N.W.2d 95 (S.D. 1964).[38] While

---

> Congresses had no clear view whether the opened territories were or were not still part of the Cheyenne River Reservation. A similar state of confusion characterizes the Executive's treatment of the Cheyenne River Sioux Reservation's opened lands.

465 U.S. at 478-79. *See also Rosebud*, 430 U.S. at 605 n.27 (the "sporadic, and often contradictory, history of congressional and administrative actions in other respects carries but little force"). The examples culled from the record by both the majority, *see* Maj. Op. at 27-33, and the district court, *see Yankton Sioux*, 890 F. Supp. at 886-87, are similarly either "merely passing references," *Hagen*, 114 S. Ct. at 970 (citations and quotations omitted), or "rife with contradictions." *Solem*, 465 U.S. at 478.

[38] The majority dismisses the case law of the South Dakota Supreme Court by asserting that it does "not show full development of the issues or the analytical approach required by the United States Supreme Court." Maj. Op. at 22. I disagree. In *State v. Thompson*, 355 N.W.2d 349 (S.D. 1984), the South Dakota Supreme Court applied the analysis provided by the United States Supreme Court in *DeCoteau* and in *Rosebud*, and upheld its earlier determination that the Yankton Reservation had been diminished. *See id.* at 350-51. While the South Dakota Supreme Court's analysis in *Thompson* is considerably briefer than that performed by the majority in the instant case, I do not believe that accuracy can necessarily be measured by volume.

The majority also notes that the South Dakota Supreme Court was once reversed by the United States Supreme Court after incorrectly finding that a reservation had been diminished. *See* Maj. Op. at 22 n.20 (citing *State v. Janis*, 317 N.W.2d 133 (S.D. 1982), *abrogated in relevant part, Solem*, 465 U.S. at 466 (affirming contrary decision in *Bartlett v. Solem*, 691 F.2d 420 (8th Cir. 1984))). I remind the majority that, while we were right and the

the Yankton tribe has not "exercised civil jurisdiction, particularly environmental regulation, over Indians or non-Indians beyond its trust lands," *Yankton Sioux*, 890 F. Supp. at 888, by contrast, "the State of South Dakota has exercised jurisdiction over mining, solid waste disposal, and hazardous materials on non-Indian lands located within the 1858 exterior boundaries of the Yankton Sioux Reservation." *Id.* Indeed, South Dakota has exercised civil and criminal jurisdiction over tribal members in the ceded lands for the past century. *See id.* at 887. Although this exercise of jurisdiction may not be dispositive, it substantially supports a finding of diminishment. *See, e.g., Hagen*, 114 S. Ct. at 970 ("This 'jurisdictional history,' as well as the current population situation in the Uintah Valley, demonstrates a practical acknowledgement that the Reservation was diminished; a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area."); *see also Rosebud*, 430 U.S. at 604 ("[T]he fact that neither Congress nor the Department of Indian Affairs has sought to exercise its authority over this area, or to challenge the State's exercise of authority is a factor entitled to weight as a part of the 'jurisdictional history.' "); *DeCoteau*, 420 U.S. at 449 ("Until the Court of

---

South Dakota Supreme Court was wrong in *Solem*, it was the South Dakota Supreme Court's finding of diminishment which was upheld, while this Court's conclusion that a reservation was not diminished was reversed, by the United States Supreme Court in *DeCoteau*. *See* 420 U.S. at 449 (affirming *DeCoteau v. District County Court*, 211 N.W.2d 843 (S.D. 1973), and reversing *United States ex rel. Feather v. Erickson*, 489 F.2d 99 (8th Cir. 1973)).

Appeals altered the status quo, South Dakota had exercised jurisdiction over the unallotted lands of the former reservation for some 80 years.").

Federal courts have also usually considered the Yankton reservation to have been diminished. In *Perrin v. United States*, 232 U.S. 478 (1914), a white merchant living on ceded lands within the boundaries of the 1858 Yankton reservation was convicted of selling alcohol, in violation of the 1894 Act and a related statute. The Court, after noting that "[t]he power of Congress to prohibit the introduction of intoxicating liquors into an Indian reservation . . . does not admit of any doubt," *id.* at 482, went on to analyze whether Congress had authority to regulate alcohol "upon ceded lands formerly included in the Yankton Sioux Indian Reservation." *Id.* at 480. The Court referred to the "original reservation," *id.* at 486, and quoted case law that "[i]f liquor is injurious to [Indians] inside of a reservation, it is equally so outside of it." *Id.* at 484 (quoting *United States v. Forty-three Gallons of Whiskey*, 93 U.S. 188, 195 (1876)). While not reaching a specific holding, the United States Supreme Court clearly treated the Yankton Sioux Reservation as diminished.[39] *See also*

---

[39] In addition, cases citing to *Perrin* have assumed that the Yankton reservation had been diminished. *See, e.g., United States v. Mazurie*, 419 U.S. 544, 554 (1975) (*Perrin* involved land that "originally had been included in the Yankton Sioux Indian Reservation, but had been ceded to the United States."); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 159 (1973) (Douglas, J., dissenting) ("In the liquor cases the Court held that it reached acts even off Indian reservations in areas normally subject to the police power of the States." (citing to *Perrin*)); *Johnson v. Gearlds*, 234 U.S. 422, 444-45 (1914) (*Perrin* involved "ceded lands formerly included in the Yankton Sioux Indian reservation in the State of South Dakota.").

Weddell v. Meierhenry, 636 F.2d 211, 213 (8th Cir. 1980) (noting that community within the 1858 boundaries of the reservation was not a "dependent Indian community") (denying habeas relief to Yankton tribal member convicted in the South Dakota state court for crimes committed on ceded lands), *cert. denied*, 451 U.S. 941 (1981); *Yankton Sioux Tribe v. United States*, 623 F.2d 159, 165 (Ct. Cl. 1980) ("These final boundaries of the Yankton Sioux Reservation were respected by both parties for more than three decades up until the 1892 Agreement changed those boundaries by the cession at issue in this case.") (awarding additional compensation for lands ceded by 1894 Act).

IV.

Under the explicit terms of the 1894 Act and in light of controlling United States Supreme Court precedent, it is clear that the 53rd Congress intended to change the Yankton Sioux Reservation's boundaries and to remove tribal authority over lands ceded in the 1894 Act, and that the 1894 Act therefore diminished the Yankton Sioux Reservation. While I understand the majority's desire to "remake history," *DeCoteau*, 420 U.S. at 449, and to redraft legislation which has arguably had unfortunate results, *see, e.g.*, Maj. Op. at 8 (noting that "it became clear in the first decades of the twentieth century that the allotment policy was failing"), its rejection of clear congressional intent and its disregard of controlling and contrary Supreme Court precedent cannot be condoned. I respectfully dissent.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

The YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members, and DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe, Plaintiffs, -vs- SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a non-profit corporation, Defendant.	CIV 94-4217 MEMORANDUM OPINION AND ORDER (Filed June 14, 1995)

SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, Third-Party Plaintiff, -vs- STATE OF SOUTH DAKOTA, Third-Party Defendant.	

The central issue in this case is whether the Yankton Sioux Reservation, created by the 1858 Treaty between the United States and the Yankton Sioux Tribe, was disestablished and returned to the public domain on August 15, 1894, when the Fifty-Third Congress ratified a December

31, 1892 Agreement with the Yankton Sioux for the sale of surplus lands. The Court holds that the 1894 Act did not disestablish the exterior boundaries of the Yankton Sioux Reservation. The Court also holds, however, that the Yankton Sioux Tribe failed to establish that it may exercise regulatory jurisdiction over the municipal solid waste landfill proposed to be built by Southern Missouri Recycling and Waste Management District on non-Indian land located within the exterior boundaries of the reservation. Finally, the Court holds that federal EPA regulations apply to Southern Missouri's proposed facility, that Southern Missouri will be required to install a composite liner as defined in the federal regulations, and Southern Missouri may proceed to construct the facility with the composite liner at the site selected.

I. Preservation of the Reservation

"[O]nly Congress can divest a reservation of its land and diminish its boundaries." *Solem v. Bartlett*, 465 U.S. 463, 470, 104 S.Ct. 1161, 1166 (1984). In determining whether a reservation has been diminished or disestablished, this Court must apply the analytical structure set out in the Supreme Court precedents, looking primarily to three factors. *See Hagen v. Utah*, ___ U.S. ___, 114 S.Ct. 958, 96[illegible] (1994); *Solem*, 465 U.S. at 470, 104 S.Ct. at 1166. The equities of the situation cannot, under established precedent, be given any consideration in determining the outcome from this analysis. The most probative evidence is the language used to open the Indian lands to settlement. *Hagen*, ___ U.S. ___, 114 S.Ct. at 965. "Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly

suggests that Congress meant to divest from the reservation all unallotted opened lands." *Solem*, 465 U.S. at 470, 104 S. Ct. at 1166; *DeCoteau v. District County Court*, 420 U.S. 425, 444-45, 95 S.Ct. 1082, 1092-93 (1975). "[A] statutory expression of congressional intent to diminish, coupled with the provision of a sum certain payment, would establish a nearly conclusive presumption that the reservation had been diminished." *Hagen*, ___ U.S. ___, 114 S.Ct. at 965-66. Secondly, the Court must consider the historical context surrounding the passage of the surplus land Act, looking more carefully to the evidence of the contemporaneous understanding of the Act rather than to matters occurring after passage of the Act. *Id.* Finally, the Court may explore whether diminishment occurred *de facto*, by considering whether the opened area was settled by non-Indians and has now lost its Indian character. *Id.*; *Solem*, 465 U.S. at 471, 104 S.Ct. at 1166. The Court will not lightly find diminishment or disestablishment, and the Court must resolve any ambiguities in favor of the Indians. *Hagen*, ___ U.S. ___, 114 S.Ct. at 965. Before considering the language of the 1892 Agreement, the Court will reconstruct the events that preceded negotiation of the 1892 Agreement and consider the historical context of the 1894 ratification of the Agreement.

The evidence presented at trial shows that, in the April 19, 1858 Treaty, 11 Stat. 743, (Pl. Ex. 1), the Yankton Sioux ceded and relinquished to the United States:

> all the lands now owned, possessed, or claimed by them, wherever situated, except four hundred thousand acres thereof, situated and described as follows, to wit – Beginning at the mouth of the Naw-izi-wa-koo-pah or Chouteau

> River and extending up the Missouri River thirty miles; thence due north to a point; thence easterly to a point on the said Chouteau River; thence down said river to the place of beginning, so as to include the said quantity of four hundred thousand acres.

The Yankton Sioux were to have exclusive occupation of the reservation lands, along with unrestricted use of the red pipestone quarry in the State of Minnesota. A land survey later conducted revealed that 430,495 acres were included in the area described by the 1858 Treaty and reserved to the Yankton Sioux. S. Exec. Doc. No. 27, 53rd Cong., 2d Sess., at 5 (1894). (Pl. Ex. 5.) The land mass comprising the 1858 Yankton Sioux Reservation is located in the central to southeastern portion of Charles Mix County, South Dakota.

In the 1858 Treaty, the Yankton Sioux relinquished and abandoned all claims and complaints growing out of any and all treaties previously made by them or other Indian Tribes, except for their claim to annuity rights under the September 17, 1851 Treaty of Laramie. In return for the cession of land and release of claims, the United States agreed to protect the Yankton Sioux in their "quiet and peaceable possession" of the tract reserved to them. The government also agreed to pay the Yankton Sioux or to expend for their benefit, starting the year of their settlement upon the reservation, the total sum of $1.6 million in annuities over a period of fifty years. The government also agreed to expend additional amounts during the first year of the Tribe's relocation for the purchase of stock, agricultural implements, and fencing,

and for the construction of houses, schools, and other buildings.

In the years that followed, the federal government did not provide all of the financial assistance promised. To compound this problem, the northern plains region experienced extreme weather cycles of prolonged drought and devastating flood, leaving the Yankton Sioux desperate for cash and direct assistance. The Yankton Sioux generally did not want to become involved in the Great Sioux War, and the Tribe suffered inner turmoil during this period. Some members of the Yankton Sioux Tribe served as scouts for federal troops. The growing population of white farmers, businessmen, and railroad men began pressuring federal government officials to open the surplus lands of the Yankton Sioux Reservation for settlement.

By passage of the General Allotment Act on February 8, 1887 (Dawes Act), 24 Stat. 388, Congress attempted to reconcile the federal government's responsibility for the Indians' welfare with the desire of non-Indians to settle upon tribal lands. Congress determined that tracts of reservation land should be allotted to individual tribal members and, with the Tribe's consent, the surplus lands should be sold to white settlers, with the proceeds of these sales dedicated to the benefit of the Indians. This new policy of Congress sought to encourage the Indians to adopt the ways of the white settlers and thereby become socialized into the white culture. Faced with all of these pressures, the Yankton Sioux split into three factions: those who wished to accommodate by selling the surplus lands, those who were ambivalent about any

such sale, and those who strongly opposed the sale of surplus lands.

Of the 430,495 acres of land comprising the 1858 Yankton Sioux Reservation, 167,325 acres were allotted and patented to the Indians under the Dawes Act. By early 1894, allotments under the Act of February 28, 1891, 26 Stat. 594, had been made in the field, but those allotments had not been examined and approved. The federal government estimated that some 95,000 additional acres had been allotted after passage of the 1891 Act, leaving surplus lands of approximately 168,000 acres. S. Exec. Doc. No. 27, 53rd Cong., 2d Sess., at 5 (1894); (Pl. Ex. 5.)

In 1892 the Secretary of the Department of the Interior appointed three members to serve on the Yankton Indian Commission to negotiate the sale of the surplus land owned by the Yankton Sioux. (Pl. Ex. 28.) These three commissioners were John J. Cole, J.C. Adams, and Dr. W.L. Brown; however, Dr. Brown resigned from the Commission before the negotiations were completed, and his replacement, L.W. French, was never qualified to act as a Commissioner and took no part in the negotiations. S. Exec. Doc. No. 27, 53rd Cong., 2d Sess. at 7-8, 34 (1894); (Pl. Ex. 5.) The Commission arrived at the Yankton Sioux Reservation on October 1, 1892, and began negotiating for the sale of the surplus lands at tribal councils called for that purpose. The transcribed minutes of these tribal councils reveal that the Commissioners encouraged the Yankton Sioux to voice their concerns and opinions, and that many spoke out, both for and against the sale. *Id.* at 47-81.

The Commission and the tribal members discussed at length whether the Tribe should cede the land in trust for later appraisal and sale to individual buyers or whether the Tribe should cede the land in a direct sale to the federal government. The Agreement ultimately reached provided for direct sale to the government. *Id.* at 12. The negotiators had extensive difficulty in establishing a price for the ceded land, and it was claimed that price was "[t]he only real grounds for opposition." *Id.* at 22. The Indians wanted no less than $6.00 per acre for the surplus lands; the Commission reported the Indians thought their lands should bring "fabulous prices." *Id.* at 13. The Commission and the required majority of the males of the Tribe finally agreed to a cession of the land for the fixed price of $600,000, which amounted to about $3.60 per acre. The Commission reported to the Secretary of the Interior that this figure was "as low as these lands could be purchased from them without coercion, and about what they think they should receive." *Id.* at 14. Aside from the issue of price, some time was taken, according to Commissioner John J. Cole, in preparing both the rough draft and the final version of the 1892 Agreement.

> In drawing the treaty we have consulted with your missionaries almost daily, submitting to them our work and asking for their assistance in this matter. After making a complete rough draft of the treaty, we on the 10th instant submitted it to Secretary Noble for his consideration and approval.

Id. at 83-84. The changes Secretary Noble requested were made and the Agreement was then submitted to the missionaries, including John P. Williamson. *Id.* at 84.

In its report on the negotiations, the Commission also acknowledged that obtaining the sale of the surplus lands was "but a small part of our mission and of minor importance to both the Indians and the Government, the provisions in connection therewith for the future welfare of the Indians being of greater importance to them and to the Government than the sale of their surplus lands." *Id.* at 17. The Commission reported that the Indians expressed the fear that opening of the Yankton Reservation to settlement by white people would bring with it the establishment of drinking saloons, to the great injury of their people. To alleviate the Tribe's concern, Article XVII, limiting the sale and distribution of liquor on the ceded lands, was included in the Agreement. *Id.* at 21. The Commissioners also noted that it was customary in negotiating with Indians to give a medal to the chiefs, "but as the Yanktons are so far advanced toward individual citizenship, we thought it best to meet this requirement as in Article VII" by giving a $20 gold piece to each adult male of the Tribe. *Id.* at 19.

The negotiations culminated on December 31, 1892, in a final written agreement for the sale of the surplus land to the federal government at a fixed price, (State Ex. 601), and by March 1893, when the Commissioners left the Yankton Sioux Reservation to return to Washington, the required majority of adult male members of the Tribe had signed the Agreement.[1] *Id.* at 7. The Commission

---

[1] The 1892 Agreement contains the following important provisions:

ARTICLE I. "The Yankton tribe of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all

reported that, when agreement with the Tribe was reached, the Commission:

> called together small parties of the chiefs, headmen, and leaders, and conferred with them in drawing the agreement, and after it was written, we continued to call such small councils, to whom we read and explained the agreement for the benefit of the tribe. This work was continued from day to day until the 21st day of January, when we called a full council of the tribe, sending couriers to all parts of the reservation to notify the Indians that we would submit an agreement for their approval. The agreement was submitted, read, interpreted and explained to a full council, at the close of which we took between fifty and sixty signatures to it. Councils for signature were continued from day to day until March 8, when, having a safe majority, we

---

their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said Indians as aforesaid."

ARTICLE II. "In consideration for the lands ceded, sold, relinquished, and conveyed to the United States as aforesaid, the United States stipulates and agrees to pay to the said Yankton tribe of Sioux Indians the sum of six hundred thousand dollars ($600,000), as hereinbefore provided for."

ARTICLE XVIII. "Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement, and its ratification by Congress, all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858." (Pl. Exs. 2, 5.)

> closed up the work of the commission on the reservation.

Id. at 11. Of the 458 male tribal members eligible to vote on the Agreement, 255 members signed it. *Id.* at 21. One-half of the white men married to Indian women gave their consent to the Agreement by signing on a separate page attached to the Agreement. *Id.* at 16-17. United States Interpreter C.F. Picotte certified that the Agreement "was read verbatim and carefully and correctly interpreted in an open council of the tribe," and that the Agreement was "also read and interpreted to the chiefs and to various parties of the headmen, and all members of the tribe had a good understanding of the various provisions of the agreement before signing it." *Id.* at 33.[2]

---

[2] In contradiction to this, Indian Agent E.W. Foster of the Yankton Agency told the Commissioner of Indian Affairs of the Department of the Interior, in a May 1893 letter and in his 1893 annual report, that the Yankton Indian Commissioners read the 1892 agreement in public once, they did not leave a copy in South Dakota when they left the reservation, and many times the Indians asked Foster to show them the document, but he did not have a copy. *See* Report of the Commissioner of Indian Affairs, Dept. of the Interior at 311 (Sept. 14, 1894); (Pl. Ex. 10); May 2, 1893 letter of E.W. Foster (Pl. Ex. 26). It appears from the record that Agent Foster opposed the sale of surplus lands, and he told the Tribe at the first tribal council with the negotiators in October 1892 that they did not have to sell their surplus lands unless they wanted to. S. Exec. Doc. No. 27, 53rd Cong., 2d Sess. at 48 (1894); (Pl. Ex. 5). The Yankton Sioux apparently did not trust Foster, however, for the Indians made it known that they "were willing to negotiate for sale of surplus as long as Sgt. Foster [had] no hand in such negotiations." (Pl. Ex. 28.)

The Report of the Yankton Indian Commission, dated March 31, 1893, was filed in the Department of the Interior on May 27, 1893. Annual Report of the Commissioner of Indian Affairs dated September 16, 1893. (Pl. Ex. 10.) The Commission reported to Washington officials that "[t]here will be no basis for misunderstanding or discontent in carrying out this agreement with the Yanktons, for everything was done openly and aboveboard, and they well understood every provision of the agreement which they signed, and they signed with the greatest possible deliberation." *Id.* at 24. The Yankton chiefs, headmen, and certain members of the Tribe sent letters and petitions to Congress in December 1893 and in January and March 1894 acknowledging that the agreement negotiations had occurred "aboveboard" and that the signers willingly agreed to the Agreement's provisions. They urged Congress to ratify the Agreement quickly so that the Indians could receive from the federal government the money promised to them. S.Rep. Accompanying S. 1538 from the Committee on Indian Affairs at 2 (February 1, 1894); (Pl. Ex. 7); March 2, 1894 Letter to the Chairman, Committee Indian Affairs (State's Exs. 606-07); (Pl. Ex. 21.)

The legislative history of the Agreement leaves no doubt, however, that the faction of the Yankton Sioux opposed to the land sale vehemently worked against the Agreement. Two federal investigators were sent separately to the Yankton Sioux Reservation in 1893 to investigate allegations of fraud in the procurement of signatures on the Agreement. Indian Inspector John W. Cadman reported in November 1893 that he had uncovered only one incident of possible undue influence, but that he did not believe such had occurred in that case. He

also reported that some tribal members who had signed the Agreement wished to change their minds, while others wished to sign the Agreement for the first time. S. Exec. Doc. No. 27, 53rd Cong. 2d Sess. at 35 (1894); (Pl. Ex. 5; State Ex. 605) Special Agent Cooper also found no evidence of coercion by the Commissioners in reaching the Agreement. *Id.* at 95.

In a letter to the Secretary of the Interior, subsequently referred to Congress with the 1892 Agreement, the Acting Commissioner of Indian Affairs, Frank C. Armstrong, stated that the Yankton Indian Commission was appointed in 1892

> [t]o enable the Secretary of the Interior to negotiate with any Indians for the surrender of any portions of their reservation, etc.
>
> By the first article of the agreement the said Indians cede, sell, relinquish, and convey to the United States, all their claim, right, title, and interest, in and to all the unallotted lands within the limits of their reservation in South Dakota.

S. Exec. Doc. No. 27, 53rd Cong., 2d Sess., at 2 (1894). (Pl. Ex. 5.) The letter also states, however, that "[t]he treaty makes no provision regarding the cession or relinquishment of the reservation or any portion thereof." *Id.* at 5. The preamble to the bill to ratify the 1892 agreement nonetheless stated that the Yankton Sioux Tribe "is willing to dispose of a portion of the land set apart and reserved to said tribe, by the first article of the treaty" of April 19, 1858. *Id.* at 26.

The February 1, 1894 Senate Report from the Committee on Indian Affairs, accompanying S. 1538, recommended ratification of the Agreement with the Yankton Sioux because "[t]he occupation of the land released by them by actual settlers under the homestead law bringing them in close contact with the frugal, moral, and industrious people who will settle there will stimulate individual effort and make their progress much more rapid than heretofore." (Pl. Ex. 7; State Ex. 608.) *See also* House Report to Accompany H.R. 6216 (Mar. 10, 1894); (Pl. Ex. 8; State Ex. 609.) Congress ratified the 1892 Agreement with the Yankton Sioux on August 15, 1894. 28 Stat. 314-19. One month later, the Commissioner of Indian Affairs commented in his annual report:

> The agreement concluded with the . . . Yankton Sioux in South Dakota, concluded December 31, 1892, . . . referred to in my last annual report, [was] ratified by the act of Congress approved August 15, 1894 – the Indian appropriation act. Under these agreements some 880,000 acres of land *will be restored to the public domain* for disposition as provided in said act."

Annual Report of Commissioner of Indian Affairs, dated September 16, 1894, at 26 (emphasis added). (Pl. Ex. 11.)

On May 16, 1895, President Grover Cleveland issued a Proclamation opening for settlement the unallotted lands ceded by the Yankton Sioux to the United States, noting that "the said Yankton tribe of Sioux or Dacotah Indians, for the consideration therein mentioned, ceded, sold, relinquished, and conveyed to the United States, all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set

apart to said tribe by the first article [of the 1858 treaty]." Annual Report of the Commissioner of the General Land Office for The Fiscal Year Ending June 30, 1895 at 120-21; (Pl. Exs. 6, 35; State Ex. 602.) The unallotted lands were officially opened for settlement at 12 noon on May 21, 1895. *Id.* at 5. (Pl. Ex. 6.) Non-Indians rapidly settled and purchased the lands ceded by the Yankton Sioux. (Pl. Ex. 58, 61-64, 66.) In fact, some settlers squatted on the lands without authority even before the issuance of the presidential proclamation opening the land for settlement. (Pl. Ex. 27.)

With this historical context in mind, the Court now turns to an examination of the "most probative evidence" of diminishment or disestablishment: the language of the Agreement. Article I of the 1892 Agreement provided that the Yankton Sioux

> hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said Indians as aforesaid.

In Article II, the United States agreed that,

> [ ]in consideration for the lands ceded, sold, relinquished, and conveyed to the United States as aforesaid, the United States stipulates and agrees to pay to the said Yankton tribe of Sioux Indians the sum of six hundred thousand dollars ($600,000), as hereinbefore provided for.

These two Articles of the Agreement, taken together and without consideration of Article XVIII, plainly indicate that the Yankton Sioux were willing to convey to the United States, for payment of a sum certain, all of their

interest in all of their unallotted lands. *See DeCoteau*, 420 U.S. at 445, 95 S.Ct. at 1093. The explicit cession language used in Article I, coupled with the agreement to sell lands for a sum certain in Article II, was "precisely suited to [the] purpose [of disestablishment]." *Id. See also, Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 592, 97 S.Ct. 1361, 1366 (1977). If Article XVIII had not been included in the Agreement, the language utilized in these two Articles would establish "a nearly conclusive presumption that the reservation had been diminished." *See Hagen*, ___ U.S. ___, 114 S.Ct. at 965-66. *See also Perrin v. United States*, 232 U.S. 478, 480, 34 S.Ct. 387 (1914) (referring to the "ceded lands formerly included in the Yankton Sioux Indian Reservation" when construing Article XVII, the liquor provision, of the 1892 Agreement with the Yankton Sioux). The fact that lands were considered by the Court in *Perrin* as ceded does not mean that the boundaries were diminished, as that issue was not addressed.

The Court must further consider, however, the meaning and impact of Article XVIII:

> Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement, and its ratification by Congress, all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858.

The Court focuses upon the phrases "[n]othing in this agreement shall be construed to abrogate the treaty

of April 19th, 1858," and "all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made[.]" The extensive post-trial research of the parties to this case reveals no other treaty or agreement made between the United States and an Indian tribe that includes this identical language. There are treaties and agreements that include savings clauses; however, the language used in such clauses is far from uniform. The parties cite to the Court numerous examples of savings clauses in other agreements providing that treaty provisions shall remain in force or continue in force to the extent those treaty provisions are not inconsistent with the provisions of a subsequent act. (Doc. 97 at 5-8; Doc. 94 at 4-6, 9-12.) The State also cites decisions of the United States Supreme Court in which such savings clauses did not affect the Court's ultimate finding of reservation diminishment or diminution of special Indian rights. *Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 105 S.Ct. 3420 (1985); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361 (1977); *Chippewa Indians of Minnesota v. United States*, 301 U.S. 358, 57 S.Ct. 826 (1937); *Shoshone Tribe of Indians v. United States*, 299 U.S. 476, 57 S.Ct. 244 (1937). The Court has considered the other clauses and cases cited by the parties, but finds them to be of little help in resolving this case. No other clause contains language as forceful as Article XVIII.

The Court finds that the phrase in Article XVIII that "all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made," when read with the clear cession and sale clauses of Articles I and II, creates an

internal inconsistency in the 1892 Agreement. Construing this ambiguity in favor of the Tribe as the Court must do, *see Hagen*, ___ U.S. ___, 114 S.Ct. at 965, the Court concludes, as the Tribe argues, that the effect of Article XVIII is to incorporate by reference the exterior boundaries of the Yankton Sioux Reservation as set out in the 1858 treaty.

The circumstances surrounding the ratification of the 1892 Agreement fail to establish a clear congressional purpose to disestablish the reservation boundaries. In referring the 1892 Agreement to Congress for ratification, Acting Commissioner of Indian Affairs Frank Armstrong reminded Congress that the Yankton Indian Commission was appointed under the authority of the Act of July 13, 1892, so that the Secretary of the Interior could "negotiate with any Indians for the surrender of any portions of their reservation." S. Exec. Doc. No. 27, 53rd Cong., 2d Sess., at 2 (1894) (emphasis added). (Pl. Ex. 5.) Armstrong then informed Congress that, by Article I of the 1892 Agreement, "the said Indians cede, sell, relinquish, and convey to the United States, all their claim, right, title, and interest in and to all the unallotted lands *within the limits of their reservation* in South Dakota." *Id.* (emphasis added). He informed Congress that "Article XVIII provides that nothing in the agreement shall be construed to abrogate the treaty of April 19, 1858, and that the Yankton Indians shall continue to receive their annuities under said treaty." *Id.* at 4. Most importantly, Armstrong also observed that the Agreement "*makes no provision regarding the cession or relinquishment of the reservation* or any portion thereof." S. Exec. Doc. No. 27, 53rd Cong., 2d Sess., at 5 (1894) (emphasis added). (Pl. Ex. 5.) The transcribed

minutes of the tribal councils held by the Yankton Indian Commission to negotiate the Agreement with the Yankton Sioux, which are included in the legislative history of the ratifying Act, do not divulge any discussion that might have taken place as to the meaning the parties to the Agreement gave to Article XVIII, and there is no discussion as to whether the Yankton Sioux or the negotiators believed the 1858 boundaries of the reservation would change. *Id.* at 47-97. John P. Williamson was one of the missionaries to whom the final version of the 1892 Agreement was submitted.[3] In his letter of January 3, 1893, from Greenwood, South Dakota, on the reservation, Rev. Williamson wrote: "I have read the agreement you present the Yankton Indians . . . [and in conclusion] and further there is no cause for apprehension that this agreement will in any way interfere with the treaty of 1858." S. Exec. Doc. No. 27, 53rd Cong., 2d Sess., at 84 (1894). (Pl. Ex. 5.) The Court can find no other mention of Article XVIII in the legislative history of the ratification Act.

The Court therefore concludes that Congress reasonably could have understood, by reason of the communications it received from the Commissioner of Indian

---

[3] Rev. John P. Williamson was a well regarded Presbyterian missionary among the Yankton Sioux. *See, e.g.*, Eastman, *From the Deep Woods to Civilization*, 48 (Little, Brown and Company 1916). Rev. Williamson lived near the Yankton Agency at Greenwood from 1869 to 1916 and was the first resident missionary of any denomination among the Indians within the bounds of what is now South Dakota and interceded for the Yankton Sioux with President Grant in 1873. Sister Mary Claudia Duratschek, *Crusading Along Sioux Trails*, 268, 275 (Grail Publication 1947).

Affairs through the Secretary of the Interior, particularly in light of no other indications to the contrary, that the Yankton Sioux intended to cede the surplus lands within the exterior boundaries of the reservation, but that they did not intend to relinquish the boundaries established in the 1858 treaty. The Court's conclusion in this regard is supported by the fact that Congress stated in the preamble to the ratification bill that the Yankton Sioux Tribe "is willing to dispose of a portion of the land set apart and reserved to said tribe, by the first article of the treaty" of April 19, 1858. *Id.* at 26. Congress did not expressly state in the ratification bill that the boundaries would be diminished or disestablished, and such congressional intent is not clear from the surrounding circumstances and legislative history. *See Solem*, 465 U.S. at 474, 104 S.Ct. at 1168 ("Nowhere else in the [Cheyenne River] Act is there specific reference to the cession of Indian interests in the opened lands or any change in existing reservation boundaries.") Without such clear congressional intent, the general rule applies that doubtful expressions must be resolved in favor of the Tribe. *See DeCoteau*, 420 U.S. at 445, 95 S.Ct. at 1093 (once Congress establishes a reservation, all tracts included within it remain part of the reservation until separated from it by Congress).

Historical events following ratification of the Agreement are not entirely at odds with a determination that the exterior boundaries remained intact, although there is some evidence that the reservation was treated as if it had been diminished or disestablished. *See Hagen*, ___ U.S. ___, 114 S.Ct. at 965-66; *Solem*, 465 U.S. at 471, 104 S.Ct. at 1166. Illustrative of this latter type of evidence are

maps issued by private publishers in 1904, 1906, and 1912 which treated the Yankton Sioux Reservation as if its exterior boundaries no longer existed. (State Exs. 630-32.) Also, the State introduced into evidence a February 21, 1921 letter regarding construction of a spillway and drainage ditch to maintain the level of Lake Andes, in which Secretary of the Interior Payne stated that Lake Andes is "within the former Yankton-Sioux Indian Reservation." (State Ex. 665.) Having carefully reviewed all similar evidence presented by the State, (State's Exs. 604, 627-28, 651-52, 667-68), the Court finds that the evidence is insufficient to prove that *de facto* diminishment or disestablishment occurred.

One month after Congress ratified the Agreement, the Commissioner of Indian Affairs stated that the effect of the Agreement was to return land to the public domain "as provided in said act." Annual Report of Commissioner of Indian Affairs, dated September 16, 1894, at 26. (Pl. Ex. 11.) A return of surplus lands to the public domain is consistent with a conclusion that the Ratification Act opened the surplus lands for settlement only and did not change the reservation boundaries. *See Solem*, 465 U.S. at 474, 104 S.Ct. at 1168. Upon ratification, President Cleveland opened the unallotted lands for settlement, noting in his Proclamation that the Yankton Sioux had ceded and relinquished to the United States all the unallotted lands "within the limits of the reservation set apart to said tribe by the first article [of the 1858 treaty]." Annual Report of the Commissioner of the General Land Office for The Fiscal Year Ending June 30, 1895 at 120-21. (Pl. Exs. 6, 35; State Ex. 602.) This proclamation is consistent with the conclusion that the boundaries remained

intact while the unallotted lands were opened to settlement.

White settlers rapidly entered and settled the opened areas of the reservation. Census data show that the population of Charles Mix County increased by 103.4 percent between 1890 and 1900, and of the 8,498 persons residing in Charles Mix County in 1900, only 1,483 were Indian. (State Exs. 612-13.) By 1910, the Indian population in Charles Mix County had dropped to 1,345, and Indian land holdings had dropped dramatically by 1914. (Pl. Exs. 22, 25; State Exs. 613, 623.) This evidence tends to show that the opened lands quickly lost their Indian character. However, of particular concern to the Yankton Sioux during this time period were attempts by the Commissioner of School and Public Lands for the State of South Dakota to select for State purposes land ceded in the 1892 Agreement, as the Yankton Sioux preferred stable white settlers for neighbors rather than cowboys who would graze livestock on lands leased from the State. (Pl. Exs. 17, 19-20, 27, 56, 76.) This is some evidence that the Yankton Sioux believed that the reservation boundaries had not changed and that they could exercise some influence within Congress or executive agencies to determine the use to be made of the opened lands.

Official government reports, documents, and maps issued in the years between 1894 and 1923 sometimes referred to the Yankton Sioux Reservation as if the 1858 exterior boundaries remained intact, and at other times treated the area within the 1858 exterior boundaries as "allotted or opened" or as a "former reservation." (Pl. Exs. 30, 34-55; State Exs. 612-14, 617, 619-22, 625-26, 666.) Thus, the government itself did not take a clear position

as to whether the reservation had been diminished or disestablished. In a letter dated May 13, 1910, the Commissioner of Indian Affairs informed the Yankton Sioux that lands ceded under the 1892 Agreement became public lands, (State Ex. 664), but this is not inconsistent with a conclusion that the reservation boundaries remained intact. Beginning as early as 1895, state courts exercised civil and criminal jurisdiction in the opened area of the reservation, (State Exs. 633-38); however, this fact in itself does not confirm that the exercise of state jurisdiction was appropriate, nor is it inconsistent with the existence of shared jurisdiction by the state, tribe and federal government within the opened area of an existing Indian reservation. *See Solem*, 465 U.S. at 467, 104 S.Ct. at 1164. Within the last sixty years, the Yankton Sioux Tribe has taken steps to assert tribal jurisdiction, although those efforts have not completely come to fruition.

In 1932 the Yankton Sioux Tribal Business and Claims Committee wrote a Constitution and Bylaws, but this Constitution was silent as to the extent of jurisdiction asserted by the Tribe. (State Ex. 651.) Trial testimony revealed that the Business and Claims Committee was suspended from 1936 through 1965 and did not operate during that time, although two or three other limited purpose committees were developed by tribal members. In 1962 the Yankton Sioux Tribal Business and Claims Committee was re-established and adopted an Amended Constitution and Bylaws, certain sections of which were again amended in 1975. (State Ex. 652.) The Amended Constitution provided that "[t]he territory under which this Constitution shall exist shall extend to all original

Tribal lands now owned by the Tribe under the Treaty of 1858." (*Id.*)

In a Department of Interior Solicitor's Opinion, "Authority Of Yankton Sioux Tribe of South Dakota To Establish A Tribal Court," the Associate Solicitor stated:

> The cession of unallotted lands by the Yankton Sioux Tribe by the Agreement of December 31, 1892, as ratified by the Act of August 15, 1894, 28 Stat. 314, diminished the area over which the tribe might exercise its authority but did not otherwise terminate legislative authority of the tribe; the tribe retained inherent authority to administer justice through a tribal court.
>
> The result of a cession of all unallotted lands was to leave in Indian control lands in a checkerboard pattern. The impracticality of such jurisdiction is recognized. (cases omitted) However, as stated in *De Marrias*, the checkerboard jurisdiction stems from the acts of Congress and therefore had the approval of Congress. *De Marrias* [*v. State of South Dakota*, 206 F. Supp. 549, 551 (D.S.D. 1962), *aff'd*, 319 F.2d 845 (8th Cir. 1963)].

(State Ex. 628 at 4.) Since the mid-1960's, the State of South Dakota has exercised jurisdiction over mining, solid waste disposal, and hazardous materials on non-Indian lands located within the 1858 exterior boundaries of the Yankton Sioux Reservation. (State Exs. 640-46, 647-50.) Plaintiffs presented no evidence that, since 1894, the Tribe has exercised civil jurisdiction, particularly environmental regulation, over Indians or non-Indians beyond its trust lands. Yankton Sioux Tribal Chairman Darrell Drapeau specifically testified that he seeks tribal solid waste regulation over Indians only, and not over

non-Indians located on lands within the 1858 exterior boundaries of the Yankton Sioux Reservation.

Although there is evidence that governmental and private entities often treated the Yankton Sioux Reservation as if it had been diminished or disestablished, the Court holds for the reasons previously stated that the 1892 Agreement, ratified by Congress in 1894, did not disestablish or diminish the exterior boundaries of the Yankton Sioux Reservation as set out in the 1858 Treaty.[4]

Nonetheless, "when Congress has broadly opened up . . . land to non-Indians, the effect of the transfer is the destruction of pre-existing Indian rights to regulatory control." *South Dakota v. Bourland*, ___ U.S. ___, 113 S.Ct. 2309, 2318 (1993). Indian tribes retain inherent authority to punish members who violate tribal law, to regulate tribal membership, and to conduct internal tribal relations, but the " 'exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation[.]' " *Id.* at 2319 (quoting *Montana v. United States*, 450 U.S. 544, 564, 101 S.Ct. 1245, 1258 (1981)). Plaintiffs have provided no evidence to prove that Congress intended to allow the Tribe to assert regulatory jurisdiction over non-Indian lands within the exterior boundaries of the reservation pursuant to inherent sovereignty. The Court also finds that plaintiffs failed to produce sufficient evidence to warrant application of the

---

[4] This holding does not affect the validity of the holding of record title to real estate within the exterior boundaries of the Yankton Sioux Reservation.

second *Montana* exception in this case. *See Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408, 424, 109 S.Ct. 2994 (1989) (plurality); *Montana*, 450 U.S. at 566, 101 S.Ct. at 1258. Plaintiffs produced no evidence regarding impact of the proposed municipal solid waste landfill on the political integrity, economic security, or health and welfare of the Tribe except for very limited and somewhat contradictory testimony by Tribal Chairman Darrell Drapeau. Accordingly, the Tribe may not assert civil jurisdiction over the municipal solid waste landfill that is proposed to be built on non-Indian land within the exterior boundaries of the Yankton Sioux Reservation.

II. Regulation of the Municipal Solid Waste Landfill

The Southern Missouri Recycling and Waste Management District, formerly known as the Southern Missouri Waste Management Association, came into existence on February 5, 1992, for the purpose of constructing a municipal solid waste disposal facility in compliance with state solid waste disposal regulations and federal Environmental Protection Agency (EPA) Subtitle D regulations. Faced with a federal mandate to close unregulated town dump sites by October 6, 1995, community leaders formed Southern Missouri to develop a solid waste disposal facility that will serve approximately 25,000 residents located in four counties and numerous communities. Although tribal representatives regularly attended Southern Missouri's meetings, the Yankton Sioux Tribe did not sign the joint powers agreement or become an official member of the organization.

Southern Missouri selected a site for the landfill west of Lake Andes, in Charles Mix County, South Dakota. The site is located on land formerly owned by a non-Indian, Kenneth McBride, within the exterior boundaries of the Yankton Sioux Reservation. Southern Missouri purchased the parcel from McBride and filed an application with the State of South Dakota, Department of Environment and Natural Resources (DENR), to obtain a permit to construct and operate the landfill. Following review of Southern Missouri's application and subsequent submissions, DENR recommended approval of the permit to the Board of Minerals and Environment.

On October 4, 1993, the Yankton Sioux Tribe filed with the Board of Minerals and Environment a Petition For A Contested Case Hearing, a Motion to Intervene, and a Request For An Environmental Impact Statement. (State Ex. 653.) The Board Chairman accepted the petition to intervene and granted party status to the Tribe, but denied the Tribe's request for an Environmental Impact Statement. (State Exs. 654, 656.)

On December 8-10 and December 20, 1993, the Board of Minerals and Environment conducted a lengthy contested case hearing regarding Southern Missouri's application for a permit. The Yankton Sioux Tribe, represented by counsel at the hearing, presented evidence and cross-examined witnesses called by other parties. (State Ex. 675 Tr. Vols. 1-4.) Several of the witnesses who testified at the trial in this action also testified at the state administrative hearing, among them the engineers who designed Southern Missouri's facility and the Tribe's experts, Dr. Henry Mott and Dr. Perry Rahn. The Court finds that the testimony given in the two proceedings is virtually identical.

At the conclusion of the contested case hearing, the Board filed extensive Findings of Fact And Conclusions of Law granting Southern Missouri the requested permit. (State Ex. 657.) Based upon a careful review of the evidence, the Board rejected the concerns raised by the Tribe's experts as to (1) inadequacy of the proposed compacted clay liner; (2) location of major acquifers underlying the site; (3) potential groundwater mounding beneath the site; (4) inadequate drilling of test wells; (5) the presence of fissures or lineaments, as well as sand and gravel lenses, at the site that might assist the migration of leachate into groundwater and acquifers; (6) and the inadequacy of the methane gas and leachate collection systems. The Board specifically found that South Dakota solid waste regulations do not require the installation of a synthetic composite liner over the compacted clay liner, and therefore, the Board did not order its installation. The Board found that the facility will not cause significant adverse effect on wildlife, recreation, endangered species, or aesthetic value; the facility is not located within one thousand feet of water classified for fish life propagation; it is not located within an area where leachate can potentially contaminate groundwater; it is not located within the 100-year flood plain; it is not visible or within one thousand feet of a public park; and it is in an area that does not constitute a potential safety hazard to the public. The Board determined that the permit would be subject to certain conditions attached to it and incorporated by reference. The permit issued to Southern Missouri contains conditions relating to design and construction, monitoring, operations, recordkeeping and reporting, and financial assurance. Particularly, Southern Missouri is

required to conduct soil tests while the compacted clay liner is under construction to assure that the liner will achieve the proposed impermeability rating of 1 x 10 (-7) cm/sec. (State Ex. 659.)

The Tribe did not seek review of the administrative ruling in the state circuit court as permitted by state law. Another party to the contested case hearing called VOTE, which was also represented by the Tribe's attorney, did seek judicial review, and the Sixth Judicial Circuit Court affirmed. (State Ex. 658.) No appeal was taken to the South Dakota Supreme Court. The Tribe then filed this federal lawsuit seeking to enjoin construction of Southern Missouri's solid waste facility.

The Court held in the previous section of this Opinion that the Tribe did not meet its burden to prove at trial that it may exercise civil jurisdiction over this proposed landfill. The Court must nonetheless consider the Tribe's argument that federal EPA regulations apply to this solid waste disposal facility, and not state regulations, because EPA has not delegated to the State of South Dakota its permitting and enforcement authority over lands located within the exterior boundaries of the Yankton Sioux Reservation.

The Tribe is correct that on October 8, 1993, EPA exempted "Indian Country" as defined in 18 U.S.C. § 1151, including the "existing or former" Yankton Sioux Reservation, from its final determination of the adequacy of South Dakota's State/Tribal Municipal Solid Waste Permit Program. 58 Federal Register 52486-52489, October 8, 1993; (State Ex. 661.) On April 7, 1994, however, the EPA published notice of its tentative determination of

adequacy of the State's amended Municipal Solid Waste Permit Program over non-Indian lands, except for "Indian Country" as defined in § 1151, within the boundaries of the Yankton Sioux Reservation. 59 Federal Register 16647-16649, April 7, 1994; (State Ex. 662.)

On November 10, 1994, William Yellowtail, Regional Administrator for the EPA, in a letter to Robert Roberts, Secretary of the South Dakota Department of Environment and Natural Resources, stated EPA's position that federal regulations apply to Southern Missouri's site because the facility lies within the exterior boundaries of the reservation. Yellowtail asserted EPA's view that the federal regulations would require installation of the synthetic liner, although he acknowledged that EPA had yet to make a final decision on the State's amended application for enforcement authority over all non-Indian lands within the exterior reservation boundaries. (Pl. Ex. 69.) In response, on March 14, 1995, the State requested that EPA take no further action on its amended application pending the outcome of this lawsuit. (State Ex. 675 File Vol. 1, Correspondence.) The Tribe has also applied for EPA enforcement authority over lands within the exterior reservation boundaries, and that application is pending before the EPA. (Pl. Ex. 57.)

The Court finds that, until the EPA takes final action to approve or disapprove either the State's or the Tribe's applications, federal EPA regulations apply to Southern Missouri's proposed solid waste disposal facility. The evidence shows that the EPA takes the position that a synthetic liner is required in addition to the compacted clay liner to bring Southern Missouri's design into compliance with Subpart D, 40 C.F.R. § 258.40. The Court will

require Southern Missouri to install a composite liner as defined in 40 C.F.R. § 258.40(b) because a composite liner and leachate collection system is required where noncontainerized leachate derived from the solid waste disposal facility will be recirculated into the cells, as is proposed in Southern Missouri's design and operation. 40 C.F.R. § 258.28(a)(2). Plaintiff's expert, Dr. Henry Mott, testified that his concerns regarding the adequacy of the compacted clay liner and the leachate collection system would be alleviated if Southern Missouri were required to install a composite liner. At trial, Southern Missouri offered to construct the proposed facility with a composite liner. Now that the Court is requiring installation of the composite liner, these concerns are fully addressed.

As Dr. Perry Rahn testified, the EPA regulations do not require a facility design that prepares for a worst case scenario. The Court has carefully considered all of the testimony given by the witnesses at trial regarding the adequacy of the site selection and the design of Southern Missouri's proposed facility. As to all remaining factual issues, this Court makes the same findings as those made by the South Dakota Board of Minerals and Environment. The Court finds credible the testimony of the engineers who designed the facility for Southern Missouri, Brian Bernhardt and John Childs. The Court is convinced that in designing the facility these engineers appropriately considered the concerns raised by the Tribe's experts as to groundwater mounding, sand and gravel lenses, fissures and lineaments, acquifers, test borings, and methane gas collection. All of these matters have been adequately addressed in the design of the facility, which

complies fully with EPA regulations once the composite liner is required. Accordingly,

IT IS ORDERED:

(1) that Congress did not disestablish or diminish the boundaries of the Yankton Sioux Reservation when it ratified the 1892 Agreement with the Yankton Sioux Tribe and therefore, the exterior boundaries of the reservation, as set out in the 1858 Treaty, remain intact.

(2) that plaintiffs failed to establish that the Yankton Sioux Tribe may exercise regulatory jurisdiction over the municipal solid waste landfill proposed to be built by Southern Missouri Recycling and Waste Management District on non-Indian land located within the exterior boundaries of the Yankton Sioux Reservation.

(3) that Southern Missouri Recycling and Waste Management District may proceed with construction of its solid waste disposal facility at the site selected.

(4) that, during construction of the solid waste disposal facility, Southern Missouri will install a composite liner as defined in 40 C.F.R. § 258.40(b).

(5) that all other relief requested by plaintiffs is denied.

Dated this 14th day of June, 1995.

BY THE COURT:

/s/ Lawrence L. Piersol
Lawrence L. Piersol
United States District Judge

ATTEST:

WILLIAM F. CLAYTON, CLERK

BY /s/ Alice R. Raesly
DEPUTY

(SEAL)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-2647SDSF

Yankton Sioux Tribe, et al.,
Appellees,
vs.
State of South Dakota,
Appellant.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. Judge Bowman, Judge Magill, and Judge Loken would grant the suggestion.

The petition for rehearing by the panel is also denied.

Judge Wollman took no part in the consideration or decision of this case.

January 6, 1997

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

---

* * *

TREATY WITH THE YANKTON SIOUX, 1858

Articles of agreement and convention made and concluded at the city of Washington, this nineteenth day of April, A.D. one thousand eight hundred and fifty-eight, by Charles E. Mix, commissioner on the part of the United States, and the following-named chiefs and delegates of the Yancton tribe of Sioux or Dacotah Indians, viz:

Pa-la-ne-a-pa-pe, the man that was struck by the Ree.
Ma-to-sa-be-che-a, the smutty bear.
Charles F. Picotte, Eta-ke-cha.
Ta-ton-ka-wete-co, the crazy bull.
Pse-cha-wa-kea, the jumping thunder.
Ma-ra-ha-ton, the iron horn.
Mombe-kah-pah, one that knocks down two.
Ta-ton-ka-e-yah-ka, the fast bull.
A-ha-ka-ma-ne, the walking elk.
A-ha-ka-na-zhe, the standing elk.
A-ha-ka-ho-che-cha, the elk with a bad voice.
Cha-ton-wo-ka-pa, the grabbing hawk.
E-ha-we-cha-sha, the owl man.
Pla-son-wa-kan-na-ge, the white medicine cow that stands.
Ma-ga-scha-che-ka, the little white swan.
Oke-che-la-wash-ta, the pretty boy.

(The three last names signed by their duly-authorized agent and representative, Charles F. Picotte,) they being thereto duly authorized and empowered by said tribe of Indians.

ARTICLE 1.

The said chiefs and delegates of said tribe of Indians do hereby cede and relinquish to the United States all the lands now owned, possessed, or claimed by them, wherever situated, except four hundred thousand acres thereof, situated and described as follows, to wit – Beginning at the mouth of the Naw-izi-wa-koo-pah or Chouteau River and extending up the Missouri River thirty miles; thence due north to a point; thence easterly to a point on the said Chouteau River; thence down said river to the place of beginning, so as to include the said quantity of four hundred thousand acres. They, also, hereby relinquish and abandon all claims and complaints about or growing out of any and all treaties heretofore made by them or other Indians, except their annuity rights under the treaty of Laramie, of September 17, A.D. 1851.

ARTICLE 2.

The land so ceded and relinquished by the said chiefs and delegates of the said tribe of Yanctons is and shall be known and described as follows, to wit –

"Beginning at the mouth of the Tchan-kas-an-data or Calumet or Big Sioux River; thence up the Missouri River to the mouth of the Pa-hah-wa-kan or East Medicine Knoll River; thence up said river to its head; thence in a direction to the head of the main fork of the Wan-dush-kah-for or Snake River; thence down said river to its junction with the Tchan-san-san or Jaques or James River; thence in a direct line to the northern point of Lake Kampeska; thence along the northern shore of said lake

and its outlet to the junction of said outlet with the said Big Sioux River; thence down the Big Sioux River to its junction with the Missouri River."

And they also cede and relinquish to the United States all their right and title to and in all the islands of the Missouri River, from the mouth of the Big Sioux to the mouth of the Medicine Knoll River.

And the said chiefs and delegates hereby stipulate and agree that all the lands embraced in said limits are their own, and that they have full and exclusive right to cede and relinquish the same to the United States.

ARTICLE 3.

The said chiefs and delegates hereby further stipulate and agree that the United States may construct and use such roads as may be hereafter necessary across their said reservation by the consent and permission of the Secretary of the Interior, and by first paying the said Indians all damages and the fair value of the land so used for said road or roads, which said damages and value shall be determined in such manner as the Secretary of the Interior may direct. And the said Yanctons hereby agree to remove and settle and reside on said reservation within one year from this date, and, until they do so remove, (if within said year,) the United States guarantee them in the quiet and undisturbed possession of their present settlements.

ARTICLE 4.

In consideration of the foregoing cession, relinquishment, and agreements, the United States do hereby agree and stipulate as follows, to wit:

1st. To protect the said Yanctons in the quiet and peaceable possession of the said tract of four hundred thousand acres of land so reserved for their future home, and also their persons and property thereon during good behavior on their part.

2d. To pay to them, or expend for their benefit, the sum of sixty-five thousand dollars per annum, for ten years, commencing with the year in which they shall remove to, and settle and reside upon, their said reservation – forty thousand dollars per annum for and during ten years thereafter – twenty-five thousand dollars per annum for and during ten years thereafter – and fifteen thousand dollars per annum for and during twenty years thereafter; making one million and six hundred thousand dollars in annuities in the period of fifty years, of which sums the President of the United States shall, from time to time, determine what proportion shall be paid to said Indians, in cash, and what proportion shall be expended for their benefit, and, also, in what manner and for what objects such expenditure shall be made, due regard being had in making such determination to the best interests of said Indians. He shall likewise exercise the power to make such provision out of said sums as he may deem to be necessary and proper for the support and comfort of the aged or infirm, and helpless orphans of the said Indians. In case of any material decrease of said Indians, in number, the said amounts may, in the discretion of the

President of the United States, be diminished and reduced in proportion thereto – or they may, at the discretion of the President of the United States, be discontinued entirely, should said Indians fail to make reasonable and satisfactory efforts to advance and improve their condition, in which case, such other provisions shall be made for them as the President and Congress may judge to be suitable and proper.

3d. In addition to the foregoing sum of one million and six hundred thousand dollars as annuities, to be paid to or expended for the benefit of said Indians, during the period of fifty years, as before stated, the United States hereby stipulate and agree to expend for their benefit the sum of fifty thousand dollars more, as follows, to wit: Twenty-five thousand dollars in maintaining and subsisting the said Indians during the first year after their removal to and permanent settlement upon their said reservation; in the purchase of stock, agricultural implements, or other articles of a beneficial character, and in breaking up and fencing land; in the erection of houses, storehouses, or other needful buildings, or in making such other improvements as may be necessary for their comfort and welfare.

4th. To expend ten thousand dollars to build a school-house or school-houses, and to establish and maintain one or more normal-labor schools (so far as said sum will go) for the education and training of the children of said Indians in letters, agriculture, the mechanic arts, and housewifery, which school or schools shall be managed and conducted in such manner as the Secretary of the Interior shall direct. The said Indians hereby stipulating to keep constantly thereat, during at least nine

months in the year, all their children between the ages of seven and eighteen years; and if any of the parents, or others having the care of children, shall refuse or neglect to send them to school, such parts of their annuities as the Secretary of the Interior may direct, shall be withheld from them and applied as he may deem just and proper; and such further sum, in addition to the said ten thousand dollars, as shall be deemed necessary and proper by the President of the United States, shall be reserved and taken from their said annuities, and applied annually, during the pleasure of the President to the support of said schools, and to furnish said Indians with assistance and aid and instruction in agricultural and mechanical pursuits, including the working of the mills, hereafter mentioned, as the Secretary of the Interior may consider necessary and advantageous for said Indians; and all instruction in reading shall be in the English language. And the said Indians hereby stipulate to furnish, from amongst themselves, the number of young men that may be required as apprentices and assistants in the mills and mechanic shops, and at least three persons to work constantly with each white laborer employed for them in agriculture and mechanical pursuits, it being understood that such white laborers and assistants as may be so employed are thus employed more for the instruction of the said Indians than merely to work for their benefit; and that the laborers so to be furnished by the Indians may be allowed a fair and just compensation for their services, to be fixed by the Secretary of the Interior, and to be paid out of the shares of annuity of such Indians as are able to work, but refuse or neglect to do so. And whenever the President of the United States shall become

satisfied of a failure, on the part of said Indians, to fulfil the aforesaid stipulations, he may, at his discretion, discontinue the allowance and expenditure of the sums so provided and set apart for said school or schools, and assistance and instruction.

5th. To provide the said Indians with a mill suitable for grinding grain and sawing timber; one or more mechanic shops, with the necessary tools for the same; and dwelling-houses for an interpreter, miller, engineer for the mill, (if one be necessary,) a farmer, and the mechanics that may be employed for their benefit, and to expend therefor a sum not exceeding fifteen thousand dollars.

ARTICLE 5.

Said Indians further stipulate and bind themselves to prevent any of the members of their tribe from destroying or injuring the said houses, shops, mills, machinery, stock, farming-utensils, or any other thing furnished them by the Government, and in case of any such destruction or injury of any of the things so furnished, or their being carried off by any member or members of their tribe, the value of the same shall be deducted from their general annuity; and whenever the Secretary of the Interior shall be satisfied that said Indians hae become sufficiently confirmed in habits of industry and advanced in the acquisition of a practical knowledge of agriculture and the mechanic arts to provide for themselves, he may, at his discretion, cause to be turned over to them all of the said houses and other property furnished them by the United States, and dispense with the services of any or all

persons hereinbefore stipulated to be employed for their benefit, assistance, and instruction.

ARTICLE 6.

It is hereby agreed and understood that the chiefs and headmen of said tribe may, at their discretion, in open council, authorize to be paid out of their said annuities such a sum or sums as may be found to be necessary and proper, not exceeding in the aggregate one hundred and fifty thousand dollars, to satisfy their just debts and obligations, and to provide for such of their half-breed relations as do not live with them, or draw any part of the said annuities of said Indians: Provided, however, That their said determinations shall be approved by their agent for the time being, and the said payments authorized by the Secretary of the Interior: Provided, also, That there shall not be so paid out of their said annuities in any one year, a sum exceeding fifteen thousand dollars.

ARTICLE 7.

On account of their valuable services and liberality to the Yanctons, there shall be granted in fee to Charles F. Picotte and Zephyr Rencontre, each, one section of six hundred and forty acres of land, and to Paul Dorian one-half a section; and to the half-breed Yancton, wife of Charles Reulo, and her two sisters, the wives of Eli Bedaud and Augustus Traverse, and to Louis Le Count, each, one-half a section. The said grants shall be selected in said ceded territory, and shall not be within said reservation, nor shall they interfere in any way with the improvements of such persons as are on the lands ceded

above by authority of law; and all other persons (other than Indians, or mixed-bloods) who are now residing within said ceded country, by authority of law, shall have the privilege of entering one hundred and sixty acres thereof, to include each of their residences or improvements, at the rate of one dollar and twenty-five cents per acre.

ARTICLE 8.

The said Yancton Indians shall be secured in the free and unrestricted use of the red pipe-stone quarry, or so much thereof as they have been accustomed to frequent and use for the purpose of procuring stone for pipes; and the United States hereby stipulate and agree to cause to be surveyed and marked so much thereof as shall be necessary and proper for that purpose, and retain the same and keep it open and free to the Indians to visit and procure stone for pipes so long as they shall desire.

ARTICLE 9.

The United States shall have the right to establish and maintain such military posts, roads, and Indian agencies as may be deemed necessary within the tract of country herein reserved for the use of the Yanctons; but no greater quantity of land or timber shall be used for said purposes than shall be actually requisite; and if, in the establishment or maintenance of such posts, roads, and agencies, the property of any Yancton shall be taken, injured, or destroyed, just and adequate compensation shall be made therefor by the United States.

ARTICLE 10.

No white person, unless in the employment of the United States, or duly licensed to trade with the Yanctons, or members of the families of such persons, shall be permitted to reside or make any settlement upon any part of the tract herein reserved for said Indians, nor shall said Indians alienate, sell, or in any manner dispose of any portion thereof, except to the United States. Whenever the Secretary of the Interior shall direct, said tract shall be surveyed and divided as he shall think proper among said Indians, so as to give to each head of a family or single person a separate farm, with such rights of possession or transfer to any other member of the tribe or of descent to their heirs and representatives as he may deem just.

ARTICLE 11.

The Yanctons acknowledge their dependence upon the Government of the United States, and do hereby pledge and bind themselves to preserve friendly relations with the citizens thereof, and to commit no injuries or depredations on their persons or property, nor on those of members of any other tribe or nation of Indians; and in case of any such injuries or depredations by said Yanctons, full compensation shall, as far as possible, be made therefor out of their tribal annuities, the amount in all cases to be determined by the Secretary of the Interior. They further pledge themselves not to engage in hostilities with any other tribe or nation, unless in self-defence, but to submit, through their agent, all matters of dispute and difficulty between themselves and other Indians for

the decision of the President of the United States, and to acquiesce in and abide thereby. They also agree to deliver, to the proper officer of the United States all offenders against the treaties, laws, or regulations of the United States, and to assist in discovering, pursuing, and capturing all such offenders, who may be within the limits of their reservation, whenever required to do so by such officer.

ARTICLE 12.

To aid in preventing the evils of intemperance, it is hereby stipulated that if any of the Yanctons shall drink, or procure for others, intoxicating liquor, their proportion of the tribal annuities shall be withheld from them for at least one year; and for a violation of any of the stipulations of this agreement on the part of the Yanctons they shall be liable to have their annuities withheld, in whole or in part, and for such length of time as the President of the United States shall direct.

ARTICLE 13.

No part of the annuities of the Yanctons shall be taken to pay any debts, claims, or demands against them, except such existing claims and demands as have been herein provided for, and except such as may arise under this agreement, or under the trade and intercourse laws of the United States.

ARTICLE 14.

The said Yanctons do hereby fully acquit and release the United States from all demands against them on the

part of said tribe, or any individual thereof, except the beforementioned right of the Yanctons to receive an annuity under said treaty of Laramie, and except, also, such as are herein stipulated and provided for.

ARTICLE 15.

For the special benefit of the Yanctons, parties to this agreement, the United States agree to appoint an agent for them, who shall reside on their said reservation, and shall have set apart for his sole use and occupation, at such a point as the Secretary of the Interior may direct, one hundred and sixty acres of land.

ARTICLE 16.

All the expenses of the making of this agreement, and of surveying the said Yancton reservation, and of surveying and marking said pipe-stone quarry, shall be paid by the United States.

ARTICLE 17.

This instrument shall take effect and be obligatory upon the contracting parties whenever ratified by the Senate and the President of the United States.

Source: April 19, 1858, 11 Stat 743;
Ratified February 16, 1859;
Proclamation February 26, 1859.

AGREEMENT WITH THE YANKTON SIOUX OR DAKOTA INDIANS, IN SOUTH DAKOTA

Sec. 12. The following agreement, made by J.C. Adams and John J. Cole, commissioners on the part of the United States, with the chiefs, headmen, and other male adults of the Yankton tribe of Sioux or Dakota Indians upon the Yankton Reservation, in the State of South Dakota, on the thirty-first day of December, eighteen hundred and ninety-two, and now on file in the Department of the Interior, and signed by said commissioners on behalf of the United States, and by Charles Martin, Edgar Lee, Charles Jones, Isaac Hepikigan, Stephen Cloud Elk, Edward Yellow Bird, Iron Lingthing, Eli Brockway, Alex Brunot, Francis Willard, Louis Shunk, Joseph Caje, Albion Hitika, John Selwyn, Charles Ree, Joseph Cook, Brigham Young, William Highrock, Frank Felix, and Philip Ree, on behalf of the said Yankton tribe of Sioux Indians, is hereby accepted, ratified, and confirmed.

ARTICLES OF AGREEMENT

Whereas J.C. Adams and John J. Cole, duly appointed commissioners on the part of the United States, did, on the thirty-first day of December, eighteen hundred and ninety-two, conclude an agreement with the chiefs, headmen, and other male adults of the Yankton tribe of Sioux or Dacotah Indians upon the Yankton Reservation, in the State of South Dakota, which said agreement is as follows:

Whereas a clause in the act making appropriations for the current and contingent expenses of the Indian

Department, and for fulfilling treaty stipulations with various Indian tribes, for the fiscal year ending June thirtieth (30th), eighteen hundred and ninety-three (1893), and for other purposes, approved July 13th, 1892, authorizes the "Secretary of the Interior to negotiate with any Indians for the surrender of portions of their respective reservations, any agreement thus negotiated being subject to subsequent ratification by Congress;" and

Whereas the Yankton tribe of Dacotah – now spelled Dakota and so spelled in this agreement – or Sioux Indians is willing to dispose of a portion of the land set apart and reserved to said tribe, by the first article of the treaty of April (19th) nineteenth, eighteen hundred and fifty-eight (1858), between said tribe and the United States, and situated in the State of South Dakota:

Now, therefore, this agreement made and entered into in pursuance of the provisions of the act of Congress approved July thirteenth (13th), eighteen hundred and ninety-two (1892), at the Yankton Indian Agency, South Dakota, by J.C. Adams of Webster, S.D., John J. Cole of St. Louis, Mo., and I.W. French of the State of Neb., on the part of the United States, duly authorized and empowered thereto, and the chiefs, headmen, and other male adult members of said Yankton tribe of Indians, witnesseth:

ARTICLE I.

The Yankton tribe of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the

unallotted lands within the limits of the reservation set apart to said Indians as aforesaid.

ARTICLE II.

In consideration for the lands ceded, sold, relinquished, and conveyed to the United States as aforesaid, the United States stipulates and agrees to pay to the said Yankton tribe of Sioux Indians the sum of six hundred thousand dollars ($600,000), as hereinbefore provided for.

ARTICLE III.

Section 1. Sixty days after the ratification of this agreement by Congress, or at the time of the first interest payment, the United States shall pay to the said Yankton tribe of Sioux Indians, in lawful money of the United States, out of the principal sum stipulated in Article II, the sum of one hundred thousand dollars ($100,000), to be divided among the members of the tribe per capita. No interest shall be paid by the United States on this one hundred thousand dollars ($100,000).

Section 2. The remainder of the purchase money or principal sum stipulated in Article II, amounting to five hundred thousand dollars ($500,000), shall constitute a fund for the benefit of the said tribe, which shall be placed in the Treasury of the United States to the credit of the said Yankton tribe of Sioux Indians, upon which the United States shall pay interest at the rate of five per centum (5) per annum from January first, eighteen hundred and ninety-three (January 1st, 1893), the interest to be paid and used as hereinafter provided for.

ARTICLE IV.

The fund of five hundred thousand dollars ($500,000) of the principal sum, placed to the credit of the Yankton tribe of Sioux Indians, as provided for in Article III, shall be payable at the pleasure of the United States after twenty-five years, in lawful money of the United States. But during the trust period of twenty-five years, if the necessities of the Indians shall require it, the United States may pay such part of the principal sum as the Secretary of the Interior may recommend, not exceeding $20,000 in any one year. At the payment of such sum it shall be deducted from the principal sum in the Treasury, and the United States shall thereafter pay interest on the remainder.

ARTICLE V.

Section 1. Out of the interest due to the Yankton tribe of Sioux Indians by the stipulations of Article III, the United States may set aside and use for the benefit of the tribe, in such manner as the Secretary of the Interior shall determine, as follows: For the care and maintenance of such orphans, and aged, infirm, or other helpless persons of the Yankton tribe of Sioux Indians, as may be unable to take care of themselves; for schools and educational purposes for the said tribe; and for courts of justice and other local institutions for the benefit of said tribe, such sum of money annually as may be necessary for these purposes, with the help of Congress herein stipulated, which sum shall not exceed six thousand dollars ($6,000) in any one year: Provided, That Congress shall appropriate, for the same purposes, and during the same time, out of any

money not belonging to the Yankton Indians, an amount equal to or greater than the sum set aside from the interest due to the Indians as above provided for.

Section 2. When the Yankton tribe of Sioux Indians shall have received from the United States a complete title to their allotted lands, and shall have assumed all the duties and responsibilities of citizenship, so that the fund provided for in section 1 of this article is no longer needed for the purposes therein named, any balance on hand shall be disposed of for the benefit of the tribe as the Secretary of the Interior shall determine.

ARTICLE VI.

After disposing of the sum provided for in Article V, the remainder of the interest due on the purchase money as stipulated in Article III shall be paid to the Yankton tribe of Sioux Indians semiannually, one-half on the thirtieth day of June and one-half on the thirty-first day of December of each year, in lawful money of the United States, and divided among them per capita. The first interest payment being made on June 30th, 1893, if this agreement shall have been ratified.

ARTICLE VII.

In addition to the stipulations in the preceding articles, upon the ratification of this agreement by Congress, the United States shall pay to the Yankton tribe of Sioux Indians as follows: To each person whose name is signed to this agreement and to each other male member of the tribe who is eighteen years old or older at the date of this

agreement, twenty dollars ($20) in one double eagle, struck in the year 1892 as a memorial of this agreement. If coins of the date named are not in the Treasury coins of another date may be substituted therefor. The payment provided for in this article shall not apply upon the principle sum stipulated in Article II, nor upon the interest thereon stipulated in Article III, but shall be in addition thereto.

ARTICLE VIII.

Such part of the surplus lands hereby ceded and sold to the United States as may now be occupied by the United States for agency, schools, and other purposes, shall be reserved from sale to settlers until they are no longer required for such purposes. But all other lands included in this sale shall, immediately after the ratification of this agreement by Congress, be offered for sale through the proper land office, to be disposed of under the existing land laws of the United States, to actual and bona fide settlers only.

ARTICLE IX.

During the trust period of twenty-five years, such part of the lands which have been allotted to members of the Yankton tribe of Indians in severalty, as the owner thereof can not cultivate or otherwise use advantageously, may be leased for one or more years at a time. But such leasing shall be subject to the approval of the Yankton Indian agent by and with the consent of the Commissioner of Indian Affairs; and provided that such leasing shall not in any case interfere with the cultivation

of the allotted lands by the owner thereof to the full extent of the ability of such owner to improve and cultivate his holdings. The intent of this provision is to compel every owner of allotted lands to cultivate the same to the full extent of his ability to do so, before he shall have the privilege of leasing any part thereof, and then he shall have the right to lease only such surplus of his holdings as he is wholly unable to cultivate or use advantageously. This provision shall apply alike to both sexes, and to all ages, parents acting for their children who are under their control, and the Yankton Indian agent acting for minor orphans who have no guardians.

ARTICLE X.

Any religious society, or other organization now occupying under proper authority for religious or educational work among the Indians any of the land under this agreement ceded to the United States, shall have the right for two years from the date of the ratification of this agreement within which to purchase the land so occupied at a valuation fixed by the Secretary of the Interior, which shall not be less than the average price paid to the Indians for these surplus lands.

ARTICLE XI.

If any member of the Yankton tribe of Sioux Indians shall within twenty-five years die without heirs, his or her property, real and personal, including allotted lands, shall be sold under the direction of the Secretary of the Interior, and the proceeds thereof shall be added to the

fund provided for in Article V for schools and other purposes.

ARTICLE XII.

No part of the principal or interest stipulated to be paid to the Yankton tribe of Sioux Indians, under the provisions of this agreement, shall be subject to the payment of debts, claims, judgments, or demands against said Indians for damages or depredations claimed to have been committed prior to the signing of this agreement.

ARTICLE XIII.

All persons who have been allotted lands on the reservation described in this agreement and who are now recognized as members of the Yankton tribe of Sioux Indians, including mixed-bloods, whether their white blood comes from the paternal or maternal side, and the children born to them, shall enjoy the undisturbed and peaceable possession of their allotted lands, and shall be entitled to all the rights and privileges of the tribe enjoyed by full-blood Indians.

ARTICLE XIV.

All allotments of lands in severalty to members of the Yankton tribe of Sioux Indians, not yet confirmed by the Government, shall be confirmed as speedily as possible, correcting any errors in same, and Congress shall never pass any act alienating any part of these allotted lands from the Indians.

ARTICLE XV.

The claim of fifty-one Yankton Sioux Indians, who were employed as scouts by General Alf. Sully in 1864, for additional compensation at the rate of two hundred and twenty-five dollars ($225) each, aggregating the sum of eleven thousand four hundred and seventy-five dollars ($11,475) is hereby recognized as just, and within ninety days (90) after the ratification of this agreement by Congress the same shall be paid in lawful money of the United States to the said scouts or to their heirs.

ARTICLE XVI.

If the Government of the United States questions the ownership of the Pipestone Reservation by the Yankton Tribe of Sioux Indians, under the treaty of April 19th, 1858, including the fee to the land as well as the right to work the quarries, the Secretary of the Interior shall as speedily as possible refer the matter to the Supreme Court of the United States, to be decided by that tribunal. And the United States shall furnish, without cost to the Yankton Indians, at least one competent attorney to represent the interests of the tribe before the court.

If the Secretary of the Interior shall not, within one year after the ratification of this agreement by Congress, refer the question of the ownership of the said Pipestone Reservation to the Supreme Court, as provided for above, such failure upon his part shall be construed as, and shall be, a waiver by the United States of all rights to the ownership of the said Pipestone Reservation, and the

same shall thereafter be solely the property of the Yankton tribe of the Sioux Indians, including the fee to the land.

ARTICLE XVII.

No intoxicating liquors nor other intoxicants shall ever be sold or given away upon any of the lands by this agreement ceded and sold to the United States, nor upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the treaty between the said Indians and the United States, dated April 19th, 1858, and as afterwards surveyed and set off to the said Indians. The penalty for the violation of this provision shall be such as Congress may prescribe in the act ratifying this agreement.

ARTICLE XVIII.

Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement, and its ratification by Congress, all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858.

ARTICLE XIX.

When this agreement shall have been ratified by Congress, an official copy of the act of ratification shall be

engrossed, in copying ink, on paper of the size this agreement is written upon, and sent to the Yankton Indian agent to be copied by letter press in the "Agreement Book" of the Yankton Indians.

ARTICLE XX.

For the purpose of this agreement, all young men of the Yankton tribe of Sioux Indians, eighteen years of age or older, shall be considered adults, and this agreement, when signed by a majority of the male adult members of the said tribe, shall be binding upon the Yankton tribe of Sioux Indians. It shall not, however, be binding upon the United States until ratified by the Congress of the United States, but shall as soon as so ratified become fully operative from its date. A refusal by Congress to ratify this agreement shall release the said Yankton Indians under it.

In witness whereof, the said J.C. Adams, John J. Cole, and J.W. French, on the part of the United States, and the chiefs, headmen, and other adult male Indians, on the part of the said Yankton tribe of Sioux or Dakota – spelled also Dacotah – Indians, have hereunto set their hands and affixed their seals.

Done at the Yankton Indian agency, Greenwood, South Dakota, this thirty-first day of December, eighteen hundred and ninety-two (Dec. 31st, 1892).

JAMES C. ADAMS, [SEAL.]
JOHN J. COLE, [SEAL.]

The foregoing articles of agreement having been read in open council, and fully explained to us, we, the undersigned, chiefs, headmen, and other adult male members

of the Yankton tribe of Sioux Indians, do hereby consent and agree to all the stipulations therein contained.

Witness our hands and seals of date as above.

Wicahaokdeun (William T. Selwyn), seal; and others:

Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That said agreement be, and the same hereby is, accepted, ratified, and confirmed.

That for the purpose of carrying the provisions of this Act into effect there is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of six hundred thousand dollars, or so much thereof as may be necessary, of which amount the sum of five hundred thousand dollars shall be placed to the credit of said tribe in the Treasury of the United States, and shall bear interest at the rate of five per centum per annum from the first day of January, eighteen hundred and ninety-three, said interest to be paid and distributed to said tribe as provided in articles five and six of said agreement. Of the amount herein appropriated one hundred thousand dollars shall be immediately available to be paid to said tribe, as provided in section one of article three of said agreement. There is also hereby appropriated the further sum of ten thousand dollars, or so much thereof as may be necessary, which sum shall be immediately available, to be paid to the adult male members of said tribe, as provided in article seven of said agreement. There is also hereby appropriated the further sum of

eleven thousand four hundred and seventy-five dollars, which sum shall be immediately available, to be paid as provided in article fifteen of said agreement: Provided, That none of the money to be paid to said Indians under the terms of said agreement, nor any of the interest thereon, shall be subject to the payment of any claims, judgments, or demands against said Indians for damages or depredations claimed to have been committed prior to the signing of said agreement.

That the lands by said agreement ceded, to the United States shall, upon proclamation by the President, be opened to settlement, and shall be subject to disposal only under the homestead and town-site laws of the United States, excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common-school purposes and be subject to the laws of the State of South Dakota: Provided, That each settler on said lands shall, in addition to the fees provided by law, pay to the United States for the land so taken by him the sum of three dollars and seventy-five cents per acre, of which sum he shall pay fifty cents at the time of making his original entry and the balance before making final proof and receiving a certificate of final entry; but the rights of honorably discharged Union soldiers and sailors, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States, shall not be abridged except as to the sum to be paid as aforesaid.

That the Secretary of Interior, upon proper plats and description being furnished, is hereby authorized to issue patents to Charles Picotte and Felix Brunot, and W.T.

Selwyn, United States interpreters, for not to exceed one acre of land each, so as to embrace their houses near the agency buildings upon said reservation, but not to embrace any buildings owned by the Government, upon the payment by each of said persons of the sum of three dollars and seventy-five cents.

That every person who shall sell or give away any intoxicating liquors or other intoxicants upon any of the lands by said agreement ceded, or upon any of the lands included in the Yankton Sioux Indian Reservation as created by the treaty of April nineteenth, eighteen hundred and fifty-eight, shall be punishable by imprisonment for not more than two years and by a fine of not more than three hundred dollars.

Source: 28 Stat 286.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * *

STATE OF SOUTH DAKOTA, Plaintiff and Appellee,

v.

FRED GREGER, Defendant and Appellant.

* * *

APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
CHARLES MIX COUNTY, SOUTH DAKOTA

* * *

THE HONORABLE RICHARD BOGUE
Judge

* * *

MARK W. BARNETT
Attorney General

JOHN P. GUHIN
ROXANNE GIEDD
SHERRI SUNDEM WALD
Assistant Attorneys General
Pierre, South Dakota — Attorneys for plaintiff and appellee.

THOMAS J. DEADRICK
Platte, South Dakota — Attorney for defendant and appellant.

TIMOTHY R. WHALEN
Charles Mix County State's Attorney
Lake Andes, South Dakota

TOM D. TOBIN of
Tobin Law Offices
Winner, South Dakota

Attorneys for amicus curie [sic]
Charles Mix County.

* * *

ARGUED ON OCTOBER 24, 1996
OPINION FILED **02/19/97**

KONENKAMP, Justice.

Preface

[¶1.] In an Agreement with the United States dated December 31, 1892, the Yankton Sioux Tribe "ceded, sold, relinquished and conveyed" all its unallotted reservation land for a "sum certain" of $600,000. Under firmly established doctrine, these words of absolute conveyance create a "nearly insurmountable presumption" that the reservation was diminished. Nevertheless, will the original boundaries remain intact because the Agreement further stated "all provisions of the [earlier treaty establishing the reservation] shall be in full force and effect, the same as though this Agreement had not been made. . . . "? We conclude that giving this excerpt unqualified primacy would make the remainder of the Agreement meaningless, but interpreted in context with the whole document, relevant contemporary circumstances, and congressional purpose, diminishment was plainly intended.

Historical Overview

[¶2.] Beginning in the late eighteenth and continuing through the mid-nineteenth century, the United States endeavored to exchange Indian lands in the east for

regions further west. This "Indian removal" policy contemplated forging permanent tribal "homelands" in the western expanse. Various treaties created immense reservations designed to allow traditional ways of life to continue. Yet as immigration increased and pioneers advanced ever westward, settlers, railroaders, miners, and developers brought increasing pressure to further contain Indian tribes, calling for reservations to be opened for settlement and inevitably extinguished. Reformers hoping to improve the welfare of Indian people also sought to resolve the "Indian problem" through a plan of assimilation, encouraging Native Americans to become farmers and ranchers alongside homesteaders. Congress supervened with the Dawes Severalty Act (or General Allotment Act) of 1887, followed by a series of surplus land acts. With the allotment system, the homesteading ideal would be applied to "civilize" Indian people by forcing them onto individual plots cut out of reservations, while freeing unassigned lands for non-Indian settlement. Eventually, the allotment system was considered a failure. In 1934, the Indian Reorganization Act banned further allotments and restored remaining surplus lands to the tribes at the discretion of the Secretary of the Interior. Yet, this abandoned policy left perplexing jurisdictional problems, as Justice Thurgood Marshall chronicled in Solem v. Bartlett, 465 US 463, 467-69, 104 SCt 1161, 1164-65, 79 LEd2d 443, 448-49 (1984) (footnotes and internal citations omitted):

> The modern legacy of the surplus land Acts has been a spate of jurisdictional disputes between state and federal officials as to which sovereign has authority over lands that were opened by the Acts and have since passed out of

Indian ownership. As a doctrinal matter, the States have jurisdiction over unallotted opened lands if the applicable surplus land Act freed that land of its reservation status and thereby diminished the reservation boundaries. On the other hand, federal, state, and tribal authorities share jurisdiction over these lands if the relevant surplus land Act did not diminish the existing Indian reservation because the entire opened area is Indian country under 18 U.S.C. § 1151(a) (1982 ed.).

Unfortunately, the surplus land Acts themselves seldom detail whether opened lands retained reservation status or were divested of all Indian interests. When the surplus land Acts were passed, the distinction seemed unimportant. The notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century. Indian lands were judicially defined to include only those lands in which the Indians held some form of property interest: trust lands, individual allotments, and, to a more limited degree, opened lands that had not yet been claimed by non-Indians. Only in 1948 did Congress uncouple reservation status from Indian ownership, and statutorily define Indian country to include lands held in fee by non-Indians within reservation boundaries. See Act of June 25, 1948, ch. 645, 62 Stat. 757 (codified at 18 U.S.C. § 1151 (1982 ed.)).

Another reason why Congress did not concern itself with the effect of surplus land Acts on reservation boundaries was the turn-of-the-century assumption that Indian reservations were a thing of the past. Consistent with prevailing

wisdom, Members of Congress voting on the surplus land Acts believed to a man that within a short time – within a generation at most – the Indian tribes would enter traditional American society and the reservation system would cease to exist. Given this expectation, Congress naturally failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation.

Although the Congresses that passed the surplus land Acts anticipated the imminent demise of the reservation and, in fact, passed the Acts partially to facilitate the process, we have never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations with the passage of every surplus land Act. Rather, it is settled law that some surplus land Acts diminished reservations . . . and other surplus land Acts did not- . . . . The effect of any given surplus land Act depends on the language of the Act and the circumstances underlying its passage.

The Yankton Reservation

[¶3.] The 1858 Yankton Treaty of Cession created a 430,495-acre reservation along the eastern bank of the Missouri River for the Yankton Tribe. 11 Stat 743. Beginning in 1891, tracts within the reservation were allotted to individual Yankton Indians, leaving approximately 168,000 acres of unallotted land. The next year, in response to communications from the Tribe to the Secretary of the Interior, the United States appointed the Yankton Indian Commission to negotiate for the sale of the

surplus lands. A specific enactment was passed "to enable the Secretary of the Interior in his discretion to negotiate with any Indians for the surrender of portions of their respective reservations. . . . " 27 Stat 120, 136.

[¶4.] In their first meeting with the Commission, tribal members were urged to reflect on compelling realities:

> The buffalo is gone, the antelope is gone, you can no longer live by hunting. You must plow like the white man. You must raise cattle to take the place of the buffalo; you must raise sheep to take the place of the antelope. You must raise wheat and corn and oats to make bread and to feed your stock. You must raise everything which the white man raises and have plenty to eat and plenty to sell. Then you can build good houses where you can keep warm and dry and be comfortable. You can wear good warm clothes and have many comforts that will make you happy.

The Yanktons had suffered severe adversities over the years, as their ancestral ways of living dwindled away. John P. Williamson, a Presbyterian missionary who lived with the Yanktons for a quarter century, would later reflect in one of his annual reports:

> The Indian's occupation is gone, so far as the Yanktons are concerned. Twenty-five years ago they lived by the chase. Herds of buffalo numbering thousands ranged on the vast plains which were the hunting grounds of the Yanktons. From them they secured food, clothing and teepees, the three great objects of all industry. Now the white man has covered these vast plains with his wheat fields and herds of tame cattle, and the buffalo are no more. Never more

> suddenly has a ready people lost their entire means of support.

Commissioner John J. Cole explained to tribal members at one of the negotiation councils:

> The Great White Father . . . wants you to sell your surplus lands for which you have no use. If you want to sell these surplus lands we will buy them and pay you all they are worth, and the Government will sell them to men who will make homes on them and will build good houses and make good farms, and this will make your other lands – your homes – worth more than all your lands are now worth, and what you get from the Government for the surplus lands will be a clear gain to you.

During their meetings, both the Yanktons and the Commission members equated this proposed sale with the 1858 Treaty when the Yanktons renounced ownership of any other lands claimed in the past. After months of negotiation, a majority of the male tribal members and the Commission reached agreement.[1] The first two articles provided:

> Article I.
>
> The Yankton tribe of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within

---

[1] The Agreement had been "translated into the Dakota language for the use and consideration of the Yankton Sioux tribe." In accord with tradition, only males participated in this type of decision: 255 of the 458 eligible male members signed the Agreement.

the limits of the reservation set apart to said Indians as aforesaid.

Article II.

In consideration for the lands ceded, sold, relinquished, and conveyed to the United States as aforesaid, the United States stipulates and agrees to pay to the said Yankton tribe of Sioux Indians the sum of six hundred thousand dollars ($600,000), as hereinbefore provided for.

Congressional ratification was delayed due to allegations of impropriety in negotiations. In September 1893, the Commissioner of Indian Affairs sent a special United States Indian Inspector to the reservation who, after an investigation, concluded "no undue pressure was used or improper methods resorted to. . . . " Many Yankton leaders knew well the import of their Agreement and were anxious to conclude it. In a petition dated March 2, 1894, to the Senate Indian Affairs Committee, 109 Yankton chiefs, headmen and tribal members urged quick congressional action, stating in part:

> When we signed the treaty [1892 Agreement] we knew what we were doing for ourselves and for the Yankton tribe in general. We did sign it because we love and respect our families, for whom we expect a support could be made out of the sale of our surplus lands. We signed it because our old and infirm people and orphans are in the need of help and are just at the present time badly off in various ways. . . .
>
> By means of the treaty we want to encourage our churches and schools and have the people progress in enlightenment and civilization. We want the nation to take on new life by

> becoming good farmers and mechanics and professional men, and that they should all be good citizens of the United States. . . . We want the laws of the United States and the State that we live in to be recognized and observed. We do not think it is a proper thing to keep up the tribal relation – as the tribal relation on this reservation is an obstacle and hindrance to the advancement of civilization.[2]

Prospective settlers were also eager for the new land to become available. On February 15, 1894, the Yankton Press and Dakotan reported:

> The prospect for the early opening of the Yankton reservation is causing quite a stir at Armour. Inquiries are pouring in from all directions, and the minute the bill passes congress there will be a rush to be on the ground.

During congressional floor debates, Representative Pickler of South Dakota reminded his fellow legislators, "The proposition that is before the House today is very simple. We are needing more lands for settlement. By an act of Congress we provided for sending out a commission to

---

[2] This petition was attached to a report from Mr. Shoup of the Committee on Indian Affairs, which stated in part:

> One of the greatest hindrances to the progress of these people in the past has been their tribal mode of life and ownership of land in common, and the issue of food and clothing to them by the Government. . . . The occupation of the land released by them by actual settlers under the homestead law bringing them in close contact with the frugal, moral, and industrious people who will settle there will stimulate individual effort and make their progress much more rapid than heretofore.

treat with the Yankton Sioux Indians for their reservation. . . . " By due course, the bill ratifying the Agreement became law on August 15, 1894. President Grover Cleveland opened the reservation with the following proclamation:

> Whereas . . . certain articles of agreement were made and concluded at the Yankton Indian Agency . . . whereby the said Yankton tribe of Sioux or Dacotah Indians, for the consideration therein mentioned, ceded, sold, relinquished, and conveyed to the United States, all their claim, right, title and interest in and to all the unallotted lands within the limits of the reservation set apart to said tribe by the [1858 Treaty]. . . .

Thus, the unallotted lands were declared available for non-Indian settlement effective May 21, 1895. That same year, South Dakota took over civil and criminal jurisdiction in the region and has since continuously maintained it.[3] *Cf.* South Dakota Constitution, Art. XXVI, § 18, ¶ 2.

[¶5.] Based upon the 1894 Act, the reservation reduced in size from a 410 square mile (430,495 acre) sanctuary

---

[3] The Indian agent's report that year reflects some lingering questions over citizenship status:

> During the past year the unallotted lands of this reservation by Executive proclamation have been thrown open for settlement and thereby some complications as to a conflict of authority of the agent and the State authorities have arisen. . . . The elective franchise has not yet been extended to them by the State, nor have they been taxed; yet under the Dawes bill they are citizens, and as such are subject to the laws, both civil and criminal, of the State.

down to what is presently scattered Indian holdings of approximately 40,000 acres. Indians and non-Indians alike have since referred to the Yankton Reservation as a "mile square."[4]

Defendant's Offense

[¶6.] Defendant, Fred Greger, is an enrolled member of the Yankton Sioux Tribe. On January 13, 1993, he and Ed Huerta were fighting in the Double D Bar in Wagner. When Huerta was escorted from the bar, defendant grabbed Huerta's wife, Lanae, and punched her in the face. The assault left her with a permanent facial scar, two missing teeth, and broken glasses. As a result, defendant was charged and convicted of aggravated assault. He raises two issues on appeal: (1) jurisdiction; and (2) violation of his Fifth Amendment privilege. Defendant believes the recent decision in Yankton Sioux Tribe v. Southern Missouri Waste Management District, 890 FSupp 878 (DSD 1995), *aff'd* 99 F3d 1439 (8thCir 1996), controls the jurisdictional issue in his case.[5] If the 1858

---

[4] This refers to the tribal headquarters area at Marty. *See, e.g.*, 1932 tribal member petition. (Exhibit # 32). *See also* Superintendent's remarks concerning "mile square" area. (Exhibit # 632).

[5] By stipulation, the parties incorporated the record from *Southern Missouri*. Hence, we have thoroughly reviewed its proceedings as well as the record in this case. We do not consider ourselves bound, however, by the Eighth Circuit's decision, for as the United States Supreme Court held in Asarco, Inc. v. Kadish, 490 US 605, 617, 109 SCt 2037, 2045, 104 LEd2d 696, 715 (1989):

> state courts . . . possess the authority, absent a provision for exclusive federal jurisdiction, to render

boundaries are still in existence, they would encompass Wagner.

Discussion

[¶7.] ***I. Prior Decisions on the Status of the Yankton Reservation***

[¶8.] In Perrin v. United States, 232 US 478, 34 SCt 387, 58 LEd 691 (1914), the Supreme Court designated the area now in question as "ceded lands formerly included in the Yankton Sioux Indian Reservation" when construing Article XVII, the section prohibiting liquor sales on ceded lands in the 1892 Agreement. *Id.* at 480, 34 SCt at 388, 58 LEd at 693. Referring to the "original reservation" as constituting 400,000 acres, the Court concluded federal jurisdiction existed beyond Indian country to enforce the alcohol prohibition, reasoning that "[i]f liquor is injurious to [Native Americans] inside a reservation, it is equally so outside of it. . . . " *Id.* at 484, 34 SCt at 390, 58 LEd at 695 (quoting United States v. Forty-three Gallons of Whiskey, 93 US 188, 195, 23 LEd 846, 848 (1876)).

> binding judicial decisions that rest on their own interpretations of federal law. (Citations omitted). Indeed, inferior federal courts are not required to exist under Article III, and the Supremacy Clause explicitly states that "the Judges in every State shall be bound" by federal law. U.S. Const., Art. VI, cl. 2.

Surely, it is "within their power and their proper role [for state courts] to render binding judgments on issues of federal law, subject to review by this Court." *Asarco*, 490 US at 620, 109 SCt at 2047, 104 LEd2d at 717. *But see* St. Cloud v. Leapley, 521 NW2d 118, 122 (SD 1994) (for purposes of federal criminal jurisdiction, we are bound by federal court interpretation of federal statute).

> The chiefs doubtless saw, from the curtailment of their reservation, and the consequent restriction of the limits of the "Indian country," that ceded lands would be used to store liquors for sale to the young men of the tribe; and they well knew that, *if there was no cession, they were already sufficiently protected by the extent of their reservation.*

Id. (emphasis added). This holding clearly depends for its import on the diminishment of reservation boundaries. Otherwise, there would have been no need for any legal inquiry to rationalize expanding federal jurisdiction into non-Indian regions. Of course, *Perrin's* notion of Indian country was consistent with the view at the time that reservations included "only those lands in which the Indians held some form of property interest: trust lands, individual allotments, and, to a more limited degree, opened lands that had not yet been claimed by non-Indians." *Solem*, 465 US at 468, 104 SCt at 1165, 79 LEd2d at 448. Nevertheless, since *Perrin*, the Supreme Court has continued to regard the reservation as diminished. *See* Johnson v. Geralds, 234 US 422, 444-45, 34 SCt 794, 802, 58 LEd 1383, 1392 (1914) (referring to "ceded lands formerly included in the Yankton Sioux Indian Reservation in the State of South Dakota"); United States v. Mazurie, 419 US 544, 554, 95 SCt 710, 716, 42 LEd2d 706, 715 (1975) ("land [which] originally had been included in the Yankton Sioux Indian Reservation, but had been ceded to the United States").

[¶9.] Lower federal courts have also recognized boundary diminishment. *See, e.g.*, Cihak v. United States, 232 F 551, 551 (8thCir 1916); Forman v. United States, 256 F2d 766, 767 (8thCir 1958); Weddell v. Meierhenry, 636 F2d

211, 213 n2 (8thCir 1980), *cert. denied*, 451 US 941, 101 SCt 2024, 68 LEd2d 329 (1981). *See also* the United States Court of Claims decision in Yankton Sioux Tribe v. United States, 623 F2d 159, 165 (CtCl 1980):

> These final boundaries of the Yankton Sioux Reservation were respected by [the tribe and the United States] for more than three decades up until the 1892 Agreement changed those boundaries by the cession at issue in this case.

[¶10.] In addition, four times our Court found the reservation was diminished or disestablished. Wood v. Jameson, 81 SD 12, 15, 130 NW2d 95, 97 (1964) (the "operative language" of the 1892 Agreement provided that the "Yankton tribe for an agreed consideration did 'cede, sell, relinquish, and convey to the United States all their claim, right, title and interest . . . ' "). Citing *Perrin*, the *Wood* Court wrote "Construing the Indian treaty and the 1894 ratifying Act together we think it was the purpose of Congress to disestablish the reservation. . . . " *Id.* at 19, 130 NW2d at 99. In State v. Williamson, 87 SD 512, 515, 211 NW2d 182, 184 (1973), we held "the Act of 1894 disestablished that portion of the Yankton Reservation which was ceded and sold to the United States. . . . " Justices Wollman and Biegelmeier concurred and reflected that the 1894 Act "expresses a congressional determination to terminate the reservation status of the portion of the reservation ceded, sold, relinquished and conveyed to the United States by the Yankton Tribe." *See also* State v. Winckler, 260 NW2d 356, 360 (SD 1977) (noting, "the Yankton Indian Reservation was disestablished"). Again in State v. Thompson, 355 NW2d 349 (SD 1984), we adjudged that the two most critical factors in

the 1894 Act, the "cession" and "sum certain" language, compelled a finding of diminishment.

[¶11.] Diminishment of the Yankton Reservation has been challenged repeatedly; each time courts have answered with the same result, excepting only the most recent decision in *Southern Missouri*. Yet the matter appears resolved by the long series of decisions preceding it. Although the question of reservation diminishment is ultimately a matter of federal law, based upon this Court's analysis using standards established by the United States Supreme Court, we must regard the issue as settled. Nonetheless, to incorporate and comply with the Supreme Court's most recent holding in Hagen v. Utah, 510 US 399, 114 SCt 958, 127 LEd2d 252 (1994), we reevaluate the matter under its analysis.

[¶12.] ***II. Hagen Analysis***

[¶13.] In *Hagen*, the Court retained its traditional approach to diminishment questions, which requires an examination of all the circumstances surrounding a reservation opening. *Id.* at 410-11, 114 SCt at 965, 127 LEd2d at 265. By looking to precedent which "established a fairly clean analytical structure," the Court concluded the Uintah Indian Reservation was diminished by Congress when it opened the reservation to non-Indian settlers. *Id.* (citing *Solem*, 465 US at 470, 104 SCt at 1166, 79 LEd2d at 450). *Hagen* sets forth three factors for consideration:

> The most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands. *Ibid.* [citing *Solem*, 465 US at 470, 104 SCt at 1166, 79 LEd2d at 450]. We have also considered the historical context surrounding the passage of the surplus land Acts,

although we have been careful to distinguish between evidence of the contemporaneous understanding of the particular Act and matters occurring subsequent to the Act's passage. *Id.* at 471[, 104 SCt at 1166-67, 79 LEd2d at 451]. Finally, "[o]n a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land Act diminished a reservation." *Ibid.* Throughout the inquiry, we resolve any ambiguities in favor of the Indians, and we will not lightly find diminishment. *Id.* at 470, 472[, 104 SCt at 1166, 1167, 79 LEd2d at 450, 451]; see also South Dakota v. Bourland, 508 US 679, 687, [113 SCt 2309, 2316, 124 LEd2d 606, 618] (1993) ("'[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" (quoting County of Yakima v. Confederated Tribes and Bands of Yakima Nation, 502 US 251, 269, [112 SCt 683, 693, 116 LEd2d 687, 704] (1992) (internal quotation marks omitted))).

Hagen, 510 US at 411, 114 SCt at 965, 127 LEd2d at 265.[6] We examine each factor.

---

[6] While it is true that ambiguities are construed in favor of Indians, we are aware of the warning of the Supreme Court in Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe, 473 US 753, 774, 105 SCt 3420, 3432, 87 LEd2d 542, 558 (1985): "[C]ourts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' Washington v. Washington Commercial Passenger Fishing Vessel Ass'n, 443 US [658, 675, 99 SCt 3055, 3069, 61 LEd2d 823, 839 (1979)], clearly runs counter to a tribe's later claims."

A. Statutory Language

[¶14.] Congress incorporated the entire 1892 Agreement into its ratifying enactment. We begin here because "statutory language used to open the Indian lands" is the most "probative evidence of diminishment. . . . " *Id.* Yet, we would search in vain for words like "diminishment" or "disestablishment" as such expressions were not terms of art at the time. *Solem*, 465 US at 475 n17, 104 SCt at 1168 n17, 79 LEd2d at 453 n17. We must look, consequently, for other statutory language evincing "an express congressional purpose to diminish," *Solem*, 465 US at 475, 104 SCt at 1168-69, 79 LEd2d at 453, but no particular form of words is required. *Hagen*, 510 US at 411, 114 SCt at 965, 127 LEd2d at 265. To that end, we agree with the exhortation of the *Rosebud* Court, "as Mr. Justice (then Judge) Holmes commented, we are not free to say to Congress: 'We see what you are driving at, but you have not said it, and therefore we shall go on as before.' " Rosebud Sioux Tribe v. Kneip, 430 US 584, 597, 97 SCt 1361, 1368, 51 LEd2d 660, 671 (quoting Johnson v. United States, 163 F 30, 32 (1stCir 1908)). Therefore, we analyze to determine whether there is "a statutory expression of congressional intent to diminish, [which,] coupled with the provision of a sum certain payment, would establish a nearly conclusive presumption that the reservation had been diminished." *Hagen*, 510 US at 411, 114 SCt at 965-66, 127 LEd2d at 265. *See also Solem*, 465 US at 470-71, 104 SCt at 1166, 79 LEd2d at 450 (noting that cession language, coupled with a commitment from Congress to compensate a tribe for land, created "an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished").

[¶15.] The operative language of the 1894 Act provided that Yankton tribal members did "cede, sell, relinquish, and convey to the United States *all* their *claim, right, title,* and *interest* in and to *all* the unallotted lands within the limits of the reservation" and that in consideration for the "lands ceded, sold, relinquished, and conveyed" the United States agreed to pay a sum certain of $600,000. (Emphasis added). Nearly identical language signaled diminishment in DeCoteau v. District County Ct., where the Court noted that such language was "precisely suited" to diminishment. 420 US 425, 445, 95 SCt 1082, 1093, 43 LEd2d 300, 314 (1975). *Cf. Solem,* 463 US at 473, 104 SCt at 1167, 79 LEd2d at 452 (noting that "sell and dispose" language was not evidence of diminishment, while "cede, sell, relinquish and convey" constitutes such evidence).[7]

---

[7] *Compare* United States v. Grey Bear, 828 F2d 1286 (8thCir 1987), *vacated in part on other grounds on reh'g en banc,* 863 F2d 572 (8thCir 1988), *cert. denied,* 493 US 1047, 110 SCt 846, 107 LEd2d 840 (1990). In *Grey Bear,* the Eighth Circuit Court of Appeals considered an act that contained cession language similar to that of the 1892 Yankton Agreement. 828 F2d at 1290. However, it did not provide for a sum certain payment, so the court held that the "almost insurmountable presumption" of disestablishment was not present. The court noted:

> We agree with the district court's analysis that although the "cede, surrender, grant, and convey" language of the Act suggests congressional intent to disestablish the reservation boundaries, the Act does not contain an *unconditional* commitment by Congress to pay the tribe for the ceded lands. Compensation for the lands was not set at any fixed price and the tribe was guaranteed reimbursement only for the lands actually disposed of by the government.

[¶16.] Other passages bolster a finding of intent to diminish. In ratifying the 1892 Agreement, Congress added a provision requiring that "the sixteenth and thirty-sixth sections in each Congressional township . . . shall be reserved for common-school purposes and be subject to the laws of the State of South Dakota." This language explicitly conforms to the enabling act granting statehood to South Dakota. The Act of February 22, 1889, admitting South Dakota to the Union (25 Stat 679 § 10) provided in part:

> [U]pon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed States . . . are hereby granted to said States for the support of common schools . . . : Provided, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants . . . of this act, nor shall any land embraced in Indian, military, or other reservation of any character be subject to the grants . . . of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain.

Id. (citations omitted). This differs from the 1892 Yankton Agreement, as that document not only contained the cession language, but also provided for a sum certain of $600,000 for the sold land. *But see Hagen,* 510 US at 412, 14 SCt at 966, 127 LEd2d at 265 ("While the provision for definite payment can certainly provide additional evidence of diminishment, the lack of such a provision does not lead to the contrary conclusion.").

From this same parallel statutory arrangement, the Court in *Rosebud* discerned

> a congressional intent to disestablish Gregory County from the Rosebud Reservation, thereby making the sections available for disposition to the State of South Dakota for "school sections" under § 10 of the Act of February 22, 1889.

430 US at 601, 97 SCt at 1370, 51 LEd2d at 673.[8] The Court noted, "Congress, therefore, [in using such language] clearly thought that it was acting pursuant to § 10 of the

---

[8] Article VIII in the 1892 Agreement states "[s]uch part of the ceded surplus lands hereby ceded and sold to the United States as may now be occupied by the United States for agency, schools, and other purposes . . . until they are no longer required for such purposes." The school lands provision in the Cheyenne River Act in *Solem*, 465 US at 474, 104 SCt at 1168, 79 LEd2d at 452-53, is somewhat similar, as the Secretary of the Interior could set aside land "for agency, school, and religious purposes, to remain reserved as long as needed, and as long as agency, school, or religious institutions are maintained thereon for the benefit of said Indians." *Id.* (citing 35 Stat 461). However, the difference between the Act in *Solem*, which was held to not have created diminishment, and the 1892 Yankton Agreement is that the Cheyenne River Act did not have the dispositive cession language which has been found to create diminishment in the past. *See, e.g., DeCoteau*, 420 US at 445-46, 95 SCt at 1093-94, 43 LEd2d at 314-15. The *Solem* Court wrote, "Nowhere else in the [Cheyenne River] Act is there specific reference to the cession of Indian interests in the opened lands. . . . " 465 US at 474, 104 SCt at 1168, 79 LEd2d at 452. This is not the case in the 1892 Agreement, as we have noted, *supra*, that Article I provided the tribe would "cede, sell, relinquish, and convey" their lands to the United States. In addition, the school lands provision refers to the "ceded surplus lands hereby ceded and sold." *See Article VIII supra*. Therefore, the *Solem* analysis regarding the school lands similar provision is inapplicable to this case.

Act of February 22, 1889, and not *sub silentio* adding an additional grant for school lands located within a continuing reservation." *Id.* at 600-01, 97 SCt at 1370, 51 LEd2d at 673.

[¶17.] President Cleveland's Proclamation mirrors the 1894 enactment using the same language so often interpreted as authoritative in signifying boundary diminishment: "the said Yankton tribe of Sioux or Dacotah Indians, for the consideration therein mentioned, *ceded, sold, relinquished, and conveyed* to the United States, *all their claim, right, title and interest in and to all* the unallotted lands within the limits of the reservation set apart to said tribe by the [1858 Treaty]. . . . " The Supreme Court has held that such language in a presidential proclamation is clear evidence of diminishment, as it is "an unambiguous, contemporaneous, statement, by the Nation's Chief Executive." *Rosebud*, 430 US at 602, 97 SCt at 1371, 51 LEd2d at 674 ("*the said Indian tribe ceded, conveyed, transferred, relinquished, and surrendered, forever and absolutely, without any reservation whatsoever . . . all their claim, title, and interest of every kind and character . . .* "); *see also Hagen*, 510 US at 420, 114 SCt at 970, 127 LEd2d at 270.

[¶18.] Article XVII, the anti-liquor provision, notably distinguishes between reservation and ceded land:

> No intoxicating liquors nor other intoxicants shall ever be sold or given away upon *any of the lands by this agreement ceded and sold to the United States*, nor upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the treaty between the said Indians and the United States, dated April 19th, 1858, as afterwards surveyed

> and set off to the said Indians. (Emphasis added).

This terminology presupposes the ceded lands would not be part of the reservation. *Cf. Rosebud*, 430 US at 613, 97 SCt at 1376, 51 LEd2d at 680-81. Moreover, in 1892, Congress enacted laws prohibiting alcohol sales on Indian reservations. Adding this clause to the Agreement was unnecessary unless the parties understood that the ceded lands would no longer be part of the reservation. Although the laws prohibiting alcohol on reservations were created only a short time before the negotiations began in 1892, and even if it can be said that the negotiators were unaware of the 1892 Act prohibiting liquor sales on reservations, if it means nothing else, clearly by this language tribal members understood that without this Agreement the Tribe would have no control over commerce in alcohol on ceded lands. Finally, if the negotiators did not have the new alcohol prohibition statutes in mind, we can deduce that Congress knew of them when it passed the Act ratifying the Agreement, which included the no intoxicant provisions. Miles Apex Marine Corp., 498 US 19, 32, 111 SCt 317, 325, 112 LEd2d 275, 291 (1990)("We assume that Congress is aware of existing law when it passes legislation.").

[¶19.] We come now to the crux of defendant's argument. He jettisons all previous judicial rulings on diminishment for having failed to consider Article XVIII in the 1892 Agreement.

> Article XVIII
>
> Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement, and its ratification by Congress, all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858.

Defendant believes that by expressing a clear intent to conserve all provisions of the 1858 Treaty, the article manifests a purpose to maintain the reservation's exterior boundaries as they were before the Agreement was ratified in 1894. A literal reading of this passage to the exclusion of the remainder, however, would force a conclusion even more extreme than simply reviving the 1858 boundaries: it would also impugn the entire sale. After all, the 1858 Treaty guaranteed to the Yankton Tribe "quiet and peaceful" possession of 430,495 acres. If Article XVIII is given overarching prominence, then no provision contrary to the 1858 Treaty can stand, and the 1892 Agreement along with the congressional enactment ratifying it are nullities.

[¶20.] An understanding of the contemporary negotiations for the land purchase furnishes insight on the reason for this provision and why its language was so absolute. Many tribal members were reluctant to sign the Agreement without solid reassurance they would not lose their annuities pledged in the 1858 Treaty. Professor Hoover[9] believes the reference to annuities was probably

---

[9] The only historian to offer an opinion on the question was Professor Herbert Hoover of the University of South Dakota,

included "because during negotiations tribal members were led to believe that their annuity benefits might have been suspended had not a majority in the tribe acceded to the terms of the 1894 Agreement." The addition of the annuity language in the last sentence in Article XVIII seems to confirm the existence of these fears. Other promised financial entitlements were also discussed. For example, during the Great Sioux War, the Yankton Tribe had remained loyal to the United States, with some of its members acting as scouts for the Army. "Good scout" pay had been promised.[10] Yet history deplorably confirms the United States had not always kept its promises to Indian people. As one Yankton tribal member, White Swan, put it: "the Great Father has deceived us in many payments."

---

who testified on behalf of the Tribe in *Southern Missouri*. His testimony was included in this case by stipulation. Professor Hoover adds insightful details on the creation of the Yankton Reservation and the events surrounding the 1894 Act. He holds no doubt about the Tribe's continued sovereignty over the land in question, believing there is no evidence to support a contrary conclusion. He concedes only that, not being a lawyer, he is unable to perform a legal or case analysis.

[10] In fact, in Article XV the claim of fifty-one scouts employed by General Sully in 1864 was recognized as just, thus the Agreement provided for the payment of additional compensation to them or their heirs. It apparently did not concern government negotiators to assert that this pay should be contingent upon the land sale. Yet as the Supreme Court noted in *DeCoteau*, despite what we now perceive as injustices, "we cannot remake history." 420 US at 449, 95 SCt at 1095, 43 LEd2d at 317. This is not to say that negotiators had dishonest intentions. As Colonel Adams, one of the Commissioners, stated: "We want . . . your surplus lands, but we want to get it honorably."

A conflicting perception appears in the government negotiators' commentary: "The Indians, partly through ignorance and partly through craft, presented a long list of claims and grievances. They claim they had not received their dues under the Treaty of 1858. . . . " Whatever the viewpoint, the record of negotiations is replete with Yankton concerns for obtaining unsatisfied monetary entitlements before selling their unallotted reservation land. Nevertheless, in the chronicles kept at the time, no mention is found respecting the preservation of reservation boundaries, keeping a tribal presence on ceded lands, or extending Indian dominion over white settlements, except with respect to the prohibition on the sale of liquor as discussed in *Perrin*. Was Article XVIII a rhetorical overstatement inserted to reassure tribal members of their monetary entitlements? We need not rely solely upon contemporary annals for an answer to such an imponderable. Long established legal principles put Article XVIII in its legitimate perspective.

[¶21.] Although "legal ambiguities are resolved to the benefit of the Indians . . . [a] canon of construction is not a license to disregard clear expressions of tribal and congressional intent." *DeCoteau*, 420 US at 447, 95 SCt at 1094, 43 LEd2d at 315; South Carolina v. Catawba Indian Tribe, 476 US 498, 506, 106 SCt 2039, 2044, 90 LEd2d 490, 498 (1986); Oregon Dept. of Fish and Wildlife v. Klamath Tribe, 473 US 753, 766-770, 105 SCt 3420, 3428-30, 87 LEd2d 542, 553-55 (1985). Here, the canons reinforce our analysis. An age-old precept of contract interpretation requires that agreements be interpreted as a whole to give meaning to all terms, but when provisions conflict so that all cannot be given full weight, the more specific clauses

are deemed to reflect the parties' intentions – a specific provision controls a general one. Bock v. Perkins, 139 US 628, 634, 11 SCt 677, 679, 35 LEd 314, 316 (1891)("The particular description [in the contract] must control the . . . general description. . . . "). *See also* Colautti v. Franklin, 439 US 379, 99 SCt 675, 58 LEd2d 596 (1979)(one clause should not be read to render another inoperative). A definite intent was clearly expressed in the "cession and sum certain language" found in the congressionally approved Yankton Agreement. Articles I and II explicitly set forth, as the Supreme Court noted in another case, "a broad and unequivocal conveyance of the Tribe's title to the land and a surrender of '*all* their claim, *right*, title and interest *in and to*' that portion of the reservation. (Citation omitted). The . . . Agreement thus was both a divestiture of the Tribe's ownership of the ceded lands and a diminution of the boundaries of the reservation within which the Tribe exercised its sovereignty." *Oregon Department of Fish and Wildlife*, 473 US at 768, 105 SCt at 3429, 87 LEd2d at 554 (emphasis in original)(dealing with nearly identical divestiture language). Article XVIII only generally asserts the preeminence of the 1858 Treaty and in no way disavows the purpose of divestiture in Articles I and II.

[¶22.] A similar savings clause in a reservation sale agreement was found not to have overridden the clear intent of the agreement to diminish boundaries. In the Agreement with the Crow Indians, one provision stated:

> That all existing provisions of the treaty of May seventh Anno Domini eighteen hundred and sixty-eight, and the agreement approved by act of Congress dated April eleventh, eighteen hundred and eighty-two, shall continue in force.

26 Stat 989, 1039-1040, § 31. Act of March 3, 1891, 1 Kappler 407, 432, 435, § "Fifteenth." The Supreme Court found, despite this clause, the 1891 Crow Tribe Agreement diminished the size of their reservation. Montana v. United States, 450 US 544, 548, 101 SCt 1245, 1249, 67 LEd2d 493, 499 (1981); "An Act Accepting and Ratifying Agreement for Sale of a Portion of the Crow Indians of Montana Reservation," Ch 74, 22 Stat 42 (1882). *See also* Rosebud v. Kneip, 521 F2d 87, 94 n21 (8thCir 1975), *aff'd*, 430 US 584, 97 SCt 1361, 51 LEd2d 660 (1977)(savings clause held not to prevent diminishment); Chippewa Indians of Minnesota v. United States, 301 US 358, 368-70, 57 SCt 826, 830-31, 81 LEd 1156, 1163-64 (1937); Shoshone Tribe v. United States, 299 US 476, 489, 57 SCt 244, 248, 81 LEd 360, 365 (1937); United States *ex rel.* Cook v. Parkinson, 525 F2d 120, 124 (8thCir 1975), *cert. denied*, 430 US 982, 97 SCt 1677, 52 LEd2d 376 (1976).

[¶23.] Construing Article XVIII in the sweeping manner defendant advocates ignores the remainder of the Act. Such a result would be an extravagant misuse of the canons of statutory construction to salve modern sensibilities, especially given that the language in Articles I and II is so "precisely suited" to diminishment. Courts should not presume Congress intended an "absurd result." Hughey v. JMS Dev. Corp., 78 F3d 1523, 1529 (11thCir 1996); *In re* Pacific-Atlantic Trading Co., 64 F3d 1292, 1303 (9thCir 1995). To give Article XVIII pointed emphasis allows it to negate the preceding seventeen articles, and that is a result contrary to the plain meaning of the rest of the Agreement.

B. Historical Context

[¶24.] Contemporary historical records are not as compelling as the statutory inferences, but they still add impetus to a judgment of diminishment. Commissioner of Indian Affairs Browning reported after reaching agreement, the land would be "restored to the public domain. . . . " In 1896, two years after ratification, the Commissioner of Indian affairs wrote: "I have the honor to report that the lands in the *former* Yankton Indian Reservation . . . were opened to settlement and entry. . . . " (Emphasis added). The 1889 map created by the General Land Office of the Department of Interior shows the reservation as contemplated by the 1858 Treaty, but beginning in 1901, their maps eliminated both the Yankton and Lake Traverse (Sisseton) Reservations in conformance with their respective land sale agreements. Similarly, maps contained in the Annual Reports of the Commissioner of Indian Affairs after the 1894 ratification still show the Yankton Reservation in outline using the 1858 boundaries; but before the sale, these maps depicted the reservation in color, as were other nondiminished reservations. After the sale, the coloring was removed from the depiction of the Yankton Reservation. Likewise, Annual Reports of the Commissioner of Indian Affairs before the 1894 Act indicate the Reservation had 409.75 square miles. The 1896 and 1897 reports, however, show no acreage or square mileage amounts. *See* Russ v. Wilkins, 624 F2d 914, 923-24 (9thCir 1980); *DeCoteau*, *supra*. The Historical Atlas of South Dakota (1904) refers to the former Yankton Indian reservation.

[¶25.] Both sides further rely on events and perceptions occurring many years after the 1894 Act as evidence to

either prove or disprove diminishment. Later perceptions are of lesser value, as the Supreme Court has "been careful to distinguish between evidence of the contemporaneous understanding of the particular Act and matters occurring subsequent to the Act's passage." *Hagen*, 510 US at 411, 114 SCt at 965, 127 LEd2d at 265. Most of the contemporary evidence, including maps, atlases, and the behavior of federal, state and tribal entities, all either explicitly or tacitly acknowledge diminishment. We think it noteworthy also that in the 1892 sale, the Tribe retained no land for itself as a seat of government from which to manage the domain defendant now claims to be under its jurisdiction. The Tribe's 1932 Constitution asserts no claim to the 1858 Treaty boundaries. Only in recent times has the Tribe attempted to assert some dominion in this region.

[¶26] The 1894 Congressional Record confers additional insight into the understanding of Congress. Representative McRae stated during debate concerning a series of reservation land purchases, including the Yankton Agreement, that the lands involved "will become part of the public domain under these agreements. . . . " 53 CongRec 6425 (1894). In like manner, Representative Herman said the lands would become "a part of our public domain." 53 CongRec 6426 (1894). By returning lands to the public domain, Congress manifests an intent to diminish. *See Hagen*, 510 US at 414, 114 SCt at 967, 127 LEd2d at 267 ("[W]e hold that restoration of unallotted reservation lands to the public domain evidences a congressional intent with respect to those lands inconsistent with the continuation of reservation status."); *DeCoteau*, 420 US at 440 & 446, 95 SCt at 1091 & 1094, 43 LEd2d at 311 & 315.

Compare Solem, 465 US at 475, 104 SCt at 1168, 79 LEd2d at 453 (noting that reference to the public domain in a statute was supportive of diminishment, but not dispositive); *but see Hagen*, 510 US at 413, 114 SCt at 966-67, 127 LEd2d at 266-67 (differentiating between the Act in *Solem*, which did not "restore" the lands to the public domain, and the Act in question, which did direct "all the unallotted lands within said reservation shall be restored to the public domain"). This was also the understanding of the Commissioner of Indian Affairs: the lands "will be restored to the public domain."[11]

[¶27.] The United States has not attempted to exercise criminal jurisdiction in the area. All criminal offenses on nontrust land (91% of the region) are handled in state courts. Since 1895, the year the reservation was opened, South Dakota courts have consistently maintained, without intervention by federal or tribal authorities, civil and criminal jurisdiction within the former reservation

---

[11] Even if we assume congressional or administrative history regarding diminishment is not clear, we note such a position carried little weight with the *Rosebud* Court:

> The material presented by the parties reveals no consistent, or even dominant, approach to the territory in question. In light of the clear assumption of jurisdiction over the past 70 years by the State of South Dakota of the territory now in dispute, and acquiescence by the Tribe and Federal Government, this sporadic, and often contradictory, history of congressional and administrative actions in other respects carries but little force.

Rosebud, 584 US at 605 n27, 97 SCt at 1372 n27, 51 LEd2d at 675 n27.

boundaries. "[T]he single most salient fact is the unquestioned actual assumption of state jurisdiction over the unallotted lands. . . . " *See Rosebud*, 430 US at 603, 97 SCt at 1371, 51 LEd2d at 675. *See also* United States v. Grey Bear, 828 F2d 1286, 1291 (8thCir 1987), *dismissing in part, reversing in part on other grounds; affirming joinder issue on reh'g en banc*, 863 F2d 572 (8thCir 1988), *cert. denied*, 493 US 1047, 110 SCt 846, 107 LEd2d 840 (1990)("Jurisdictional history of disputed lands is an important factor because it reveals the traditional understanding of the Act, which has created justifiable expectations that should not be upset by a strained reading of the Act.").

C. Result of Opening the Reservation

[¶28.] Finally, the Supreme Court has recognized that, if congressional language and payment, as well as contemporary history, are inconclusive, the courts will look to "who actually moved onto opened reservation lands . . . [as] relevant to deciding whether a surplus land Act diminished a reservation." *Solem*, 465 US at 471, 104 SCt at 1166, 79 LEd2d at 451. "Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred." *Id.* (citing *Rosebud*, 430 US at 588 n3 & 604-05, 97 SCt at 1364 n3 & 1372-73, 51 LEd2d at 665 n3 & 675-76; *DeCoteau*, 420 US at 428, 95 SCt at 1085, 43 LEd2d at 304-05).

[¶29] Once the Yankton Reservation was opened, non-Indian settlers quickly moved in.

> [T]he population of Charles Mix County increased by 103.4 percent between 1890 and 1900, and of the 8,498 persons residing in Charles Mix County in 1900, only 1,483 were Indian. By 1910, the Indian population in Charles Mix County had dropped to 1,345, and Indian land holdings had dropped dramatically by 1914. This evidence tends to show that the opened lands quickly lost their Indian character.

Southern Missouri, 890 FSupp at 887 (internal citations omitted). As Professor Hoover phrased it, the "Yanktons entered the 1890's with 430,405 [sic] acres. By the year 1930, they had divested themselves of ownership on 387,047 acres and retained only 43,358." Today, less than ten percent of the land within the 1858 Treaty boundaries is trust land. Over 600 miles of road in the area are maintained by county and township authorities. Only 22 miles are maintained by the Bureau of Indian Affairs. The state-chartered municipalities of Wagner, Lake Andes, Dante, Pickstown, Ravinia, and Marty all lie within the former boundaries. Non-Indians comprise over two-thirds of the population in the area.

[¶30] Our review of a current map depicting Charles Mix County showing trust lands and other Indian holdings illustrates how dispersed these tracts are in relation to the extensive territory held in fee.[12] Yet if we accept defendant's arguments, over 6000 citizens of Charles Mix County would presently find they have become residents

---

[12] Exhibit 906 dated October 25, 1995, shows allotments, tribal trust lands, other government lands, tribal fee-to-trust lands, and land held in fee. Fee lands largely dominate the area.

of an Indian reservation. This region has not been considered a reservation by the general populace.[13] As Justice O'Connor wrote, "a contrary conclusion would seriously disrupt the justifiable expectations of people living in the area." *Hagen*, 510 US at 421, 114 SCt at 970, 127 LEd2d at 271.[14]

[¶31.] For over one hundred years, federal and state authorities have treated the Yankton Sioux Reservation as diminished. By agreement of tribal members and an Act of Congress, all unallotted reservation lands were sold to the United States and opened for settlement in 1895. The United States Supreme Court in 1914 referred to the very area now in question as no longer part of the reservation, and, in four separate decisions, this Court concluded

---

[13] Even though *Perrin* cannot be considered *res judicata* as it did not specifically deal with diminishment, certainly its import created considerable reliance.

> If lower courts felt free to limit Supreme Court opinions precisely to the facts of each case, then our system of jurisprudence would be in shambles, with litigants, lawyers, and legislators left to grope aimlessly for some semblance of reliable guidance.

McCoy v. Massachusetts Inst. of Technology, 950 F2d 13, 19 (1stCir 1991), *cert. denied*, 504 US 910, 112 SCt 1939, 118 LEd2d 545 (1992).

[14] Even the statutory county boundary descriptions refer to the "former Yankton-Sioux Indian reservation," and have since the South Dakota Code of 1939. *See* SDCL 7-1-5 (SDC 1939, § 12.0106)(Bon Homme county boundaries); SDCL 7-1-12 (SDC 1939, § 12.0113)(Charles Mix county boundaries); SDCL 7-1-22 (SDC 1939, § 12.0123)(Douglas county boundaries); SDCL 7-1-34 (SDC 1939, § 12.0135)(Hutchinson county boundaries).

diminishment occurred. Statutory language, contemporary negotiations, land ownership, population patterns and "jurisdictional history" all support diminishment. After more than a century, no other expectation is reasonable – using the Supreme Court's "clean analytical structure," the evidence is clear: the Yankton reservation has been diminished. South Dakota maintains jurisdiction in defendant's case.

[¶32.] *IV. Cross-examination on Prior Felony*

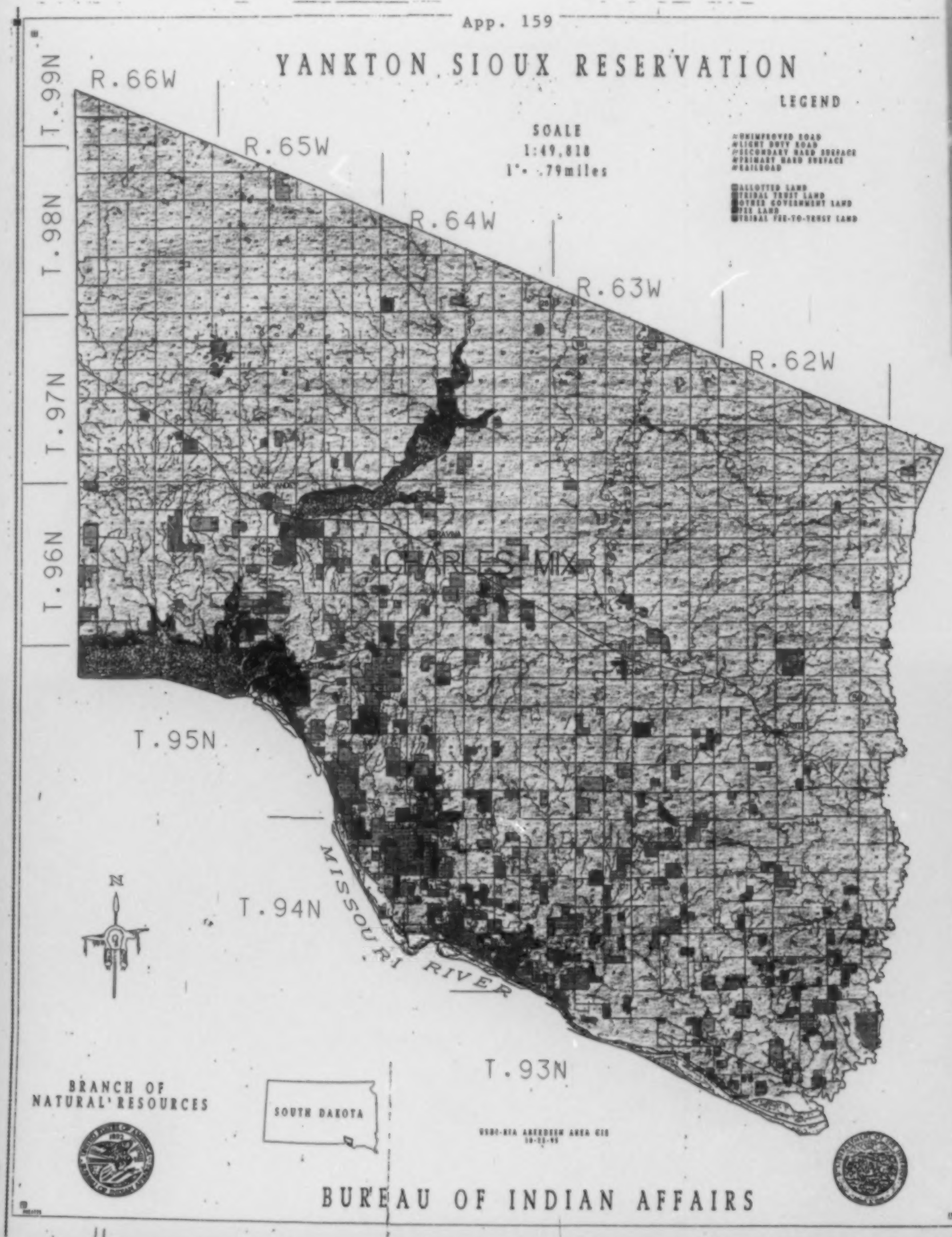
[¶33.] Defendant complains the trial court erred in allowing the prosecutor to ask him on cross-examination if he had ever been convicted of a felony. He alleges prejudice because he was yet to be tried as a habitual offender and his admission could have been used against him. Yet after his conviction on this charge, the State dismissed the habitual offender information. We therefore deem the matter moot. Hanson v. Hanson, 318 NW2d 355, 356 (SD 1982).

[¶34.] Affirmed.

[¶35] MILLER, Chief Justice, and SABERS, AMUNDSON, and GILBERTSON, Justices, concur.

BEST AVAILABLE COPY

YANKTON SIOUX RESERVATION



No. 96-1581

Supreme Court, U.S.
FILED
APR 28 1997
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF SOUTH DAKOTA,
Petitioner,
v.
YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,
Respondents,
and
SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF RESPONDENT, SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, IN SUPPORT OF PETITIONER, STATE OF SOUTH DAKOTA

KENNETH W. COTTON
WIPF & COTTON
P.O. Box 370
Wagner, South Dakota 57380
(605) 384-5471
Counsel for Respondent

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

86 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
REASONS FOR GRANTING THE PETITION	8
THE LEGISLATIVE HISTORY OF THE YANKTON ACT ESTABLISHES THAT THE DIVIDED PANEL UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE RELEVANT DECISIONS OF THIS COURT; THE EXTENT OF THE CONFLICT IS NOT LIMITED TO SOUTH DAKOTA, OR TO THE EIGHTH CIRCUIT, IT IS NATIONAL IN SCOPE AND IT IS IMPORTANT	11
A. Congress and the Yankton Sioux Tribe Did Not Intend That the Original Boundaries of the Yankton Reservation Would Remain Intact	11
CONCLUSION	30
APPENDIX	
Excerpts from the Annual Reports of the Commissioner of Indian Affairs and the Secretary of the Interior	1a
A Memorial to Congress—First Session Legislature of the State of South Dakota, January 31, 1890	47a
Letter from Commissioner, J. T. Morgan, Department of the Interior to Commissioners (July 27, 1892)	49a

TABLE OF AUTHORITIES

CASES: Page

Backcountry Against Dumps v. E.P.A., 100 F.3d 147 (D.C. Cir. 1996) 7
DeCoteau v. District County Court, 420 U.S. 425 (1975) ..... *passim*
Dick v. United States, 208 U.S. 340 (1908) 26
Hagen v. Utah, 510 U.S. 399 (1994) 8, 11, 12, 27
Montana v. United States, 450 U.S. 455 (1981) 5, 7
Pittsburg & Midway Coal Min. Co. v. Yazzie, 909 F.2d 1387 (10th Cir. 1990) 24, 27
Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) 11, 13, 24, 26
Solem v. Bartlett, 465 U.S. 463 (1984) 8, 11, 12
State v. Greger, 559 N.W.2d 854 (S.D. 1997) 10
Yankton Sioux Tribe v. Southern Missouri Waste Management Dist., 890 F.Supp. 878 (D.S.D. 1995) 16
Yankton Sioux Tribe v. Southern Missouri Waste Management Dist., 99 F.3d 1439 (8th Cir. 1996) 6

STATUTES:

Act of April 19, 1858, 11 Stat. 743 ..... 11, 15, 20
Act of February 8, 1887, 24 Stat. 388 ..... 12, 15
Act of July 13, 1892, 27 Stat. 120 14
Act of August 15, 1894, 28 Stat. 286 ..... 10, 13, 30
Yankton Proclamation of May 16, 1895, 29 Stat. 865 30

CONGRESSIONAL MATERIALS:

South Dakota H.R.J. Res. 183, Special Sess. (1889) 14
21 Cong. Rec. 1753, 51st Cong., 1st Sess. (1890) 14
Report of the Yankton Indian Commission dated March 31, 1893, S. Doc. No. 27, 53d Cong., 2d Sess. (1894) ..... *passim*
26 Cong. Rec., 53d Cong., 2d Sess. (1894) ..... *passim*
H.R. Rep. No. 802, 53d Cong., 2d Sess., pt. 5 (1894) 24
S. Rep. No. 510, 53d Cong., 2d Sess. (1894) 26

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES: Page

Sup. Ct. R. 12.6 1
South Dakota Codified Laws 34A-16-1 1
Brief for Respondent and Appendix II for Respondent, *DeCoteau v. District County Court*, 420 U.S. 425 (1975) 11
Letter from Commissioner J. T. Morgan, Department of the Interior, to Commissioners (July 27, 1892) 14
Yankton Press and Dakotan (1894) 23
40 C.F.R. pt. 258 ..... 1, 3, 7
58 Fed. Reg. 52488 (Oct. 8, 1993) 3
59 Fed. Reg. 16649 (April 7, 1994) 5
61 Fed. Reg. 48684-48685 (Sept. 16, 1996) 5, 6
42 U.S.C. 6972 7
Ex. 675, Administrative Record before the South Dakota Board of Minerals and Environment, Drapeau Testimony 4
Report of Commissioners of Indian Affairs (1891) 8
Yankton Act, Annual Report, Commissioner of Indian Affairs (1894) 11
Yankton Act, Annual Report, Secretary of the Interior (1894-1895) 11

BRIEF OF RESPONDENT, SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, IN SUPPORT OF PETITIONER, STATE OF SOUTH DAKOTA

Respondent, Southern Missouri Waste Management District (District) in support of Petitioner, State of South Dakota (State), adopts the "Question Presented," "Opinions Below," "Jurisdictional Statement," and the "Constitutional and Statutory Provisions Involved" set forth in the Petition.[1] Sup. Ct. R. 12.6.

STATEMENT OF THE CASE

The District concurs in the "Statement of the Case" submitted by the State, but adds the following to illustrate the dramatic change in the status quo effected by the decisions below which hold that the Yankton Sioux Reservation has not been disestablished.

In late 1991 and early 1992, representatives of Charles Mix and Douglas counties, the Yankton Sioux Tribe (Tribe) and various municipalities began to meet in order to discuss significant new State and new federal regulatory criteria for solid waste landfills. T 573. The federal requirements, developed by the Environmental Protection Agency (EPA) pursuant to the Resource Conservation and Recovery Act (RCRA), amended existing rules to include new criteria for siting, designing and operating solid waste facilities. 40 CFR pt. 258.

---

[1] The Office of the Clerk advised the District to bring the following facts to the attention of the Court in this fashion. The full and correct name of the District is Southern Missouri Recycling and Waste Management District. This entity was formed in August, 1994, and had begun functioning as a political subdivision of the State of South Dakota under South Dakota Codified Laws 34A-16-1, *et seq.* at the time this litigation was instituted. Plaintiff/Respondent Yankton Sioux Tribe (Tribe) presumably overlooked this fact when the complaint was filed against the initial non-profit corporation. In any event, the full and correct name of that non-profit corporation was Southern Missouri Waste Management Association, Inc.

In February, 1992, a non-profit entity entitled Southern Missouri Waste Management Association, Inc. was incorporated to deal with the challenge of the new requirements. District Court Opinion, (DCO), Pet. App. 90. According to the district court, "tribal members regularly attended Southern Missouri's meetings" although the Tribe "did not sign the joint powers agreement or become an official member of the organization." *Id.* Nonetheless, the testimony indicated that a tribal representative was a voting member of the District Board, T 581-582, 640-641 and that a tribal councilman occasionally attended. *Id.* at 640-641. A former chairman of the District perceived at the time that the Tribe was, in fact, a member. *Id.* at 640, 660. *See also id.* at 581.

The District aggressively sought out various sites for the landfill and, indeed, advertised in an effort to seek sellers of property. T 637-638. After conferences with its engineers, as well as the South Dakota Department of Environment and Natural Resources (DENR), the District selected as a site non-Indian fee land approximately one and one-half miles west of Lake Andes, South Dakota. The testimony at trial indicated that the tribal member present at the Southern Missouri meeting, voted in favor of the proposed site, or at least did not oppose the site. T 581-582, 589-590. The site selection was reviewed with the tribal chairman, who stated that he did not want the site on nearby trust land but made no objection to the site actually selected on the grounds that it was within a "reservation." T 636-637. The site was within the 1858 boundaries of the Yankton Sioux Reservation, a factor not deemed important or material at the time.

After a site characterization study was completed, the site was found to be environmentally suitable and the District submitted a formal request to DENR for a solid waste permit in order to construct and operate the landfill. DCO, Pet. App. 91. Further, at about the same time as the study was completed, the District approved membership in the District of two additional neighboring counties—

Gregory County, South Dakota and Bon Homme County, South Dakota. T 579-580. The greater size of the District promised to make the facility more affordable to the rural population it was meant to serve.

In the latter part of 1993, after a general tribal election and a change in the tribal administration, the attitude of the new leadership of the Tribe toward the merits of the landfill changed radically.[2] In early October, 1993, the Tribe petitioned to intervene in the contested case hearing procedure with regard to the landfill permit. The Tribe's Petition was granted, and the Tribe was allowed "party status" in the hearing. T 91.[3]

A four-day contested case hearing was held before the South Dakota Department of Minerals and Environment on December 8-10 and 20, 1993. DCO, Pet. App. 91. It is critical to note that at this time the Tribe opposed the landfill on environmental grounds but did *not* oppose it on jurisdictional grounds *nor* on the grounds that it was planned within a reservation. The colloquy between tribal chairman and the tribal attorney, in December of 1993, in fact, referred to "*former* boundaries" of the Reservation. According to the testimony:

---

[2] Throughout the 1980's and the 1990's, voter participation in tribal elections fluctuated substantially. Sometimes fewer than 600 people participated in the tribal process. More recently, voter turnout has leveled out at around 1,000 (tribal voters need not reside in the area). In general, approximately 90% of the area within the 1858 boundaries is non-Indian owned and over two-thirds of the population is non-Indian.

[3] Consistent with RCRA's authority to delegate environmental programs to states (Subtitle D of RCRA) the State sought to implement the new requirements and therefore revised statutes and rules to do so. EPA generally approved the State's program on October 8, 1993, thereby authorizing the State to implement and enforce the requirements of 40 CFR pt. 258. Plaintiff's Exhibit 3. *See generally* T 573. In the same notice, EPA reserved the delegation question on "'existing or former' Indian reservations." 58 Fed. Reg. 52488 (Oct. 8, 1993).

> Q: (By Mr. Abourezk, the Tribe's Attorney): Are you familiar with the *former boundaries* before that area was opened up, of the Yankton Sioux Reservation?
>
> A: (By Tribal Chairman Drapeau): Yes.
>
> Q: Was that land within the *former boundaries* of the Yankton Sioux Reservation?
>
> A: Yes.

Ex. 675, Administrative Record before the South Dakota Board of Minerals and Environment, Drapeau Testimony at 556 (emphasis added).[4]

The Board granted the permit in December, 1993. Following the Board's decision, a second group represented by Mr. Abourezk (the Tribe's attorney) filed an appeal to state circuit court alleging an abuse of discretion on the part of the Board in granting the permit. *See* Pet. App. 93. No jurisdictional issue was raised. The Sixth Judicial Circuit Court for the State of South Dakota ultimately affirmed the Board decision, and no appeal was taken to the South Dakota Supreme Court. *Id.* The Tribe did not participate in the circuit court appeal.

Federal regulators continued to recognize that the original reservation had been disestablished well into 1994. Thus, on April 7, 1994, EPA issued its Tentative Determination, based on consultation with the Department of the Interior, on whether the State would be granted RCRA authority with regard to the former Yankton Reservation. According to EPA:

> On review of the arguments and consultation with the Department of the Interior, EPA believes that the State of South Dakota has sufficiently demonstrated that the Yankton Sioux Reservation was *disestablished* by the Act of 1894.

[4] The tribal chairman's subsequent effort to explain this testimony was unconvincing. T 306-313.

59 Fed. Reg. 16649 (April 7, 1994) (emphasis added).[5] The Tribe's arguments with regard to reservation status had thus been raised for the first time in the process before EPA.

Having failed to convince EPA and, apparently, the Department of the Interior, of the existence of the reservation, the Tribe, in September, 1994, filed a complaint in federal district court. In the complaint the Tribe alleged that the Yankton Sioux Reservation remained intact and had not been disestablished by the 1894 Act, *contrary* to nearly a century of state and federal precedent.

In essence, the Tribe contended that, based on the status of the area as a "reservation," the State did not have authority to issue the District a "Subtitle D" landfill permit and that the Tribe had jurisdiction over the site. At this point, the District sued the State, on a third party complaint, requiring it to defend its jurisdiction as to the solid waste permit that the District had obtained from the State. The State waived its Eleventh Amendment privilege and participated fully in all the proceedings at bar.

The district court, after trial, found that Congress had not disestablished or diminished the boundaries of the Yankton Reservation. Pet. App. 96. The district court additionally found that, in this instance, the Tribe had failed to demonstrate the existence of either of the Montana exceptions, *Montana v. United States*, 450 U.S. 544, 565-566 (1981), and so could not regulate the landfill itself.

The district court also found that, because EPA had not delegated federal authority to the State with regard to "Indian country" and because the proposed landfill was now newly defined as within "Indian country," EPA regulations applied. The district court found further that the

[5] EPA reversed its position with regard to reservation status only after the district court's decision. *See* 61 Fed. Reg. 48684-48685 (Sept. 16, 1996).

federal regulations required the installation of a very expensive (1.75 million dollars) "composite liner." *See* DCO Pet. App. 96.[6]

The State appealed the disestablishment/diminishment issue to the Eighth Circuit Court of Appeals. A divided panel affirmed the district court on this issue. *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 99 F.3d 1439 (8th Cir. 1996). Pet. App. 1. (The District did not appeal because the district court allowed it to go forward with the construction of the proposed landfill facility.)[7]

Further, the decisions of the federal courts present a very difficult situation for the District. Both the State and the Tribe have applied for delegation of federal RCRA authority with regard to the area within the 1858 boundaries of the Yankton reservation. EPA denied RCRA authority delegation to the State after, and based upon, the district court decision. *See* 61 Fed. Reg. 48684-48685 (Sept. 16, 1996). Even though the Tribe has been found by the federal district court to *lack* the authority

[6] The District later petitioned EPA to waive the liner requirement. On June 6, 1996, EPA granted the District's petition. The District thereafter sought and obtained relief from the federal court order with regard to the liner based upon EPA's determination. This relief was granted on December 11, 1996. The Tribe has separately sued EPA arguing that it lacked legal authority to grant the waiver; the district court ruled in favor of EPA on December 11, 1996, on that issue. The Tribe has appealed both of these decisions to the Court of Appeals for the Eighth Circuit.

[7] The District expected that the district court would be reversed on the disestablishment issue in light of the strength of the precedent from this Court, the Eighth Circuit Court of Appeals, and the South Dakota Supreme Court. *See Rosebud*, 430 U.S. at 603-604, "the single most salient fact is the unquestioned actual assumption of state jurisdiction." The District files this brief in support of the State because the district court was affirmed on the disestablishment issue and because of the likelihood that the assertion of tribal jurisdiction will continue to affect the District in this or similar contexts.

under *Montana* to regulate the facility as a matter of tribal law, it is by no means certain that the federal government will not delegate *federal* authority to the Tribe, resulting in even further litigation.[8] *But see, Backcountry Against Dumps v. E.P.A.*, 100 F.3d 147 (D.C. Cir. 1996).

Thus, in the place of a well-defined system in which the State was able to grant all of the necessary permits, and would certainly have been delegated federal authority with regard to this area and this landfill, a confused and difficult situation has resulted for the District.

Lastly, the panel majority decision would adversely impact environmental protection in the area generally. EPA has no regulatory machinery in existence with which to grant permits to operate a Subtitle D landfill. Although the landfill would be required to comply with EPA criteria set forth in 40 CFR 258, the *only* entity with jurisdiction to enforce those provisions would be a federal court through a citizen lawsuit filed against the District pursuant to RCRA. 42 U.S.C. 6972. Similarly, it is the District's understanding that EPA does not approve site characterization studies or sites for landfills, nor does it approve preliminary or final design plans for landfills or monitor the construction of landfills. The District also understands that EPA does not have the manpower to adequately inspect landfills. The Tribe had virtually no environmental program at the time of trial, *see* T 315-316, and had not even made an estimate of the cost of a comprehensive program. T 335. To the extent that the Tribe intends to and does successfully insert itself into the regulation of non-Indian lands, which constitute more than 90% of the area in question, the State's authority would no doubt be further clouded.[9]

[8] The State continues to assert its inherent jurisdiction over the District; to what degree that authority will be challenged in the future is unknown.

[9] The Tribe's intent in this regard is unknown. *See* T 320-329.

REASONS FOR GRANTING THE PETITION

> If the policy of allotting lands is conceded to be wise, then it should be applied at an early date to all alike wherever the circumstances will warrant. If we have settled upon the breaking up of the tribal relations, the extinguishment of the Indian titles to surplus lands, and the restoration of the unneeded surplus to the public domain, let it be done thoroughly. If reservations have proven to be inadequate for the purposes for which they were designed, have shown themselves a hindrance to the progress of the Indians as well as an obstruction in the pathway of civilization, let the reservations, as speedily as wisdom dictates, be utterly destroyed and entirely swept away. Report of the Commissioner of Indian Affairs, 8 (1891), Resp. in Support App. 27a-28a.

The District fully supports the reasons for granting the petition set forth in the Petition of the State. We also recognize, of course, that the primary consideration governing review will focus on the fact that the United States Court of Appeals for the Eighth Circuit has decided an important federal question in a way that conflicts with the decisions of the Supreme Court of the State of South Dakota.[10] In addition, however, the District would specifically direct the attention of the Court to the legislative history of the 1894 Act, which is excerpted and summarized *infra*, at 13-30. A brief review of this documentation reiterates two fundamental points in further support of the Petition:

[10] "We granted certiorari in the two cases, 417 U.S. 929, to resolve the conflict between the Supreme Court of South Dakota and the Court of Appeals for the Eighth Circuit as to the effect of the 1891 Act on South Dakota's civil and criminal jurisdiction over unallotted lands within the 1867 reservation boundaries." *DeCoteau v. District County Court*, 420 U.S. 425, 430-431 (1975); "Because the Supreme Court of South Dakota has issued a pair of opinions offering a conflicting interpretation of the Act of May 29, 1908, we granted certiorari." *Solem v. Bartlett*, 465 U.S. 463, 466 (1984); "We granted Certiorari, 507 U.S. 1028 (1993), to resolve the direct conflict between these decisions of the Tenth Circuit and the Utah Supreme Court on the question whether the Uintah Reservation has been diminished." *Hagen v. Utah*, 510 U.S. 399, 409 (1994). *See* Pet. at 13-14.

1. The decision of the court of appeals conflicts in principle with relevant decisions of this Court.

2. This case presents a question of federal law that is important and national in scope.

First, in *every* significant respect, the Yankton documentation squarely tracks the Sisseton-Wahpeton (Lake Traverse) documentation detailed at length in *DeCoteau v. District County Court*, 420 U.S. 425 (1975). Although three short years and one session of Congress separates the passage of the Sisseton-Wahpeton and the Yankton Acts, parts of the Yankton process were actually under consideration in both sessions. Moreover, many of the key congressional participants in the process continued to hold office through the passage of the Yankton Act (e.g., Congressman John A. Pickler of South Dakota "same kind of a treaty we have always made," *infra* at 28, and Chairman of the Committee on Indian Affairs, William S. Holman). In fact, approximately *one-third* of the members in the House of Representatives and *two-thirds* of the members in the entire Senate for the 51st Congress (Sisseton-Wahpeton) were still there in the 53rd Congress when the Yankton Act was finally considered, debated and passed.

In this light, uncontested statements in the debates and reports that *specifically* reference the Sisseton-Wahpeton (Lake Traverse) documentation as *precedent* for consideration in the Yankton process assume a degree of significance that the Tribe cannot avoid. When one also considers that there is not a single reference (or even a suggestion) in the same documentation that Congress considered, much less intended, the enactment of the *radical* departure the Tribe asserts, the extent to which the decision of the court of appeals conflicts with the relevant decisions of this Court is readily apparent.

A single point serves to highlight the extent of this conflict. This is only the *second* time that any federal court of appeals has ever held that a congressional act of this nature did not disestablish the reservation area affected; the *first and only* other case with a similar holding (when controlling law was less clear), was promptly reversed in *DeCoteau*. Since then, *DeCoteau* has been cited and relied on in all circuits as controlling precedent by every other court *except* the district court and the majority of the panel in this case. Nothing in the record in this case fairly supports a departure from this universal view, as the Dissent forcefully and succinctly attests. *See* Pet. at 9-11, 16-19, 21-22, and 24. Pet. App. 44-64.

Secondly, the same documentation also confirms the importance of the question of federal law presented. Here, as in the Sisseton-Wahpeton debates, Congress addressed the national scope of this and related cession legislation and its place in forming the crux of federal Indian policy in that period (1887-1900). In this instance, as in *DeCoteau*, the annual Indian department appropriation act ratified *several* other cession agreements in addition to the Yankton agreement, which further demonstrates the scope of the legislation and its relationship with similar cessions considered in *DeCoteau* (together affecting tens of millions of acres of land across the United States). *See DeCoteau* at 6, and the Act of August 15, 1894, 28 Stat. 286.[11]

To complete the perspective, the District has appended excerpts of the Annual Reports of the Commissioner of Indian Affairs and the Secretary of Interior for the same period. Resp. in Support App. 1a-46a.[12] These reports un-

[11] This legislative history was first submitted to the Supreme Court of the State of South Dakota by Charles Mix County, South Dakota, as *Amicus Curiae* in *State v. Greger*, 559 N.W.2d 854 (S.D. 1997). In *Greger*, the South Dakota Supreme Court reaffirmed its view that the 1894 Act disestablished the Yankton Sioux reservation. *Greger* is discussed in the Petition at 12-14 and appended in the Petition Appendix at 125-158.

[12] These excerpts were first presented to this Court in the text of the Brief for Respondent (pages 72-113) and in Appendix II

equivocally confirm that the Commissioner of Indian Affairs and the Secretary of the Interior considered both the Yankton and Sisseton reservations "restored to the public domain" by the legislation in question ("*land will be restored to the public domain*," Yankton Act, Annual Report, Commissioner of Indian Affairs (1894); "*restoring to the public domain*," Yankton Act, Annual Report, Secretary of the Interior (1894-1895)). Resp. in Support App. 23a, 43a, 44a (emphasis added). They also demonstrate the general thrust of federal Indian law policy and legislation for that period, and unmistakenly support that the conclusions this Court set forth in *DeCoteau* are applicable to the present case. *See also Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) and *Hagen v. Utah*, 510 U.S. 399 (1994).

THE LEGISLATIVE HISTORY OF THE YANKTON ACT ESTABLISHES THAT THE DIVIDED PANEL UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE RELEVANT DECISIONS OF THIS COURT; THE EXTENT OF THE CONFLICT IS NOT LIMITED TO SOUTH DAKOTA OR TO THE EIGHTH CIRCUIT, IT IS NATIONAL IN SCOPE AND IT IS IMPORTANT.

A. Congress and the Yankton Sioux Tribe Did Not Intend That the Original Boundaries of the Yankton Reservation Would Remain Intact.

1. Introduction. During the "latter half of the 19th century, large sections of the Western States and Territories were set aside for Indian reservations." *Solem v. Bartlett*, 465 U.S. 463, 466 (1984). In particular, the original Yankton Sioux reservation was created in 1858 when Congress ratified a cession agreement with the Tribe, ceding other lands. Act of April 19, 1858, 11 Stat. 743. Pursuant to this cession agreement, some

of Respondent in *DeCoteau*. Brief for Respondent and Appendix II for Respondent, No. 73-1148, *DeCoteau v. District County Court*, 420 U.S. 425 (1975).

430,495 acres were set aside for the exclusive use of the Yankton Sioux. *Id.* This is the 1858 Yankton reservation.

Near the end of the century, however, federal Indian policy changed. *Hagen v. Utah*, 510 U.S. at 402. Congress began to take the view that "Indian tribes should abandon their nomadic lives on the communal reservations and settle into an agrarian economy on privately owned parcels of land." *Solem*, 465 U.S. at 466. *See also DeCoteau*, 420 U.S. at 431; *Hagen*, 510 U.S. at 402. It was felt that "individualized farming would speed the Indians' assimilation" into the American way of life. *Solem*, 465 U.S. at 466.

During this same period, many reservations were subject to certain "familiar forces" encouraging their opening. These "familiar forces" consisted predominantly of two factors. First, "[a] nearby and growing population of white farmers, merchants, and railroad men began urging authorities in Washington to open [reservations] to general settlement." *DeCoteau*, 420 U.S. at 431. Second, many Indians on the reservations "suffering from disease and bad harvests, developed an increasing need for cash and direct assistance." *Id.*

Ultimately, the combination of Congress' new position that Indians should settle on privately owned parcels of land and the ever-present "familiar forces" resulted in the General Allotment ("Dawes") Act of 1887. Act of Feb. 8, 1887, 24 Stat. 388. This Act was "enacted in an attempt to reconcile the Government's responsibility for the Indians' welfare with the desire of non-Indians to settle upon reservation lands." *DeCoteau*, 420 U.S. at 432 (citing Act of February 8, 1887, c.119, 24 Stat. 388). Pursuant to this Act, the President of the United States was granted the authority "to allot portions of reservation land to tribal members and, with tribal consent, to sell the surplus lands to . . . [non-Indian] settlers, with the proceeds of these sales being dedicated to the Indians' benefit." *Id.* (citation omitted).

As a result of the General Allotment Act and the Amendatory Act of February 28, 1891, parcels of land within the Yankton Sioux reservation were allotted to individual Yankton Sioux Indians. Subsequent to the allotment, approximately 168,000 acres of "surplus" land remained unallotted.

2. Legislative History. A brief review of the legislative history of the Act of August 15, 1894, 28 Stat. 286, puts this disestablishment issue in the proper historical perspective. Such a perspective establishes beyond question that the construction of this Act by the federal courts is untenable and clearly erroneous. As the Yankton documentation attests, neither Congress nor the Tribe intended that the original boundaries would remain intact.

The significant aspects of this legislative history are set forth in various disestablishment arguments submitted below in the briefs of the State. At this stage, however, the following chronological overview is intended to supplement those arguments by making clear that nothing in the entire history of this process supports any other conclusion. To the contrary, viewed in perspective, every source confirms that the intent of Congress and the Tribe, in all significant respects, tracks the views set forth by this Court in *DeCoteau*. In *DeCoteau*, this Court was presented with a contemporaneous and nearly identical 1891 Sisseton-Wahpeton (Lake Traverse) Act and held that it had disestablished that reservation. *DeCoteau* is controlling here. *See also Rosebud*, 430 U.S. 584.

(a) The Negotiations. The history of the negotiations for the cession of the surplus lands of the Yankton Sioux reservation follows the same general pattern found throughout the west in the latter part of the Nineteenth Century. Established as a result of an extensive 1858 cession, the Yankton reservation itself was soon subject to the familiar forces noted in *DeCoteau*. In the early 1880's, this process was initially set in motion by the United States. In 1884, the first Commission was sent to the Yankton reservation to negotiate for a cession. Report of the Yankton

Indian Commission dated March 31, 1893, S. Ex. Doc. No. 27, 53d Cong., 2d Sess., 12-13 (1894). These 1884 negotiations were unsuccessful. *Id.* After the passage of the General Allotment Act, applicable throughout the United States, efforts for negotiations were renewed. *DeCoteau*, 420 U.S. at 434 (discussing Section 5 of the General Allotment Act).

In 1889, the South Dakota legislature passed a Memorial to Congress in support of "the opening to settlement under the Homestead law of the Yankton reservation." South Dakota H.R.J. Res. 183, Special Sess. (1889).[13] This Memorial was presented in Congress and referred to the respective committees on Indian affairs. 21 Cong. Rec. 1753, 51st Cong., 1st Sess. (1890). Significantly, similar actions predated the passage of the *DeCoteau* legislation. *DeCoteau*, 420 U.S. at 431-432 n.8.

According to the Commissioners finally appointed to conduct the negotiations, the Yankton Sioux tribe itself initiated the process through communications with the Secretary of the Interior. S. Ex. Doc. No. 27 at 50, 74. In 1892, an appropriation for expenses for this purpose was approved: "to enable the Secretary of the Interior in his discretion to negotiate with any Indians for the surrender of portions of their respective reservations. . . ." Act of July 13, 1892, 27 Stat. 120, 137. In July, 1892, Commissioner of Indian Affairs J. T. Morgan issued letters of instruction to three Commissioners: Colonel J. C. Adams, Dr. W. L. Brown, and John J. Cole. Letter from Commissioner J. T. Morgan, Department of the Interior, to Commissioners (July 27, 1892), Resp. in Support App. 49a-51a.

In this instance, as in *DeCoteau*, the instructions are detailed and referenced throughout the Yankton documents. *DeCoteau*. Commissioner Morgan put the issue squarely in the cession format:

[13] The complete text of the South Dakota Memorial is reproduced at Resp. in Support App. 47a-48a.

> [T]o negotiate with the Yankton Sioux Indians for the *cession* of their surplus lands. . . .

Id. at App. 49a (emphasis added).

Importantly, the Commissioner also specifically referenced allotments pursuant to the "Act of February 8, 1887" (General Allotment or "Dawes" Act) and acts amendatory thereto, "averaging over 150 acres for each member of the tribe." *Id.* at 50a. As a result of these allotments, the Commissioner noted that there should be "a surplus of some 168,000 acres." *Id.* at 49a. *See also*, Pet. App. 9, n.9 (stating "some 200,000 acres were sold in 1894)." Further, the Commissioner instructed that:

> If they are unwilling to cede all the surplus land you will endeavor to obtain the relinquishment of such part thereof as they may be willing to part with. *Id.* at 50a.

Also enclosed with the instructions was a "form of agreement" transmitted for "guidance," but the Commissioner specifically noted that "you are not required to adhere to the same absolutely." *Id.* at 51a.[14]

[14] One aspect of the instructions is worthy of special notation. In setting forth the history of the reservation and the status of the area at that time, Commissioner of Indian Affairs Morgan cited the Treaty of April 19, 1858, 11 Stat. 743, and noted that "the treaty makes no provision regarding the cession or relinquishment of the reservation or any portion thereof." Resp. in Support App. 50a. In other words, unlike some Sioux and other treaties, which required three-fourths approval, the 1858 Treaty had no such special limitation. As a result, the provisions set forth in the General Allotment Act would control the Yankton negotiations. In this respect, a simple majority would suffice. As the Commissioner noted:

> The terms and conditions agreed upon in council should be reduced to writing and incorporated in the accompanying form of agreement which should be signed by at least a *majority* of the male adults of the members of the tribe.

Id. at App. 50a. (emphasis added).

The federal district court, in an attempt to support the result reached in its memorandum opinion, *sua sponte* quoted similar

The Commission arrived at the Yankton agency in Greenwood, South Dakota on October 1, 1892. S. Ex. Doc. No. 27 at 7. Almost immediately, the work of the Commission was interrupted by personal problems. During the first week, Commissioner Brown was "called away and was absent about six days," covering the period of the first council. *Id.* at 8. On October 10, Commissioner Cole received a telegram informing him of a fatal accident involving his oldest son, which, together with the serious illness of his wife, kept him away from the reservation until November 26, 1892. *Id.* In addition, on October 25, Commissioner Adams returned home and was absent until November 10, 1892. *Id.*

Moreover, because of a rivalry among tribal factions, the Commissioners met with some support but more opposition. *Id.* at 8-10. As a result, the discussions continued for several months. *Id.* In the process, several councils were convened and the issue was thoroughly discussed. *Id.* The proceedings of the councils were "kept as fully and as accurately as possible." *Id.* at 8. At the conclusion of the council proceedings, the Commissioners attested that the written records were:

> [C]orrect in all substantial particulars and are as nearly verbatim as possible under the circumstances, and they correctly represent the council proceedings

---

language ("'[t]he treaty makes no provision regarding the cession or relinquishment of the reservation or any portion thereof'") in support of the *inexplicable* proposition that the subsequent Yankton agreement of 1892 was *not* a cession. *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 890 F.Supp. 878, 883 (D.S.D. 1995) Pet. App. 82. In context, the Senate Document does not support the conclusion of the district court and the instructions make clear that the reference there, as in the instructions, was to the 1858 Treaty and the percentage of members' consent required for ratification. Presumably, the Tribe recognized this fact and did not advance or support this strained argument on appeal. The panel majority ignored this error of the district court but the dissent did not. Pet. App. 59-60.

> between the commissioners and the Yankton Indians. *Id.* at 97.

Throughout the councils, the price per acre was the dominant theme in the discussions.

> Peter St. Pierre: This is our land the price is entirely too small. . . . Tom No. 1: The people desire a high price for this land. Whatever we have we want a good price for it, no matter how small. You know that this is a very small tract of land. *Id.* at 74.
>
> Peter St. Pierre: I am against the sale. My friends, this land belongs to us. If the price was higher I might be willing to consider it. *Id.* at 78.

A summary of the council of February 18, 1893, reflected this same sentiment. *Id.* at 91.

The Commissioners were convinced that others, with "vested interest" motives, fueled the opposition. This group, according to the Commissioners, was not concerned with the price per acre:

> John J. Cole: [T]hat we can not get these employe[e]s to sign the agreement? Of all the Indians employed at this agency but two have signed. Louis Claymore and one other mechanic signed, and all the balance are against us, the office is against us, the police office is against us, the shops are against us, the whole agency is against us and is a hotbed of opposition, so that men who come here to sign are sent away without doing so. . . . [L]ittle progress had been made in taking signatures, as the opposition, under the lead of some of the white employe[e]s of the Government, were straining every nerve to prevent the signing of the agreement. Id. at 86, 89. *See also* S. Ex. Doc. No. 27 at 89, 94.

In the end, an agreement was reached with more than a majority of the adult male members of the Tribe. *Id.* at 94.[15] Significantly, in the process, the discussion

---

[15] The agreement was "translated into the Dakota language for the use and consideration of the Yankton Sioux tribe." S. Ex. Doc. No. 27 at 51.

establishes several points that are important in the resolution of the question presented here.

(1) References to Sisseton-Wahpeton (Lake Traverse) Cession. In general, this record constitutes an important source which confirms that, without exception, the substance of the process and the intended result corresponds with the *DeCoteau* process in every respect. In fact, in several instances the Commissioners and others specifically made reference to the Sisseton-Wahpeton (Lake Traverse) cession presented in *DeCoteau*:

> Henry Selwyn: If the *Sissetons* and Titonwan had sold their land at the same price at which we sold ours in 1858 per acre they would have given the Government their lands for nothing. *Id.* at 54 (emphasis added).

> John Cole: They have reported that four bands of Pawnee Indians will sell their land for $1.25 per acre. *The Sisseton Reservation was purchased by the Government at $2.50 per acre.* This is the highest price which has ever been given. So you see your ideas of price are away up. *Id.* at 68 (emphasis added).

> John Cole: The commissioners are now ready to make you an offer for your surplus lands. The Government will pay you $600,000 for your surplus lands, amounting to about 168,000 acres; payments to be made on the terms of our instructions from the Department of the Interior. This is nearly $3.60 per acre and is more than double what the Cherokees have agreed to sell for. *It is more than the Government paid for the Sisseton Reservation* and is the highest price we have ever known the Government to offer. *Id.* at 71 (emphasis added).

(2) Cession and Related References. The manner in which all parties referred to the process in general "cession," "sale," and "treaty" terms also confirms the general understanding and further demonstrates the similari-

ties and the purposes of the negotiations. As in *DeCoteau*, the process was not atypical. *DeCoteau*, 420 U.S. at 439 nn.21, 22. From the very beginning, the Agent, Col. Foster, the Commissioners and others clearly stated:

> Col. Foster: The Government has sent a commission to you to negotiate with you for your surplus lands . . . You do not have to sell your surplus lands if you do not want to. . . . Col. Adams: [W]e also understand that you own, outside of your allotments, a large quantity of land in common. It is this land that you own in common that we were appointed by the Great Father to talk to you about. . . . [A] treaty with you for your lands. . . . John J. Cole: [W]e must make this treaty . . . to sell your surplus lands . . . to sell your surplus lands . . . [T]he Government would buy your surplus lands if you want to sell them. . . . John J. Cole: [Y]ou have sent word to Secretary Noble that you desire to sell your surplus lands. . . . Henry Selwyn: This is the second time we sold land to the Government. . . . William T. Selwyn: Treat for the sale of the surplus land. . . . William Bean, Sr.: Struck by the Rees has sold a great portion of our reservation . . . Jandran: Selling our lands. . . . White Swan: Negotiate for the sale of these surplus lands. . . . Dr. Brown: I believe if you make this treaty. . . . Dr. Brown: [D]ecide whether you want to sell or not. . . . John J. Cole: [T]o make this treaty between you and the Government. . . . [A] direct out-and-out sale of the whole of your surplus lands. . . . [T]o cede these surplus lands to the Government. . . . We propose to buy all these lands, good, bad and indifferent. . . . Felix Brunot: [W]hether we will sell our lands or not. . . . Eugene Brunot: [S]ell their land. . . . John Omaha: It was decided by the committee that they would sell the land. . . . John Grayface: We do not object to the provisions of the treaty, but we do not want to make a treaty at this time. S. Ex. Doc. No. 27 at 48-50, 54, 56, 58, 67, 68, 73, 91. *See also* S. Ex. Doc. No. 27

at 50, 52, 57, 59-64, 66, 67, 69-72, 74, 75, 77-79, 83, 86-88, 93, 94.

(3) Treaty of 1858, 11 Stat. 743. All parties also made specific reference in these negotiations to the earlier 1858 Yankton cession. Of course, no one has ever questioned the effect of the 1858 cession (or any similar cession) on the reservation boundaries. A distinction between the 1858 cession and the 1892 cession in this respect cannot be documented in the transcripts of these negotiations:

> Henry Selwyn: I will now refer to the treaty of 1858. This is the second time we sold land to the Government. I think they should be very grateful to us for selling our land. We do not know how many acres we sold at that time, but we know it was many thousands of acres. . . . Col. Foster: Under the treaty of 1858 you sold a vas[t] tract of land for but little more than you will get under this treaty for the small amount of surplus land which you have left. S. Ex. Doc. No. 27 at 54, 83. *See also* S. Ex. Doc. No. 27 at 55-58, 61, 65, 66, 80.

(4) Familiar Forces and The General Allotment Act. The familiar forces noted in *DeCoteau* are also reflected in the Yankton councils:

> John J. Cole: The Great White Father . . . wants you to sell your surplus lands for which you have no use. If you want to sell these surplus lands we will buy them and pay you all they are worth, and the Government will sell them to men who will make homes on them and will build good houses and make good farms, and this will make your other lands—your homes—more valuable, so that the lands you have left will be worth more than all your lands are now worth, and what you get from the Government for the surplus lands will be a clear gain to you.

Id. at 49. *See also* S. Ex. Doc. No. 27 at 49, 50, 67, 68, 71, 72, 74, 75, 81.[16]

(b) Commissioners Report. On March 31, 1893, the Commissioners submitted their report to the Secretary of the Interior. *Id.* at 7. In approximately 18 pages, this report summarizes all significant aspects of the Yankton negotiations. In every respect it confirms the substance of the points noted above. The transaction was aptly described by the Commissioners as a "cession of their surplus lands," "purchase of the surplus lands," and "sale of their surplus lands;" excerpts of the negotiations were restated in detail. *Id.* at 7, 17.

The Commissioners concluded that the "purchase covers all the unallotted lands at a liberal price." *Id.* at 20. At the same time the Commissioners noted:

> Advancing civilization and the improvement of the surrounding country have immensely increased the market value of the land in this reservation, but aside from this increased valuation from external causes the reservation is worth much less to-day than it was when they made the treaty with the United States 35 years ago. While the farm improvements on the reservation are very meager, large bodies of timber have been almost wholly destroyed, leaving the reservation nearly denuded of tree life without any compensating improvement. . . . At present these Indians are receiving no benefit worthy of mention from any of their lands. Not only are their surplus lands lying waste and useless, but the same is true of their allotted lands, as but an exceedingly small portion of these lands is under cultivation. *Id.* at 15, 19.

---

[16] In more specific terms, the General Allotment Act (Section 5), formed the backdrop for this process as it did in the Sisseton-Wahpeton (Lake Traverse) negotiations discussed in *DeCoteau*. *DeCoteau*, 420 U.S. 425, 434. It is also mentioned several times in the negotiations. S. Ex. Doc. No. 27 at 51, 52, 57.

The report concluded that but for the opposition from white employees "we could have secured the assent of nearly all the tribe to the sale." *Id.* at 23.

(c) Congressional Ratification. When the report reached Washington, D.C., a bill to ratify the agreement was introduced in the Senate (S.442) but was delayed due to allegations involving the negotiations. *Id.* at 7. In September, 1893, the Commissioner of Indian Affairs detailed a special United States Indian Inspector to the reservation who, after an investigation, concluded "no undue pressure was used or improper methods resorted to. . ." *Id.* at 38.

Less than a month after the investigative report dated November 13, 1893, was received by the Commissioner of Indian Affairs, he formally submitted a favorable report on the entire agreement to the Secretary of the Interior. *Id.* at 1. This report again confirms the substance of all points noted above. In addition, it reviews the agreement *article by article.* Not a word in the entire six-page report supports the Tribe's contentions. Nor is there any doubt that the Yankton agreement was viewed as anything other than a normal cession. The Commissioner of Indian Affairs concluded his report in precisely this fashion: "I have accordingly prepared the draft of a bill for that purpose, in the *usual* form and herewith transmit the same in duplicate . . . . in line with *similar* acts." *Id.* at 7 (emphasis added).

By letter of January 16, 1894, the Secretary of the Interior submitted the Commissioner of Indian Affairs report and enclosed a draft to the President of the United States Senate. *Id.* at 1. In this correspondence, the Secretary specifically noted that the correspondence contained "a full statement of the facts in relation to said agreement." *Id.*

Two days later, the entire package was referred to the Senate Committee on Indian Affairs in order to be printed

as Sen. Exec. Doc. No. 27. This 101-page document contains the entire council proceedings with the Yankton Indians (47-101), the Articles of Agreement between the United States and the Yankton Sioux tribe (38-47), the investigative report (35-38), the Commissioner of Indian Affairs' draft of the bill to ratify and confirm the agreement and the Commissioner of the General Land Office correspondence relating to same (25-35), the report of the Yankton Indian Commission (7-25), the Commissioner of Indian Affairs report (1-7), and the Secretary of the Interior's submittal correspondence (1).

In the interim, as in *DeCoteau,* newspapers reported that many settlers anxiously awaited the opening of the reservation:

> The prospect for the early opening of the Yankton reservation is causing quite a stir at Armour. Inquiries are pouring in from all directions, and the minute the bill passes congress there will be a rush to be on the ground.

Yankton Press and Dakotan, Feb. 15, 1894.

> It is expected that when the president declares the reserve open there will be a great rush for land.

Yankton Press and Dakotan, Feb. 17, 1894.

Similarities to the opening of the Sisseton-Wahpeton (Lake Traverse) reservation do not end here. As noted *supra* at p. 10, in Congress, the Yankton agreement was eventually presented for ratification as part of the annual Indian department appropriation bill, the same process utilized for ratification in *DeCoteau. DeCoteau,* 420 U.S. 425, 440. Moreover, here, as in *DeCoteau,* other agreements were also a part of this package. *Id.* at 439 nn.21, 22. If Congress did not intend this cession agreement for a sum certain to disestablish the Yankton reservation, there is certainly no evidence of such intent in any of the documentation.

The bill, H.R. 6913, was introduced and reported to the Committee of the Whole House by the House Committee on Indian Affairs on April 30, 1894. 26 Cong. Rec. 4275, 53d Cong., 2d Sess. (1894); H.R. Rep. No. 802, 53d Cong., 2d Sess., pt. 5 (1894). In the many pages of general congressional debate that follow, nothing of substance can be cited to support the argument that Congress intended to leave the original boundaries of the reservation intact. In fact, every exchange points to the opposite conclusion.[17]

For example, by June, 1893, the House started to focus on reservation policy generally:

> Mr. WILSON of Washington. I will ask the gentleman whether he does not think a start should be made by diminishing the reservations. There are now about 120,000 reservation Indians, and they occupy about 5,000,000 acres of land. 26 Cong. Rec. 6235 (1894).
>
> Mr. SMITH of Arizona. Yes, they hold five times as much land as they ought to occupy. They are roaming over great areas of land now, and that tends to keep them in a wild state, because it keeps them removed from all sorts of civilizing and educating influences. As long as the Indian is allowed to occupy reservations, some of which are as large as an Eastern State. . . . 26 Cong. Rec. at 6235.
>
> Mr. FLYNN. I realize the fact that we are constantly crowding the Indian more and more off his reservations because we want more land for white settlement. *Id.* at 6236.

[17] Of course, this is not to say that the record does not also contain an occasional reference to "in" or "on" the reservation. But as the Tenth Circuit Court of Appeals aptly pointed out in *Pittsburgh & Midway Coal Min. Co. v. Yazzie*, 909 F.2d 1387, 1416 (10th Cir. 1990), such references are of little probative value. Similar references also appear throughout the documentation in *DeCoteau* and *Rosebud*.

> Mr. HARTMAN. Mr. Chairman, let us proceed by treaty to extinguish every right, if they have any, in the lands of the Indian reservations; let us purchase the lands and allot to them 160 acres each. . . . *Id.*
>
> Mr. COFFEEN. There is much more land given to the Indians in reservations than is proper. They have too much. I join in the sentiment that we must, by treaty, by purchase, and relinquishment, or by some other methods, cut down this vast territory in reservations that often blocks the settlement of great tracts of Western country. That is one of the things that must be done. *Id.*
>
> Mr. BLAIR. Here are 250,000 people . . . occupying an amount of territory which would yield support to at least ten millions of civilized people. *Id.* at 6237.
>
> Mr. WILSON. Of course, if we are never to commence with a reduction of the reservations and of the appropriations, the Indian problem will not be settled. . . . There are places, Mr. Chairman, and there are Indian reservations, that if Congress would do its duty could be closed up and disposed of forever. *Id.*

In those instances when the Yankton measure was first singled out because of the lower settler acreage provisions and the higher interest rate, general references to "cession," "General Allotment Act," and other "common practices" support this same view. *Id.* at 6373, 6374.

And on June 16, 1894, when the debate centered on the Yankton agreement, reference to "public domain" and other similar comments are even more probative:

> Mr. McRAE. [T]hese provisions change the methods of disposing of the lands that will become a part of the *public domain* under these agreements. . . . Mr. LYNCH. [T]he treaties the lands cost 75 cents or 80 cents or $1 an acre; and in one case, that of the Yankton Reservation, the Government pays $3.50 an acre. . . . In regard to the Yankton Reservation

> the committee were of the opinion that as the price of those lands was $3.75 an acre, $1.60 an acre would come too high for a poor man to buy, and therefore we concluded to reduce the amount which one man could enter there to 80 acres. Each reservation was taken up on its own merits, and disposed of on its own merits. *Id.* at 6425 (emphasis added).

In that same debate, others described the process with reference to the same concepts, laws and forces ("the act approved February 8, 1887," "until they become segregated from the Indian lands and become in fact a part of our *public domain.*") *Id.* at 6426 (emphasis added). *See also* 26 Cong. Rec. 6431 ("three times as much land as is necessary").

After the Chair found that a general point of order was not well taken, the bill passed the House that same day. *Id.* at 6427, 6431. Although the message that the bill had passed the House was immediately recorded in the Senate, it was not reported from the Senate Committee on Appropriations until July 10, 1894. *Id.* at 6439, 7230; S. Rep. No. 510, 53d Cong., 2d Sess. (1894).

The Senate debate started on July 18, 1894, and later that same day, the Senate specifically addressed the Yankton agreement. 26 Cong. Rec. 7616, 7627. As was the case in the House, nothing of substance in the Senate debates supports the argument of the Tribe that Congress did not intend this cession agreement to disestablish the original boundaries of the Yankton reservation. Minor unrelated changes were accepted or rejected on the basis of "business as usual." For example, see the "rule which has been pursued in all other Indian appropriations acts" comment and the "I doubt whether we ought to make a different provision in the opening of one of these reservations" comment. *Id.* at 7628. At the same time, the liquor prohibition provision was amended in final form without debate. *Id. See Rosebud*, 430 U.S. 584, 614, 615 and 624 citing *Dick v. U.S.*, 208 U.S. 340 (1908). *See also* Pet. at 9, 11, 27, 29.

The next day, other provisions of the bill were discussed and approved including legislation initiating negotiations for the Uintah and Uncompahgre reservations in Utah that similarly support disestablishment arguments.[18] Other reports were submitted for the record that also continue to reflect the familiar forces noted throughout the Yankton documents. Under a subheading of "Indian Lands and Their Purchase," a report by Mr. Donaldson noted:

> After the reservations were established by executive order or by law they *were and are still being diminished,* by an actual *decrease of reservation lines,* either by the demands of settlers, forcing reduction, or by the modern method of allotment, the Indians, by the latter method, being paid for the excess of the reservation they occupy. When reservations are *diminished* in gross the Indians are paid for the area of the reservation which the Government takes possession of and disposes of under the various laws.

26 Cong. Rec. 7689 (emphasis added).

After additional unrelated debate, the bill, as amended, passed the Senate the same day. *Id.* at 7708.

The House did not concur in the Senate amendments and requested a conference on July 21, 1894. *Id.* at 7783-7784. On July 23, 1894, the Senate insisted on its amendments and agreed to a conference. *Id.* at 7800. After the conference, the Senate still disagreed with some amendments and reported the same with a request for a

---

[18] Both Utah measures were subsequently modified in later legislation. This Court in *Hagen* rejected an original boundary argument and held that the Uintah reservation was diminished. *Id.* The panel majority completely missed the point, citing the 1985 Tenth Circuit case with reasoning since disavowed as "unexamined and unsupported" by the Tenth Circuit and effectively undermined by this Court, which expressly noted this very point. *Yazzie*, 909 F.2d at 1400; *Hagen*, 510 U.S. at 414. Pet. App. 28, n.21. In other litigation, the United States conceded the Uncompahgre reservation no longer exists, although this issue is yet to be resolved by the Utah Supreme Court or the Tenth Circuit Court of Appeals.

further conference. *Id.* at 8015. The House noted the partial concurrence and printed the report of the committee of conference in the record. *Id.* at 8056.

On August 2, 1894, the House consented to a further conference, specifically noting that the subjects upon which no conclusion had been reached included:

> [T]he appropriation of money for lands purchased from the Nez Perce Indians of Idaho and lands purchased from the Yankton Sioux in South Dakota, and lands purchased from the Siletz Indians of Oregon. *Id.* at 8136.

On August 6, the House again considered the matter. *Id.* at 8251. This debate, which extends throughout some 20 pages of the congressional record, contains additional references that support the conclusions noted above. The controversy continued to center around the amount and how the money should be paid, as well as the interest involved, but the comments leave no doubt as to the general view of Congress. *Id.* at 8255. Miscellaneous tributes were initially paid to Mr. Dawes (*Id.* at 8252), and references to "always been the practice" and "nearly universal customs" continued. *Id.* at 8255. Other comments describe the familiar forces:

> Mr. WILSON of Washington. All over the West . . . constantly letters to know when this reservation will be open to settlement. It is exceedingly valuable and fertile land, and will give an opportunity to build up a great agricultural community there. . . . This country is greatly interested in the result. We are gradually closing up our reservations; we are gradually getting them settled by the white people. *Id.* at 8256, 8257.

Later in the same debate, the Yankton agreement was again specifically referenced. *Id.* at 8265. Representative Pickler of South Dakota made clear that it was "the same kind of a treaty we have always made." *Id.* He also noted again:

> [I]f that has not been the *universal practice* of the Government, and if we have not bought Indian lands during a period of time immemorial? Have we not also sold the lands to settlers? Is there anything *new* in that? . . . [T]he treaty for the Yankton Sioux Reservation; and *what can be said of that treaty can, in general terms, be said of the others.* The proposition that is before the House today is very simple. We are needing more lands for settlement. By an act of Congress we provided for sending out a commission to *treat with the Yankton Sioux Indians for their reservation.* . . . [W]e simply procure these lands in the *same way* we have always procured lands from the Indians. We make *no departure from our past policy;* we are following in the *same* line. . . . [W]hat is the *uniform* policy of the Government in these matters. The Government does not want to speculate off of settlers; so it buys lands from the Indians as fairly and as cheaply as it can, and then disposes of the lands to the settlers at such prices as will reimburse it for the money paid to the Indians.
>
> That is the policy pursued in all these cases. And until very recently the Government purchased the lands of the Indians and disposed of them to the settlers free, but lately it is charging the settler what it paid the Indians. . . . [A]nd these are treaties, just as *all other cessions* of land have been. . . . Let us settle with the Indians at once and give the settlers all over this country who want homes an opportunity to secure them. . . . Does not the gentleman know that heretofore we have bought the lands of the Indians and given the lands to settlers? Now we are buying land from the Indians and selling it to the settlers. . . . *Id.* at 8266, 8267-8269 (emphasis added).
>
> Mr. Wilson. . . . And this [another] reservation is standing as a block in the way of the development and progress of the country. That is one reason why it is so important that action, and prompt action,

> should be taken upon this treaty. . . . I hope in return that they may be as generous to the people of the West, and help us to develop that empire, and throw open the reservations of the Government. *Id.* at 8271.

At the end of the next day, on August 7, 1894, the House considered the question and without substantial debate, receded from the disagreement to the Senate amendments, and agreed to the same. *Id.* at 8287. The Senate submitted a brief report on August 8, 1894, noting agreements and disagreements and this conference report was "concurred in." *Id.* at 8296. The bill was signed in the House on August 9, 1894, the Senate on August 10, 1894, and by the President on August 16, 1894. *Id.* at 8360, 8362, 8592. Act of Aug. 15, 1894, 28 Stat. 286.

The Presidential Proclamations opening the Reservations to settlement were deemed especially significant in *Rosebud*, 430 U.S. at 602-603, and *Hagen*, 510 U.S. at 419-420. In this instance, the cession terminology of the Yankton Proclamation similarly reflects this same important construction. Yankton Proclamation of May 16, 1895, 29 Stat. 865.

CONCLUSION

For the foregoing reasons, and those stated in the Petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

KENNETH W. COTTON
WIPF & COTTON
P.O. Box 370
Wagner, South Dakota 57380
(605) 384-5471
Counsel for Respondent

Dated April 28, 1997

APPENDIX

APPENDIX TABLE OF CONTENTS

	Page
Excerpts from the Annual Reports of the Commissioner of Indian Affairs and the Secretary of the Interior	1a
A Memorial to Congress—First Session Legislature of the State of South Dakota, January 31, 1890	47a
Letter from Commissioner, J. T. Morgan, Department of the Interior to Commissioners (July 27, 1892)	49a

APPENDIX

[Excerpts from the Annual Reports of the Commissioner of Indian Affairs and the Secretary of the Interior]

1A. REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS, H. EXEC. DOC. 48TH CONG., 2D SESS. (1884) (EMPHASIS ADDED).

Crows.—Since my last report was made, the Crow Indians, whose reservation in Montana is estimated to contain 4,713,000 acres, have been removed from their old location in the western part of the reservation to the valleys of the Big Horn and the Little Big Horn rivers. At 5.

Not only has this been done, *but it has thus been made possible to add to the public domain* at least 3,000,000 acres of this reservation, leaving still all the land necessary for the use and occupancy of this tribe of Indians. If this 3,000,000 acres are so disposed of as to give the Crows some benefit of the proceeds thereof, they will no longer require any aid from the Government, and thus one fraction of the Indian problem will have been solved, and an example and incentive given to other tribes of Indians to do likewise. At 5-6.

It having been represented to the Department that the Sisseton and Wahpeton and the Yankton bands of Sioux were desirous of disposing of a limited portion of their respective reservations, the Sioux Commission were instructed, under date of May 10th last, to visit said reservations and ascertain if such was the case, and if so to negotiate with them as to the quantity they would *cede*, the conditions as to the price, etc. No report has been received from them up to this date, but the agent for the Sisseton and Wahpeton bands reports that his Indians are unwilling to part with any of their

lands, and that the visit of the Commission was unsuccessful. At 30-31.

1B. REPORT OF THE SECRETARY OF THE INTERIOR, H. EXEC. DOC. 48TH CONG., 2D SESS. (1884) (EMPHASIS ADDED).

If the reservation is larger than is required for the use of the Indians occupying it, there should be a reduction thereof, and all that is not needed for the use of the Indians should be opened to settlement. The time has passed when large and valuable tracts of land fit for agriculture can be held by Indians for either hunting or grazing lands to the exclusion of actual settlers. At 7.

In my last report I called attention to the magnitude of this reservation, and urged that it should be reduced by a purchase of about 18,000 square miles, as proposed by the commissioner appointed in 1882. At 13.

This reservation is much larger than required for their support. The reservation is situated in the Territory of Montana, and contains 7,364 square miles, or 4,713,000 acres of land. At least 3,000,000 acres might be disposed of, . . . at 13.

2A. REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS, H. EXEC. DOC. 49TH CONG., 1ST SESSION (1885) (EMPHASIS ADDED).

This brings me directly to the consideration of the practical policy which I believe should be adopted by Congress and the Government in the management of the Indians. It should be industriously and gravely impressed upon them that they must abandon their tribal relations and take lands in severalty, as the corner-stone of their complete success in agriculture, which means self-support, personal independence, and material thrift. The

Government should, however, in order to protect them, retain the right to their lands in trust for twenty-five years or longer, but issue trust patents at once to such Indians as have taken individual holdings. When the Indians have taken their lands in severality in sufficient quantities (and the number of acres in each holding may and should vary in different localities according to fertility, productiveness, climatic, and other advantages), then having due regard to the immediate and early future needs of the Indians, *the remaining lands of their reservations should be purchased by the Government and opened to homestead entry at 50 or 75 cents per acre*. The money paid by the Government for their lands should be held in trust in 5 per cent bonds, to be invested as Congress may provide, for the education, civilization, and material development and advancement of the red race, reserving for each tribe its own money. This is all the Indians need to place them beyond the oppression and greed of white men who seek, as Mr. Barbour said in 1825 in his report as Secretary of War, "to bereave the Indians of their lands." At 4.

Assuming, however, that I have correctly divined the almost unanimous wish of the States mentioned, and that Congress would feel disposed to respect their wishes, then the further question of purchasing from the Indians all of the lands of the Indian Territory, *and of other Indian reservations*, which the Indians do not need now, or will not need in the early future, and of *opening them to homestead settlement*, presents itself for consideration. At 11-12.

THE KLAMATH RIVER INDIANS IN CALIFORNIA.

They do not need all the lands at present reserved for their use, but they should be permanently settled, either individually or in small communities,

and their lands secured to them by patent *before* any portion of their reservation is *restored to the public domain*.

ROUND VALLEY RESERVATION
IN CALIFORNIA.

This reservation was first selected for Indian purposes in 1856, and according to the survey made in 1860, comprised 25,030.8 acres (being the entire Round Valley), of fertile and productive land. Under the act of March 3, 1873 (17 Stat., 633), the boundaries of the reservation were changed, and the southern portion of the valley *thrown open to settlement*, leaving between 5,000 and 6,000 acres of it within the reservation. At 49.

The reduction of their reservation to two townships has caused some dissatisfaction, and they have asked for more land; . . . If they have suffered any wrong, as is claimed, on account of *the restoration to the public domain* of the Turtle Mountain country, by which is meant that vast territory lying north of Devil's Lake and west of the Red River of the North, the remedy is with Congress. At 53.

2B. REPORT OF THE SECRETARY OF THE INTERIOR, VOL. 1 (1885) (EMPHASIS ADDED).

The question as to what is the best and wisest course to pursue relative to these surplus lands in the Indian reservations not required for the present wants of the Indians is one demanding careful and serious consideration. . . . If, however, it shall be decided that the welfare of the Indians as well as the public interests will best be served by opening the surplus lands of these reservations to public settlement, it should be done in good faith under the general land laws of the United States. At 19.

ESTATE OF THE INDIANS.

I favor the policy recommended by a predecessor in this office, Secretary Kirkwood, of reducing to proper size the existing reservations, when entirely out of proportion to the number of Indians thereon, with the consent of the Indians, and upon just and fair terms; and second, of placing by patent the titles to these *diminished reservations* as fully under the protection of the courts as are titles of all others of our people to their lands. *The surplus portion cut off should be subject to sale* and the proceeds invested for the benefit of the Indians. The execution of it should be cautious and tentative. At 26.

He also recommends the *compression* of Indian reservations and *opening* the surplus to settlement, and cites the condition of those on the *Sisseton Reservation* who occupy separate tracts of land and are self-supporting, maintain churches and schools, and live in comfortable houses. At 78.

3A. REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS (1886) (EMPHASIS ADDED).

The practical proposition which it seems to me would be best for these Indians would be to *divide their lands* in severalty upon the basis I have suggested, or upon some other reasonable basis, and to *sell the remainder to actual settlers* at a fair and just price. At VIII.

The *general allotment* bill again passed the Senate at the last session, and was favorably reported in the House of Representatives. As there seems to be no substantial opposition to this bill, it is hoped that it will be come a law during the coming winter. Its passage will relieve this office of much embarrassment and enable it to make greater progress in the important work of assisting the Indians to be-

come individual owners of the soil by an indefeasible title. At XX.

3B. REPORT OF THE SECRETARY OF THE INTERIOR, VOL. I (1886) (EMPHASIS ADDED).

I wish I could say that the progress in this direction is sufficiently rapid to promise an early accomplishment of the policy of the Government in reference to our Indian population. That policy, as I understand it, is the incorporation of the Indian race into our political and social system as citizens. . . . As I stated in my last report, the only alternative now presented to the American Indian race is speedy entrance into the pale of American civilization, or absolute extinction. At 4.

The Indians have seen the wide ranges of territory occupied or claimed by them gradually but surely narrowed to smaller limits . . . at 6.

NEGOTIATIONS WITH INDIANS.

The negotiations authorized by the act approved May 15, 1886, making appropriations for the Indian service, to be made with certain bands or tribes in Minnesota. North Dakota, and Montana, concerning their existing treaties and reservations, and with other Indians in Washington and Idaho Territories for their removal to certain designated reservations and *cession* of certain lands, have been entrusted to a commission appointed during July last. . . . At 13.

By Executive order of May 1, 1886, the land embraced within the Columbia Reservation in Washington Territory, except the tracts occupied by and allotted to the Indians thereon, was restored to the *public domain*. . . . At 14.

4A. REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS (1887) (EMPHASIS ADDED).

ALLOTMENT OF LAND IN SEVERALTY.

The *general allotment act*, the plan of which was first suggested in the annual report of this office for 1878, became a law on the 8th of February last. I have deemed it a matter of public interest and convenient reference to submit in this report not only the full text of the act, which will be found on page 274, but also an abstract of its provisions, which are as follows: . . .

After lands have been allotted to all Indians of a tribe (or sooner if the President thinks best), the Secretary of the Interior may negotiate with that tribe for the sale of any of their unallotted lands, such negotiations to be subject to ratification by Congress. . . .

In case lands are thus sold, the purchase money to be paid therefore by the United States shall be held in the United States Treasury in trust for that tribe, at 3 per cent interest, which interest shall be subject to the appropriation by Congress for the civilization of said tribe. . . .

All lands adopted to agriculture released to the United States by Indian tribes shall be disposed of only to bona fide settlers, in tracts not exceeding 160 acres (subject to grants which Congress may make in aid of education), and no patents shall issue to any such settler or his heirs for such lands until after five years' continuous occupancy thereof as a homestead, and any conveyance of or lien on said land prior to the issuance of patent thereto shall be null and void. At IV and V.

The President has wisely ordered that allotments be made only on reservations where the Indians are

known to be generally favorable to the idea, and the following have thus far been selected: Papago and Pima (Salt River). Arizona: L'Anse and Vieux de Sert, Michigan; Lac Court d'Oreilles, Bad River, Red Cliff, and Lac du Flambeau, Wisconsin; Fond du Lac, Minnesota; Lake Traverse, Devil's Lake, Ponca, and Yankton, Dakota; Nex Perce, Idaho; Crow, Montana; Absentee Shawnee, Pottawatomie, Quapaw, Modoc, Ottawa, Shawnee, Seneca, and Wyandotte, Indian Territory; Winnebago, Nebraska; Siletz, Grande Ronde, and Warm Springs, Oregon; and Muckleshoot, Washington Territory. At VI and VII.

I fail to comprehend the full import of the allotment act if it was not the purpose of the Congress which passed it and of the Executive whose signature made it a law ultimately to dissolve all tribal relations and to place each adult Indian upon the broad platform of American citizenship. Under this act it will be noticed that whenever a tribe of Indians or any member of a tribe accepts lands in severalty the allottee at once, *ipso facto*, becomes a citizen of the United States, endowed with all the civil and political privileges and subject to all the responsibilities and duties of any other citizen of the Republic. At XXIX.

To enable the Secretary of the Interior to *negotiate* with the several tribes and bands of Chippewa Indians in the State of Minnesota for such modification of existing treaties with said Indians and such change of their reservations as may be deemed desirable by said Indians and the Secretary of the Interior, and as to what sum shall be a just and equitable liquidation of all claims which any of said tribes now have upon the Government; and also to enable said Secretary to *negotiate* with the various bands or tribes of Indians in northern *Montana* and

at *Fort Berthold*, in Dakota, for a reduction of their respective reservations, or for removal therefrom to other reservations; and also to enable said Secretary to negotiate with the upper and middle bands of Spokane Indians and Pend d'Oreille Indians, in Washington and Idaho Territories, for their removal to the Colville, Jocko, or Coeur d'Alene reservations, with the consent of the Indians on said reservations; and also to enable said Secretary to negotiate with said Indians for the *cession* of their lands to the United States; and also to enable said Secretary to negotiate with the Coeur d'Alene Indians for the *cession* of their lands outside the limits of the present Coeur d'Alene reservation to the United States, $15,000, or so much thereof as may be necessary, to be immediately available; but no agreement shall take effect till ratified by Congress. At XXVII and XXVIII.

The next Indians visited by the Commission were the Arickarees, Gros Ventres, and Mandans, of the Fort Berthold agency in Dakota, with whom an agreement was concluded January 11, 1887. By the terms of the agreement, the Indians *cede* about 1,600,000 acres of their reservation for the sum of $800,000, . . . *The agreement also provides for the allotment of lands in severalty to said Indians within the diminished reservation*. . . .

The Indians in northern Montana, belonging to the Fort Peck, Fort Belknap, and Blackfeet agencies, were the next visited by the Commission. These Indians occupy a reservation estimated to contain 33,830 square miles, or 21,651,000 acres. The agreement entered into with them provides for the *cession* to the United States of about 17,500,000 acres, and leaves three separate reservations of sufficient area, it is believed, to meet all their present and prospective wants. At XXIX.

A portion of the lands set apart to the Pawnees as a reservation, under the act of April 19, 1876 (19 Stats., 28), comprising 53,005.96 acres, was *ceded* to the United States by the Creeks by the third article of the treaty of June 14, 1886 (14 Stats., 785). At LXIV.

4B. REPORT OF THE SECRETARY OF THE INTERIOR, H. EXEC. DOC. 50TH CONG., 1ST SESS. (1887-1888) (EMPHASIS ADDED).

And I can only reiterate the conviction expressed in former reports, that the Indian race has reached a crisis in its history. Surrounded on all sides by the forces of civilization; all the reservations closed in and pressed upon by ever-increasing masses of population, made up of impetuous, daring, and aggressive settlers, miners, ranchmen, and traders; with no possibility of removal to other reservations or of escape into mountain fastnesses, the only alternative presented to the Indian race is absolute extinction or a quick entrance into the pale of American civilization. At 25.

The most important measure of legislation ever enacted in this country affecting our Indian affairs is the general allotment law of February 8, 1887. By this law every Indian, of whatever age, may secure title to a farm, enjoy the protection and benefits of the law, both civil and criminal, of the State or Territory in which he may reside, and be subject to the restraints of those laws. At 25-26.

The argument that this legislation or the measures adopted under it should be postponed until the race by gradual process is morally and intellectually adapted to the condition of civilized society is conclusively answered by the fact that a century of effort to so adapt them has produced

nothing in that direction which promises any such fitness within a century to come. The exigencies of the age will not await another century or even a quarter of a century of such expenditure of effort and time with such incommensurate results. At 26-27.

NEGOTIATIONS WITH INDIANS.

Agreements were also negotiated by the Commission with the Indians belonging to the Fort Peck, the Fort Belknap, and the Blackfeet agencies, in Northern Montana, for *cession* of about 17,500,000 acres of territory, leaving about 4,151,000 acres to be divided into three separate reservations of sufficient area to meet the wants of the Indians now inhabiting that portion of the large reservation in Northern Montana. The compensation agreed upon for the land proposed to be ceded by this agreement is $4,300,000, . . .

As a summary of the labors of the Commission it is estimated that agreements negotiated provide for *cession* to the United States by the Indians of nearly 22,000,000 acres of territory, besides the surrender by certain tribes of claims to large areas of territory, the quantities and limits of which are rather indefinite and undefined. At 38-39.

The Commission appointed under the act of March 3, 1885, for the purposes therein required, has made its report, showing that the Umailla, Walla Walla, and Cayuse Indians of Oregon have consented to the provisions of the law for diminishing the area of their reservation, taking lands in severalty, and for sale of their surplus lands for their benefit. They determined and set apart a diminished reservation embracing an area of 119,864 acres, for agricultural, pasture, timber, and school farm lands for the Indians. At 39.

by the Commission, and an agreement was concluded with the Indians of the Colville Reservation whereby they ceded to the United States the northern half of their reservation, embracing about 1,500,000 acres, for a consideration of $1,500,000. The report of the commission, their proceedings, and the agreement negotiated, were submitted to Congress at the beginning of its last session, accompanied by a draft of a bill to ratify the same, although certain provisions of the agreement were somewhat unsatisfactory to the Department. That body, when the agreement came before it for consideration, took the ground that as that reservation had been established by Executive order, it could be restored to the public domain without the consent of the Indians, and passed an act vacating and restoring to the public domain that portion of the reservation which the Indians had agreed to cede, the same to be thrown open to settlement and entry by proclamation of the President. This act becomes a law without the approval of the President. . . .

The act provides that the net proceeds of the lands so restored shall be set apart in the Treasury of the United States for the time being, but subject to such future appropriation for public use as Congress may make, and that until so otherwise appropriated may be subject to expenditure by the Secretary of the Interior from time to time for certain specific purposes for their benefit, and in the promotion of education, civilization, and self-support among the said Indians. . . .

The action of Congress in relation to this reservation constitutes legislative declaration as to the status of Executive order reservations. It is to be regretted that this declaration was not made prior to the appointment of a commission to treat with the Indians occupying this reservation for a relin-

quishment of a portion of it, for by the fact that a commission was sent to negotiate with them the Indians were led to believe through the councils held by the Commission that they possessed title to the lands and ought to be consulted as to the disposal thereof. The fact that their supposed rights have been ignored and that a portion of their reservation has been vacated and restored without their consent may cause them to feel sorely aggrieved when the land shall be opened to settlement after the survey thereof. At XLV-XLVI.

10A. REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS (1893) (EMPHASIS ADDED).

COMMISSIONS AND NEGOTIATIONS FOR REDUCTION OF RESERVATIONS.

Shoshone Reservation, Wyoming. — Under the provision of a clause contained in the Indian appropriation act approved March 3, 1891 (26 Stats., 1010), the Secretary of the Interior appointed three commissioners to negotiate with the Indians of Shoshone or Wind River reservation in Wyoming for the surrender of a portion of their reserve. . . .

Pyramid Lake Reservation, Nevada. — As stated in office report for the year 1892, an agreement was negotiated October 17, 1891, with the Pah Ute Indians residing upon the Pyramid Lake Reservation in Nevada, for the surrender of the southern portion of the reservation embracing the town of Wadsworth. At 30.

Siletz Reservation, Oregon. — October 1, 1892, an agreement was concluded with the Indians of this reservation, whereby they ceded to the United States, for the sum of $100,000, all their claim, right, title, and interest in and to all the unallotted

lands of the reservation, except five sections of timber land, the amount ceded being about 178,840 acres. . . .

Nez Perce Reservation, Idaho. — May 1, 1893, an agreement was concluded with the Nez Perces in Idaho, by which they ceded to the United States all their unallotted lands (except some 30,000 acres of timber) for the sum of $1,626,222 and certain other considerations. The agreement has not yet been submitted to you for transmittal to Congress. . . .

Yankton Reservation, S. Dak. — The report of the Yankton Commission, dated March 31, 1893, and filed in the Department May 27, 1893, submitted an agreement concluded with the Yankton Sioux Indians December 31, 1892, by which they ceded to the United States all their surplus lands, some 168,000 acres for the sum of $600,000 plus $20 for each male adult of the tribe. At 32.

11A. ANNUAL REPORT OF THE COMMISSION OF INDIAN AFFAIRS (1894) (EMPHASIS ADDED)

. . . but of recent years Congress has been in the habit of attaching to this act agreements with various Indian tribes and of ratifying them therein, instead of ratifying them in separate acts, as in former years. This adds to what is called an appropriation for the Indian service large sums which are really payments for lands purchased by the Government primarily for the benefit of its white citizens. At 2.

AGREEMENTS WITH INDIANS.

Siletz, Yankton, and Nez Perces. — The agreement concluded with the Siletz Indians in Oregon, October 1, 1892, that with the Yankton Sioux in South Dakota, concluded December 31, 1892, and

that with the Nez Perces in Idaho, concluded May 1, 1893, referred to in my last annual report, were ratified by the act of Congress approved August 15, 1894 — the Indian appropriation act. Under these agreements *some 880,000 acres of land will be restored to the public domain for disposition as provided in said act. At 28.*

PYRAMID LAKE AND WALKER RIVER.

That agreement has not been ratified, but Senate bill No. 99, Fifty-third Congress, second session, now pending, provides for vacating and restoring to the *public domain* the entire Walker River Reservation, and also a portion of the Pyramid Lake Reservation, which portion embraces a larger extent of territory than that included in the agreement. At 26-27.

11B. REPORT OF THE SECRETARY OF THE INTERIOR H. EXEC. DOC., 53RD CONG., 3RD SESS. VOL. 14 (1894-95) (EMPHASIS ADDED).

There are two means chiefly relied upon — education and *allotments of land in severalty*. . . .

I do not question the advisability of allotting land to Indians in severalty, but I do most seriously question the propriety of this course before the Indians have progressed sufficiently to utilize the land when taken. The allotments should be made to the Indians in severalty for the good of the Indians, for the advancement of the Indians, not for the purpose of obtaining land connected with the Indian reservation to satisfy the insatiable desire of border men, who obtain it frequently, not for homes, but for speculation. . . .

I urge a treatment of Indian land based solely upon the purpose of realizing from it for its owners

the highest possible value. What is best for the Indians — to keep their land or to sell it? If the members of a tribe have reached a state sufficiently civilized to be able to progress still further by selling a portion of their land, then sales should be made; but the land should not be purchased from the Indians at the best bargain the United States can make. It should be sold for the Indians by the United States, the Department acting as a faithful trustee, and obtain for the Indians every dollar the land will bring. At III-IV.

AGREEMENTS. — The agreements concluded in 1892 and 1893 with the Nez Perces, Yankton Sioux, Yuma, and Siletz Indians, were ratified by the last session of Congress and will result in *restoring to the public domain some 921,000 acres of land*. At IX.

12A. REPORT OF THE SECRETARY OF THE INTERIOR, H. DOC. 54TH CONG., 1ST SESS. VOL. 14 (1895-96) (EMPHASIS ADDED).

The area of public lands undisposed of at the close of the fiscal year amounted to 599,083,495 acres. This aggregate does not include Ohio, Indiana, and Illinois, in which a few isolated tracts may remain. It is also exclusive of Alaska, containing approximately 370,000,000 acres, and military and *Indian reservations,* reservoir sites, and timber reserves, *which may in the future be added to the public domain.* At XVII.

13A. ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS (1896).

COMMISSIONS.

Crow, Flathead, Northern Cheyenne, Fort Hall, Uintah, and Yakima. — The Indian appropriation

act for the current fiscal year authorizes the appointment by the Secretary of the Interior of a commission to consist of three persons, not more than two of whom shall be of the same political party and not more than one of whom shall be resident of any one State, to negflotiate with the following Indians, viz: The Crow and Flathead Indians in Montana for the cession of portions of their respective reservations; the Northern Cheyennes and Crows for the removal of the Northern Cheyennes from their present reservation on the Rosebud River to the southern portion of the Crow Reservation; the Indians of the Fort Hall Reservation in Idaho, the Uintah Reservation in Utah, and the Yakima Reservation in Washington, for the surrender of any portions of their respective reservations, and for such modification of existing treaties with them as may be deemed desirable by the Indians and the Secretary of the Interior; any agreement thus negotiated to be subject to ratification by Congress. At 42.

13B. REPORT OF THE SECRETARY OF THE INTERIOR (1896) H. DOC. 54TH CONG., 2D SESS. VOL. 12 (1896-97) (EMPHASIS ADDED).

The public domin, or public lands—the property of the nation, and subject to legislative control and disposition by Congress alone—is the area known as public lands acquired by treaty, capture, cession by States, conquest or other acquisition, and purchase. At VI.

It is also exclusive of military and *Indian reservations*, reservoir site and timber reservations, and tracts covered by selections, filings, railroad grants, and claims as yet unadjudicated, a part of which *may in the future be added to the public domain.* At VII.

COMMISSIONS.

The Crow and Flathead Indians in Montana for the *cession* of portions of their respective reservations; the Northern Cheyennes and Crows for the removal of the Northern Cheyennes from their present reservation on the Rosebud River to the southern portion of the Crow Reservation; the Indians of the Fort Hall Reservation in Idaho, the Uintah Reservation in Utah, and the Yakima Reservation in Washington, for the surrender of any portions of their respective reservations, and for such modification of existing treaties with them as may be deemed desirable by the Indians and the Secretary of the Interior; any agreement thus negotiated to be subject to ratification by Congress. At XLVI-XLVII.

THE UNCOMPAHGRE INDIAN RESERVATION.

A commission was appointed to allot the lands, and was instructed to inform the Secretary of the Interior what portion of the Uncompahgre Reservation in Utah *was not required for allotment or was unfit for agricultural uses, in order that the same might be restored to the public domain and opened for settlement.* That commision was duly appointed, but had difficulty in finding sufficient agricultural lands within the reservation to make the allotments, and was totally unsuccessful in persuading the Uncompahgres to agree to pay $1.25 per acre for the same. At XLVIII.

[Reproduced at the National Archives]

51st Cong., 1st Session, Bill No. 183

Referred to the Committee on Indian Affairs
Feb. 28, 1990

United States Senate
23-3

Copy, House Bill No. 183.

Introduced by Mr. Norbeck.

First Session Legislature of the State of South Dakota.

A Memorial to Congress praying for the opening to settlement under the Homestead Law, of the Yankton Indian Reservation in Charles Mix County, in South Dakota.

To the Congress of the United States:

Your Memorialists, the Legislature of the State of South Dakota, would respectfully request that you take the necessary steps to open to settlement under the Homestead law, the Yankton Indian Reservation in Charles Mix County, in South Dakota, or so much thereof as is not required for the use of the Indians resident thereon.

We would represent that said Reservation embraces about eighteen Congressional townships, and that only about 1900 Indians are resident thereon. That they occupy only a very small portion thereof, and that nearly the entire Reservation is unoccupied and is not used for pasturage, meadow or agricultural purposes except to a slight extent.

That it is surrounded on all sides by a thickly settled agricultural community. That the existence of this large tract of wild land in their midst is a constant danger and menace by reason of the immense prairie fires which annually sweep over it unchecked.

The Secretary of State is hereby directed to transmit certified copies of the foregoing Memorial to the Secretary of the Interior and to the Senators and Representatives of South Dakota in Congress.

Approved January 31st 1890, at 4:10 p.m.

/s/ J. H. Fletcher
Acting Governor

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,

Washington, July 27, 1892.

Gentlemen:

The following instructions are given for your guidance in the discharge of your duties as commissioners to negotiate with the Yankton Sioux Indians for the cession of their surplus lands, the authority for your appointment being contained in the appropriation of $11,500, made by the Indian Appropriation Act for the current fiscal year, "To enable the Secretary of the Interior to negotiate with any Indians for the surrender of portions of their respective reservations, any agreement thus negotiated being subject to subsequent ratification by Congress."

The Yankton Sioux Indian Reservation, in South Dakota, was created by the first article of the treaty with the Yankton Sioux of April 19, 1858 (11 Stats., 743), by which they ceded to the United States all the lands then owned, possessed or claimed by them, except four hundred thousand acres described as follows:

"Beginning at the mouth of the Naw-izi-wa-koo-pah or Choteau River and extending up the Missouri River thirty miles; thence due north to a point; thence easterly to a point on the said Choteau River; thence down said river to the place of beginning, so as to include the said quantity of four hundred thousand acres".

As actually surveyed it contains 430,405 acres. There has been allotted and patented to the Indians some 167,325 acres under the Act of February 8, 1887 (24 Stats., 388). The allotments made under the Act of February 28, 1891, have not yet been examined and approved but it is estimated that they will include about 95,000 acres. Some 852 acres have been reserved for government and religious purposes, leaving a surplus of some 168,000 acres.

The treaty makes no provision regarding the cession or relinquishment of the reservation or any portion thereof.

You will call a full council of the Indians and submit the subject for their consideration. No undue pressure should be used to induce them to cede the surplus lands, but the adventure to be derived from such action should be fully placed before them. Every member of the tribe has received an allotment of not less than 80 acres of agricultural land, or a double quantity of grazing land, averaging over 150 acres for each member of the tribe.

The surplus lands in their present state of reservation cannot be made to yield any considerable income, while the money which will be paid for their relinquishment, placed at 5 per cent interest will give them an income which will be sufficient to afford them all the assistance they need.

If they are unwilling to cede all the surplus land you will endeavor to obtain the relinquishment of such part thereof as they may be willing to part with.

If they consent to the relinquishment of the whole or any portion of the surplus lands the terms and conditions of sale should then be agreed upon, which should be just and equitable to the Indians as well as the United States. It is understood that some of these lands are very valuable and will be eagerly sought after. It is therefore suggested the agreement provide for their appraisement and sale to the highest bidder.

The terms and conditions agreed upon in council should be reduced to writing and incorporated in the accompanying form of agreement which should be signed by at least a majority of the male adults of the members of the tribe.

This agreement should also provide for the disposition of the funds to be derived from the cession. If possible the whole amount, or the larger portion, should constitute a fund, the interest of which shall be applied for such pur-

poses as may be agreed upon. Provision should not be made for the per capita payment of a large portion of the purchase money.

If possible, a portion of the interest should be made available for the payment of local taxes on the allotted lands during the trust period. (See Article IV of accompanying form).

When the agreement is freely and properly signed, your certificates and the certificate of the official Interpreter, should be attached to the instrument.

The proceedings of the council should be reduced to writing and attested by your signatures and that of the official Interpreter.

The Indians should be informed that the agreement will not be valid or binding until ratified by Congress.

You are authorized to employ an Interpreter or Interpreters when necessary and the services of the Agency Interpreter are not available.

The accompanying form of agreement is transmitted for your guidance and as an indication of the views of this office as to the proper disposition of the funds, but you are not required to adhere to the same absolutely.

Very respectfully,

/s/ T J Morgan
Commissioner.

(Allen)

P.

5A. REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS (1888) (EMPHASIS ADDED).

On the Lake Traverse Reservation (Sisseton Agency) in Dakota, all the Indians entitled thereto have received allotments, except some 25, and most of these have selected their tracts and will soon receive their allotments. The schedules of allotments already made were certified to by this office on May 10, 1888. They were transmitted to the Secretary and by him approved, and the Commissioner of the General Land Office was directed to cause patents to issue to the allottees, as provided in the fifth section of the severalty act. There remains on the reservation 788,900 acres of unallotted lands, of which surplus the Indians desire to dispose of some portion, and it would doubtless be greatly to their advantage to do so; but no funds are available to defray the necessary expenses of negotiations with them for this purpose. . . .

The coming on of the winter of 1887-'88 necessitated the discontinuance of allotment work on the Siletz, Yankton, Crow and Winnebago Reservations, and for want of funds it could not be resumed in the spring. Work was discontinued on the Absentee Shawnee and Pottawatomie Reservations on the 3d of April last, and for the same reason has not been resumed. At XXXVII.

On the Sisseton Reservation only have allotments been practically completed. . . .

Progress of allotment work elsewhere has been slow, owing to the time required to make surveys preliminary to allotting, and the late date at which the appropriation bill passed. . . .

Considerable opposition to the allotment policy has been developed from two sources. Those who

believe in the wisdom of tribal ownership, and in the policy of continuing the Indian in his aboriginal customs, habits, and independence, oppose it because it will eventually dissolve his tribal relations and cause his absorption into the body politic. On the other hand, those who expected that the severalty act would immediately open to public settlement *long-coveted* Indian lands, oppose it because they have learned that these expectations will not be realized. At XXXVIII.

The authority under which, for the past five or six winters, these Indians have cut and marketed their dead-and-down timber has been granted each year by the Department, on recommendation of this office, said recommendation being based on a decision rendered May 19, 1882, by Hon. H. M. Teller, then Secretary of the Interior, in regard to the right of the Sisseton Agency Indians to market such timber from their reservation in Dakota. The decision was as follows:

Sir: I have your letter of the 18th ultimo, asking that I approve of the application of Agent Crissey, of the Sisseton Agency, to allow the Indians on that reservation to cut dead and fallen timber and to sell the same. The Indians of that agency hold their reservation by virtue of a treaty made with the United States in 1867. It is recited in the treaty that, in consideration of certain cessions made by the Indians to the United States and the faithful conduct of the Indians, the Government set apart the reservation for the use of said Indians as a permanent home. It is not claimed, however, that these Indians hold by other and different title from other Indians who occupy their reservations by treaty stipulations. . . .

The fee to the reservation is in the Government, and the right of the Indians to the occupation

thereof is as unquestioned as the right of the Government to the fee. In such occupation they can not be disturbed by the Government, save through its legislative department; and it ought not to be supposed that such occupation will be interfered with without the consent of the Indians, unless, by misconduct on their part, the right to occupy should be lost. At XLIII-XLIV.

It proposed to set off from the Sioux Reserve five separate reservations for the Rosebud, Pine Ridge, Lower Brule, Cheyenne River, and Standing Rock Indians, respectively, and to reduce the Crow Creek Reserve (which is separated from the Sioux Reserve by the Missouri River), *and to restore the remaining lands of these two reservations to the public domain. By the boundaries proposed the lands restored would amount to over 11,000,000 acres and the lands retained to a little less than 11,000,000 acres. . . .*

The Indians were to have lands allotted to them in severalty and to receive patents therefore. . . .

The lands restored to the public domain were to be sold to settlers under the provisions of the homestead acts for 50 cents per acre, but $1.50 was to be paid for lands entered for town-site purposes. At LXXIII-LXXIV.

5B. REPORT OF THE SECRETARY OF THE INTERIOR, H. EXEC. DOC. 50TH CONG., 2D SESS. (1888-1889) Vol. 10 (EMPHASIS ADDED).

A beginning has already been made upon another line of policy, from which much appears justifiably to be hoped—the complete dispersion of the tribes and bands by the establishment of individuals as landowners, and the investment of them with the dignity, rights, and privileges of citizenship in the

State and nation. At another point I will exhibit what has been accomplished during the past year in the prosecution of this policy. At XXXI.

INDIAN COUNTRY.

The entire extent of territory *now* in a state of reservation for Indian purposes, including all portions of the Indian Territory, whether in fact occupied or unoccupied by Indians, is 112,413,440 acres; being equivalent to an average of 456 acres for each Indian, computed on the last reported number of the total population, including those estimated as outside the reservations. Of this area, about 81,020,129 acres are within the scope of the *general allotment law of 1887*, and afford an average for the population residing upon such lands, amounting to 173,985, of about 465 acres to each. *It will be seen that, by the execution of the general allotment law and breaking up of the reservations a wide area of the public domain will be opened to settlement. . . .* At XXXIV.

The work of allotting lands in severalty to Indians which was begun, under the provisions of the act of February 3, 1887 (24 Stats., 388), on seven reservations, the Yankton and *Lake Traverse Reservations* in Dakota Territory, the Winnebago Reservation in Nebraska, the Pottawatomie Reservation in the Indian Territory, the Crow Reservation in Montana, the Fond du Lac Reservation in Minnesota, and the Siletz Reservation in Oregon, was suspended early in 1888, because the funds appropriated for employment of the special agents, and for other expenses incident thereto, had been exhausted. . . .

On the Lake Traverse Reservation the field work had been completed, allotments were made to each Indian belonging thereon, and the schedules of the

allotments were presented to this Department for approval and for instructions for patents to be issued to the allottees. At XXXIX.

THE GREAT SIOUX RESERVATION.

By the treaty of 1868 with various bands and tribes of the Sioux nation of Indians—a treaty which, in all the circumstances of its negotiation, as the final composition of bloody disturbances of long continuance urged on the part of the Government by citizens and officers of the Army of the first rank and character, as well as by unusually solemn and particular expressions of engagement, is peculiarly stamped with the obligation of observance by the United States—a reservation of very large extent, then comprehending the most of the Territory of Dakota lying west of the Missouri, was established to be a perpetual home for these people, with specific guaranty on the part of the Government that no white man should be allowed to enter it, to pass through it or across it, without the consent of the Indians first had and obtained; and with the further clause in the twelfth article that— . . .

No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians occupying or interested in the same. . . .

In *1876* an agreement was made by which the Sioux relinquished a portion of this reservation, embracing the Black Hills country and some territory to the northward, and that agreement was ratified by Congress, although it does not appear to have received the consent, by signature, of three-fourths of the Indians as required under the treaty of 1868. The reservation as so reduced, however,

contains a little more than 22,000,000 acres, and there is now upon it a population exceeding 23,000 Indian people, who are rationed and governed through five agencies provided by law and located upon the reserved territory. . . .

The act of the present Congress, approved on the 30th of April, 1888, contains elaborate provisions, the general purposes of which are to reduce the reserved area into six separate reservations and *cede* the remainder, above 11,000,000 acres, to the Government; to open the *ceded portion* to homestead settlement, except so far as shall be necessary for the uses of two railroad companies who have made agreements with the Sioux heretofore for rights of way and station-grounds; to collect from homesteaders upon making final proof, for the use of the Indians, fifty cents per acre of the lands homesteaded, to apply the proceeds to the education and civilization of the Indians, and facilitate the allotment of the separate reservations in severalty and their establishment in independence thereon, extensive advancements being, in the mean time, authorized for these purposes; and to do so administer their affairs that, in the end, the people of this nation may be reclaimed from barbarism and established in citizenship. At LVI.

As has been said, the price proposed seemed inadmissible. It would require for no more land than is now desired to be *ceded* the payment of nearly as much money as was paid to France for the entire territory of Louisiana, merely to extinguish the Indian right of occupancy, the fee being, according to our theory, already in the Government. It would, besides, fix a probable minimum, at least, for the several millions of acres which must, at a later period, after allotments in severalty have been perfected and their improved condition thereunder shall

warrant it, *be further purchased and opened to settlement.*

The policy of Congress is wisely declared by the act to require the disposition of these lands only to homestead settlers, to be paid for after the full period of five years' residence and improvement, which now entitled homesteaders *upon the public domain elsewhere* to a patent without price. At LXIV-LXV.

The other features of the proposed amendments require no further explanation of the reasons for making them than is suggested by their reading, to one who is acquainted with the circumstances. . . .

Attention is invited to the interesting information and full presentment of the various aspects of the problem of *opening this reservation* in the elaborate report of the Commission, which is appended hereto. It appears satisfactorily that, restricted to the sole means of argument and explanation, their full duty was done in their submission of the act. At LXVI.

AGREEMENTS NEGOTIATED WITH INDIANS IN THE STATE OF MINNESOTA AND IN DAKOTA, MONTANA, IDAHO, AND WASHINGTON TERRITORIES.

The agreement entered into with the Gros Ventre, Piegau, Blood, Blackfeet, and River Crow Indians in Montana, for dividing a portion of their reservation into three separate reservations for the use and occupation of the Indians belonging respectively to the Fort Peck Agency, the Fort Belknap Agency, and the Blackfeet Agency, and for relinquishment of the Indian title to the remainder, was ratified by act of Congress approved May 1, 1888. The result of this agreement is the *extinguishment of the Indian title* to a vast area of country, estimated at about 17,500 acres, . . .

These Indians for whom appropriations have heretofore been made for their support, as a gratuity from the Government, will now receive the benefits of such appropriations made as payment of consideration money for the *portion of their territory ceded* by the agreement. At LXVII.

And that this will remain so for many years to come is apparent, when it is considered that *in addition* to 22,000,000 acres of vacant public land open to settlement there are 27,000,000 acres of land in Dakota *within the reservations of the Indian tribes, which will sooner or later be opened.* At CXXII.

6A. REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS (1889) (EMPHASIS ADDED).

Unexpectedly called to this responsible position, I entered upon the discharge of its duties with a few simple, well-defined, and strongly-cherished convictions: . . .

First.—The anomalous position heretofore occupied by the Indians in this country can not much longer be maintained. *The reservation system belongs to a "vanishing state of things" and must soon cease to exist. . . .*

Second.—The logic of events demands the absorption of the Indians into our national life, not as Indians, but as American citizens. At 3.

This whole reservation system is an abomination that should cease to exist. At 8.

During the year 1,341 patents have been issued to the Indians of the Lake Traverse Reservation in Dakota, which will be delivered at an early day. The allotment of lands on this reservation having been practically completed, recommendation was made June 21, 1889, that an officer or officers be designated to *negotiate for the relinquishment of*

such portion of the surplus lands as the Indians might be willing to cede, and instructions for the guidance of such commission have been prepared and submitted for your approval. At 16.

The second great economical fact is that the lands known as Indian reservations now set apart by the Government for Indian occupancy aggregate nearly 190,000 square miles. This land, for the most part, is uncultivated and unproductive. When the Indians shall have been properly educated they will utilize a sufficient quantity of those lands for their own support and will *release the remainder that it may be restored to the public domain* to become the foundation for innumerable happy homes; and thus will be added to the national wealth immense tracts of farming land and vast mineral resources which will repay the nation more than one hundred fold for the amount which it is proposed shall be expended in Indian education. At 112.

6B. REPORT OF THE SECRETARY OF THE INTERIOR. H. EXEC. DOC. 51st CONG., 1ST SESS. VOL. II (1889-90) (EMPHASIS ADDED).

Thus the aggregate of these *two cessions* is 5,439,865.60 acres. By the thirteenth section of this appropriation act, provision was made that the lands so acquired, except the sixteenth and thirty-sixth sections, should be *opened for settlement by proclamation of the President, and disposed of to actual settlers under the homestead laws only.* At IV.

THE SIOUX COMMISSION.

With the allotments the reservation disappears, for after the allotments are made what remains is sold to the Government and the proceeds thereof become a trust fund, the interest on which is paid to

the particular tribe, thus producing a reliable annual income. At L.

7A. REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS (1890) (EMPHASIS ADDED).

The Indians, with whose welfare and civilization he is charged, are widely scattered, and the territory in what is known as Indian reservations embraces not less than 181,000 square miles. At V.

It has become the *settled policy* of the Government to *break up reservations*, destroy tribal relations, settle Indians upon their own homesteads, incorporate them into the national life, and deal with them not as nations or tribes or bands, but as individual citizens. The American Indian is to become the Indian American. How far this process has advanced during the past year will be shown under the head of the *reduction of reservations* and allotment of lands. At VI.

It was further settled in the case of the Cherokee Nation *v.* The State of Georgia (5 Peters, p. 1) that the Indians had an unquestionable and theretofore an unquestioned right to the lands they occupied *until* that right of occupancy was extinguished by voluntary *session* to the Government; . . . at XXIII.

REDUCTION OF RESERVATIONS.

At the date of the last annual report of this office there were one hundred and thirty-three Indian reservations in the United States (counting the twenty-two small reserves of the Mission Indians of California as one only and the nineteen Pueblo reserves in New Mexico also as one), having an aggregate area of about 116,000,000 acres or 181,250 square miles, which is greater than that of the New England and Middle States combined, greater than the aggregate area of the States of Ohio, Indiana, Illinois, and Kentucky, and nearly equal to

the combined area of the two Dakotas and Montana. To carry the comparison further, it is larger by half than the United Kingdom of Great Britain and Ireland, larger than Sweden or Norway, and nearly as large as either France or Spain. The total Indian population of the United States, exclusive of Alaska, was by the census of 1889, 250,483, and exclusive of the five civilized tribes in Indian Territory, 185, 283. At XXXVII.

Where it is suitable for agricultural or grazing purposes, it is the present policy of the Government to allot land in severalty to the Indians within their respective reservations . . . to patent these individual holdings, with a restriction against alienation for twenty-five years, or longer, in the discretion of the President, and to purchase from the respective tribes any or all of the surplus land remaining after the allotments have been made. The general law for this is the allotment act of February 8, 1887 (24 Stat. p. 388), applicable to all reservations, except . . . at XXXVIII.

In numerous instances, where clearly desirable, Congress has by special legislation authorized negotiations with the Indians for portions of their reservations without waiting for the slower process of the general allotment act, which involves the survey of the land, the allotment in severalty by special agents appointed by the President for that purpose, and negotiations with the Indians for the cession and relinquishment of their surplus unallotted lands. . . .

It is estimated that under such special legislation about 13,000,000 acres of land have been secured by cession from the Indians during the past year; and there are agreements now pending before Congress, through which, if ratified, the Government will acquire some 4,500,000 acres more; all of which

will, under the operation of these laws, be open *to white settlement* in the near future. . . .

Of the land actually acquired, about 9,000,000 acres are in North and South Dakota, secured from the Sioux (act of March 2, 1889, 25 Stat., p. 888), and about 4,000,000 acres in Minnesota,* acquired from the Chippewas (act of January 14, 1889, 25 Stat., p. 642). *The agreements now pending in Congress will, if ratified, restore to the public domain* about 1,600,000 acres in North Dakota, in the Fort Berthold Reservation; about 660,000 acres in South Dakota, in the *Lake Traverse* (Sisseton,) *Reservation;* about 185,000 acres in Idaho, in the Coeur d'Alene Reservation; about 1,095,000 acres in Colorado, being the whole of the southern Ute Reservation; and about 941,000 acres in Oklahoma Territory, now embraced in the Pottawattomie, Iowa, and Sac and Fox Reservations; a grand total of upwards of 17,400,000 acres, or *about one seventh of all the Indian lands in the United States.* . . .

This might seem like a somewhat rapid reduction of the landed estate of the Indians, but when it is considered that for the most part the land relinquished was not being used for any purpose whatever, that scarcely any of it was in cultivation, that the Indians did not need it and would not be likely to need it at any future time, and that they were, as is believed, reasonably well paid for it, the mat-

* The Chippewas ceded all of their lands in Minnesota embraced in the several reservations occupied by them, except the White Earth Reservation, of which they ceded four entire townships, and excepting, also, the Red Lake Reservation of which they ceded perhaps three-fourths; but it can not be ascertained how much or just what particular portions of said reservations, except White Earth and Red Lake have actually been relinquished to the United States until the Indians shall have selected and received the allotments to which they are entitled under said act. At XXXVIII-XXXIX.

ter assumes quite a different aspect. The sooner the tribal relations are broken up and *the reservation system done away* with the better it will be for all concerned. . . .

As a general rule, I would not advise the purchase of the surplus lands until the Indians have been located upon and absolutely secured in their individual holdings. At XXXVIII-XXXIX.

As already stated, the general allotment act of February 8, 1887, confirms the Indian title in all existing reservations. It provides that in all cases where any tribe or band of Indians has been or shall hereafter be located upon any reservation created for their use, "either by treaty stipulation or by virtue of an act of Congress, or by executive order, setting apart the same for their use," the President of the United States may, whenever in his opinion any reservation or any part thereof is suitable for the purpose, allot the lands of said reservation in severalty to the Indians located thereon, in quantities as specified; and that after lands shall have been so allotted, or sooner, if in the opinion of the President it shall be for the best interests of the Indians, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall from time to time consent to sell, "upon such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians." . . .

I desire to ask special attention to the *great importance* of the early ratification of agreements made with Indians for the *cession of portions of their reservations*. Delay in such matters is not understood by them, often works hardship, creates

unrest, begets distrust, and greatly retards their progress. It should be remembered that while these agreements often involve the appropriation of large sums of money, the amount is almost wholly reimbursable from the sale of the land.

CHIPPEWA INDIANS IN MINNESOTA.

Since the date of the last annual report, the 1341 patents issued to the Sisseton and Wahpeton Indians, on the Lake Traverse Reservation, in North and South Dakota, have been delivered to the Indians. The agreement, however, for the cession of their surplus lands now pending in Congress, provides for additional allotments, so that each Indian belonging to the reservation shall have 160 acres of land. At XLV.

The division of Indian lands in severalty and the ultimate *destruction* of the tribal and *reservation systems* being inevitable, the Indians should be taught to look forward to this and be prepared, so far as practicable, to meet it. At LXIX.

7B. REPORT OF THE SECRETARY OF THE INTERIOR, H. EXEC. DOC. 51ST CONG., 2D SESS. (1890-91) (EMPHASIS ADDED).

And again, while this Territory has been forming, *great additions from the Indian reservations have been made to the public domain* soon to be opened to settlement. The various Indian commissions have made *agreements*, now awaiting Congressional action, with different tribes for many *millions of acres*. At I.

INDIAN AFFAIRS.

But it needs to be said that a much larger area of land than is necessary is held for Indian occupancy. . . .

There has been a *reduction* during the fiscal year by *cession* of Indian title to reservations under ratified agreements to the extent of about 13,000,000 acres of lands heretofore held by them, leaving the aggregate area of reserved land at this time over 103,000,000 acres. . . . *The surplus held in reservation appears therefore to be unreasonably large. A large portion of it is lying idle, and is a bar to the Indians' progress, and our country's development. To restore this to the public domain* will work no hardship to the Indians, if the *cessions* are made upon terms as fair as have characterized the agreements recently negotiated. At XXIII-XXIV.

INDIAN CESSIONS.

THE GREAT SIOUX IN NORTH AND SOUTH DAKOTA.

THE CHIPPEWAS IN MINNESOTA. AT XXVI.

OTHER CESSIONS MADE.

There are pending in Congress agreements as follows: For the cession of about 1,600,000 acres of the Fort Berthold Agency Reservation in North Dakota, negotiated under provisions of the act of May 15, 1886 (24 Stats., 44); for about 184,960 acres of the Coeur d'Alene Reservation in Idaho, negotiated under the act of March 2, 1889 (25 Stats., 1003); for about 600,000 acres of the Lake Traverse Reservation in South Dakota, negotiated under the provisions of section 5 of the general allotment act of February 8, 1887 (24 Stats., 388); for about 1,095,000 acres of the Southern Ute Reservation in Colorado, negotiated under the fourth section of the act of May 1, 1888 (25 Stats., 133), and for about 7,871 acres of the Flathead Indians in Bitter Root Valley, Montana, negotiated under the

provisions ofthe act of March 2, 1889 (25 Stats., 871). These should all have early attention by Congress. At XXVII.

CESSIONS BY VARIOUS TRIBES THROUGH THE CHEROKEE COMMISSION.

OTHER COMMISSIONS TO NEGOTIATE *CESSIONS.*

The appointment of the following commissions was also authorized during the last session of Congress: . . . at 28.

NORTHERN BAND OF CHEYENNES. AT XXVIII.

TURTLE MOUNTAIN BAND.

WARM SPRINGS INDIANS. AT XXIX.

CROW INDIANS AT XXX.

Under the authority contained in the fifth section of the general allotment law (24 Stats., 388) successful negotiations were conducted with the Sisseton Indians in South Dakota for the cession of their surplus lands, and the agreement entered into for this purpose, which was submitted to Congress early in the session, passed the Senate, but failed to receive favorable consideration in the House of Representatives. The failure to ratify this agreement is a matter to be greatly regretted. . . . At XXXV.

8A. SIXTEENTH ANNUAL REPORT OF COMMISSIONER OF INDIAN AFFAIRS (1891) (EMPHASIS ADDED).

If the policy of allotting lands is conceded to be wise, then it should be applied at an early day to all alike wherever the circumstances will warrant. If we have settled upon the breaking up of the tribal relations, the extinguishment of the Indian titles to

surplus lands, and the restoration of the unneeded surplus to the *public domain*, let it be done thoroughly. If reservations have proven to be inadequate for the purposes for which they were designed, have shown themselves a hindrance to the progress of the Indian as well as an obstruction in the pathway of civilization, let the reservations, as speedily as wisdom dictates, be utterly destroyed and entirely swept away. At 8.

The policy above outlined will eventually make all Indians citizens of the United States, when the *Indian reservation will no longer appear on our maps*, and the autonomy of the tribes, a fact to us, will be mere history to the generations that will come. At XXVI.

EARLY ALLOTMENTS.

The policy of dividing lands owned or occupied in common by an Indian tribe among its several members was inaugurated by act of March 3, 1839, which authorized division of the lands of the Brothertown Indians (Wisconsin) by a commission of five of their principal head men, and for the issuance of patents in fee simply to the Indians and their heirs and assigns. . . .

PROGRESS IN ALLOTMENTS.

In 1887 the first *general* law was enacted (24 Stats., 388), and by its provisions lands were to be given to the several members of a tribe (except married women), in quantities differing according to the age of the allottee, or status as the head of a family, or otherwise. At 40.

REDUCTION OF RESERVATIONS.

The work of reducing the area of the reservations, by extinguishing by purchase from the Indians their

title to the land and its *restoration to the public domain*, has been carried forward rapidly, as is shown in the following detailed statements: . . .

Counting the 22 small reserves of the Mission Indians of California as only one reserve and the 19 Pueblo reserves of New Mexico as one also, the number of reservations as given in the annual report of this office for 1890 was 138, having an aggregate area of about 104,314,349 acres, or 162,991 square miles. This amount is about 12,071,380 acres, or 18,861 square miles, less than the amount reported in 1889, while at the present time there are five more reservations than in 1889, owing to the division of the Great Sioux Reservation, as provided by act of March 2, 1889. . . .

The agreements ratified by act of Congress approved February 13, 1891 (26 Stats., 749), *restored to the public domain* 391,184.65 acres from the Sac and Fox Reservations, in Oklahoma, including 25,194.61 acres for school purposes; and from the Iowa Reservation, in the same Territory, 219,446.27 acres, including 12,271.75 acres for school purposes. The ratification of agreements by the act of March 3, 1891 (26 Stats., 989), *restored to the public domain* from the Pottawatomie Reservation, Oklahoma, 309,134.77 acres, including 22,650.44 for school purposes; from the Cheyenne and Arapaho Reservation, Oklahoma, about 3,000,000 acres; from the Coeur d'Alene Reservation, Idaho, about 185,000 acres; from the Fort Berthold Reservation, North Dakota, about 1,600,000 acres; *from the Lake Traverse Reservation*, South Dakota, about 660,000 acres, and from the Crow Reservation, Montana, about 1,800,000 acres; a total of about 8,164,765 acres. At 44.

The *ceded portion* of the Fort Berthold Reservation, North Dakota, consisting of about 1,600,000

acres has been *thrown open to settlement* by proclamation of the President. . . .

The *ceded lands* of the Coeur d'Alene Reservation, Idaho, were *opened to settlement* from the date of the approval of the act. . . .

Allotments of land are being made on the Lake Traverse Reservation, South Dakota, and the Cheyenne and Arapaho Reservation, Oklahoma, and surveys are in progress upon the Crow Reservation, Montana, and when they are completed and the terms of the act ratifying the respective agreements with the Indians of the several reservations shall have been fully complied with, the unalloted or vacant lands embraced within the *ceded portions will be thrown open to settlement*. . . .

The agreement with the Indians of the Southern Ute Reservation, in Colorado referred to in my last annual report, was not ratified by the last Congress.

NEGOTIATIONS FOR FURTHER REDUCTIONS.

The Indian appropriation act for the fiscal year ending June 30, 1892 (26 Stats., 1010), contains the following provisions: . . .

To enable the Secretary of the Interior in his discretion to negotiate with any Indians for the surrender of portions of their respective reservations, any agreement thus negotiated being subject to subsequent ratification by Congress, $15,000 or so much thereof as may be necessary. At 45.

RESERVATIONS SHOULD NOT BE REDUCED TOO RAPIDLY.

While perhaps it is possible to push such work too rapidly, I do not hesitate to say that the ultimate destruction of the entire system of reservations is inevitable. There is no place for it in our present condition of life, and it must go. The millions of

acres of Indian lands now lying absolutely unused are needed as homes for our rapidly increasing population and must be so utilized. Whatever right and title the Indians have in them is subject to and must yield to the demands of civilization. They should be protected in the permanent possession of all this land necessary for their own support, and whatever is taken from them should be paid for at its full market value. But it can not be expected under any circumstances that these reservations can remain intact, hindering the progress of civilization, requiring an army to protect them from the encroachments of home-seekers, and maintaining a perpetual abode of savagery and animalism. The Indians themselves are not slow to appreciate the force of the logic of events, and are becoming more and more ready to listen to propositions for the reduction of the reservations and the extinguishment of their title to such portions of the land as are not required for their own use. At 46.

. . . but the *breaking up of the reservations* and the coming of the white men with all their better modes of life necessitate a closer acquaintance with each other . . . at 47.

8B. REPORT OF THE SECRETARY OF THE INTERIOR, H. EXEC. DOC. 52ND CONG., 1ST SESS. VOL. 14 (1891-92) (EMPHASIS ADDED).

Sir: The years of the present administration have been marked to a notable degree by the expansion of the *public domain* for private settlement. European nations strive with one another to plant colonies beyond their borders, even in Africa and on distant islands; but our country is so fortunately situated that within its own boundaries are vast tracts of fertile land *heretofore unused*, on which communities can establish themselves in a single

day, and be protected by an almost instantaneous but easy and peaceful application of our system of laws and government to their new relations. . . .

OKLAHOMA—NEW PURCHASES OPENED TO SETTLEMENT.

The peaceful and efficient overtures of the government have been met in an intelligent spirit by the different Indian tribes visited by Commissions, and for valuable considerations *large portions of their reservations have been ceded for settlement.* Agreements were made by the Cherokee Commission during the previous fiscal year in the territory of Oklahoma with the Sacs and Foxes of the Mississippi, the Iowas, the Absentee Shawnees, and the Citizen Pottawatomies. These agreements were ratified by Congress at its last session. The allotments to the Indians were duly made, amounting in most cases to 160 acres each. At III.

By your proclamation dated September 18, 1891, all this domain, with required exceptions, was opened to settlement at the hour of 12 o'clock noon (central standard time), Tuesday, September 22, The lands can be acquired only by actual settlers under the homestead or town-site laws. At IV.

The agreement with these tribes made in October, 1890, and has been ratified by act of Congress. . . . As soon as the allotments are made there will be 3,000,000 acres ready upon your proclamation for settlement—equal to 18,750 homesteads of 160 acres each. At V.

A total of 27,619 Indians naturalized, and total of *acres acquired for settlement* of about 23,000,000 during the present administration alone.

He acquires a standing as complainant or otherwise in our courts on the same footing as other

citizens, except as to his allotments which the government directly guards. At V-VI.

AGREEMENTS WITH INDIANS DURING THE PRESENT ADMINISTRATION.

The following table exhibits in condensed form the results of the successful labors of the various commissions negotiating with the Indians since the commencement of the present Administration, with dates of agreements and a summary of lands purchased in Oklahoma. At VII.

HOMESTEAD SETTLERS.

The allotment law, commonly known as the *Dawes bill*, has secured for its author the praise of all interested in the welfare of the Indians. It has been accepted as the very best means of solving the Indian problem, and it is now, as has been pointed out in the earlier part of this report, receiving an administration, chiefly by written consent and agreement of the Indians, that promises to develop rapidly its benefits for allottees. At XXXV.

In a previous portion of this report it has been said that the allotment bill, commonly styled the "*Dawes bill*," whereby, through the effect of allotments, citizenship is conferred upon the allottee, has had general recognition and approval. We should not now interfere with its principal provisions or defeat any of its beneficient effects. Its purpose is to change the Indians from the state of wardship to citizenship. This process has been going on for many years, and with increased force from year to year. There are no facts furnished upon which it can be asserted that the results of this policy are injurious to the Indians, or threatening to become so, while there is abundant evidence that severance of the tribal relations, the establish-

ment of the Indian upon his own property, and the *opening of his great reservations* to white settlement have been conducive to the welfare of all concerned. At XXXVIII.

INDIAN CESSIONS AND INDIAN COMMISSIONS.

The public land transferred from uselessness to cultivation through treaties made between the Indians and the United States has been acquired by the effective agency of various commissions, some of which are still in the field. At XLII.

COLVILLE RESERVATION.

. . . in the state of Washington, to *negotiate* with the bands of Indians on the Colville Indian Reservation, in Washington, for the *cession* of such portion of the reservation as the Indians may be willing to dispose of, that the same may be opened to white settlement. At LI.

Some allotments are being made on the ceded portion of the great Sioux Reservation, . . . at LVII-LVIII.

9A. REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS (1892) (EMPHASIS ADDED).

Of course it is possible to continue the present reservation system and the exercise of guardianship over these people in the future as in the past for an indefinite period to come. The objections to this, however, are many and vital. The agency and reservation system has possibly accomplished some good in the past, and it has, at present, the possibility of benefit during the transition period, but certainly no wise man who understands the situation would venture even to suggest that the systems should be made permanent. At 5.

The power of the agent in cases where land has been allotted—as, for instance among the Sissetons, the Yanktons, the Nez Perces, and elsewhere—is very limited indeed. Those under him are no longer his subjects, but citizens of the United States. He can not maintain an Indian police force or exercise any of the autocratic power to which he was accustomed when they were still merely wards of the nation. He is agent, therefore, in large part only in name, having the shadow of his office rather than its substance. To entirely discontinue the agency, however, and leave the people who have so long been accustomed to the paternal guidance to their own resources would, in many cases, work great hardship. . . .

By placing the superintendent of the school in charge of affairs, transferring to him something of the duties that have devolved hitherto upon the agent, and constituting him their chief counselor, director, and leader, the Indians would be spared many of the evils that might result from too hasty an abolition of the agency system. At the same time there would be the doing away of the agency proper . . . at 9-10.

COMMISSIONS AND NEGOTIATIONS FOR REDUCTION OF RESERVATIONS.

Pyramid Lake Reservation, Nev. At 74.

Colville Reservation, Wash.—The agreement negotiated by this commission, to which reference was made in my last annual report, was transmitted to Congress at the beginning of the last session, accompanied by the draft of a bill to ratify the same, notwithstanding the fact that certain of the provisions of the agreement were somewhat unsatisfactory. . . .

In reporting upon the bill the Senate Committee on Indian Affairs (Senate Report 664, Fifty-second Congress, first session) took the ground that as this reservation was established by executive order, it could be restored without the consent of the Indians. . . .

Upon that ground Congress, instead of ratifying or rejecting the agreement, passed an act vacating and restoring to the public domain that portion of the reservation which the Indians had agreed to sell, the lands so vacated and restored to be opened to settlement and entry by proclamation of the President. The act provides that the net proceeds of the lands shall be set apart in the Treasury of the United States, subject to further appropriation by Congress for public use, but until so otherwise appropriated shall be subject to expenditure by the Secretary of the Interior in the building of schoolhouses, the maintenance of schools for the Indians, the payment of such part of the local taxation as may be properly applied to the lands allotted to such Indians, and in such other ways as he may deem proper for the promotion of education, civilization, and self-support among said Indians. The act became a law without the approval of the President. . . .

It is a matter of regret that this new position was not taken by Congress before the negotiations were authorized, instead of after the Indians had given their consent to the restoration of lands upon terms and conditions which have been wholly ignored in the act. The Indians were thus led to believe that their consent was necessary and that they could dictate the terms, and may feel aggrieved because the negotiations have been repudiated and their rights denied. At 76.

Another reason for the increase of business is the *breaking up of reservations* and the allotment of lands. During the past three years *more than 24,000,000 acres of Indian lands* have been *restored to the public domain*, and the amount of office work involved in preparing instructions for commissions, examining their accounts, and reporting upon their labors, as well as in allotting lands, has been very great. At 136.

REPORT OF SISSETON AGENCY.

The Reservation and Indians.—The Sisseton and Wahpetons no longer hold their land in common, having taken allotments in severalty, and on April 15 of the present year *this reservation was thrown open for settlement under the homestead law*, . . . At 469.

9B. REPORT OF THE SECRETARY OF INTERIOR, H. EXEC. DOC. 52ND CONG., 2D SESS. VOL. 12 (1892-93) (EMPHASIS ADDED).

Large areas of land held in reserve for indian purposes have been restored to the public domain. Agreements negotiated with fourteen indian tribes have provided for restoration to the public domain of nearly 26,000,000 acres, and a great bulk of this vast property has already been opened to public settlement. Other agreements negotiated are pending in Congress, and when ratified will add 10,000,000 acres at least for the same purpose. . . .

As a part of the work of reduction of indian reservations, 9,000,000 acres of the lands formerly occupied by the great Sioux Nation of indians in North and South Dakota have been opened as public domain, . . .

The same process of reduction of indian reservations is in progress in other sections of the country,

where large areas of land are yet reserved for Indian occupancy. At VII.

RESERVATIONS AND TRIBES BROKEN UP.

The reservation system and the continuance of tribal relations have been *broken* to such a degree that what remains of these obstacles to the Indian's progress is light and easily removed. *The reservations have been purchased and converted into settlements after due allotments to the Indians* in sufficient quantities to enable them each to have a farm, and this, with a constant suppression of the influence attempted to be exercised by chiefs or head men, has developed among these people a sense of the importance of the individual, an appreciation of his power to take care of himself and of the necessity that it should be exercised. At VIII.

One grand result of the purchases of indian lands has been the establishment of the territory of Oklahoma. . . .

There have been negotiated agreements with Indians for the purchase of at least 10,000,000 acres, to be added to this territory, the most recent being that of the Kiowas and the most important that for the Cherokee Strip. At IX.

Since the 4th of March, 1889, more than 24,000,000 acres of Indian lands, released by the Indians of their right of occupancy, have been restored to the public domain and opened to settlements, to become the homes of pioneer settlers. In addition, a number of agreements have been negotiated which, when ratified will swell the total area to over 30,000,000 acres of land, heretofore reserved and uncultivated, made available for productive use. During the same time 12,273 allotments in severalty have been made to Indians and 7,248 patents have been issued and

delivered to Indian allottees, and others are in course of preparation. . . .

The negotiations for relinquishments of portions of reservations and allotments of land have involved many delicate questions and a great amount of work by the department and the indian bureau. At XXXIII.

NEGOTIATIONS WITH THE INDIANS.

Important negotiations were conducted and in progress with Indian tribes during the past fiscal year, and others have been recently inaugurated under provisions of law providing therefor, which are briefly referred to as follows: . . . At XXXIX.

SHOSONE INDIAN COMMISSION.

The Department has been for some time in possession of information to the effect that the indians occupying the Shoshone or Wind River Reservation, Wyo., desired to take their lands by allotment and dispose of a portion of their reservation to the United States. The whites looking to the development of that State were anxious that negotiations be opened with the indians for the surrender of a portion of their reservation. At XLII.

COLVILLE COMMISSION.

Mark A. Fullerton, of Colfax, Oregon; William H. H. Dufur, of Dufur, Oregon, and James F. Payne, of Alma, N. C., were appointed as commissioners to determine the correct location of the northern line of the Warm Springs Reservation in Oregon, and also to negotiate with the various bands of Indians accupying the Colville Reservation, Wash., for the surrender of such portion thereof as they might choose to dispose of. Both duties were discharged

Supreme Court, U.S.
FILED
MAY 7 1997
OFFICE OF THE CLERK

No. 96-1581

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF SOUTH DAKOTA,
Petitioner,
v.

YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members; DARRELL DRAPEAU, individually, a member of the Yankton Sioux Tribe,
Respondents,
and
SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,
Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

RESPONDENTS YANKTON SIOUX TRIBE AND DARRELL DRAPEAU'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES G. ABOUREZK*
BOBBIE J. RASMUSSON
Abourezk Law Offices, P.C.
P.O. Box 1164
Sioux Falls, SD 57101-1164
Tel: (605) 334-8402
Counsel for Yankton Sioux Tribe
**Counsel of Record*

QUESTION PRESENTED

WHETHER THE BOUNDARIES OF THE YANKTON SIOUX RESERVATION ESTABLISHED BY THE 1858 TREATY BETWEEN THE YANKTON SIOUX TRIBE AND THE UNITED STATES REMAIN UNDIMINISHED.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

LEGISLATIVE HISTORY, CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION 1

STATEMENT OF THE CASE 1

A. Procedural History 2

B. Historical Background 3

C. Corrections of Misstatements in the Petition 6

REASONS FOR DENYING THE WRIT 8

I. THE PETITION FOR WRIT OF CERTIORARI IS NOT APPROPRIATE IN THIS CASE BECAUSE THE STATE ALLEGES ERRONEOUS FACTUAL FINDINGS AND THE MISAPPLICATION OF A PROPERLY STATED RULE OF LAW. 8

II. GRANTING OF CERTIORARI WILL ENCOURAGE STATE COURTS TO IGNORE PRINCIPLES OF COMITY AND IGNORE FEDERAL DECISIONS INTERPRETING ISSUES OF FEDERAL LAW . . 9

III. THE STATE'S ARGUMENTS DO NOT SUPPORT THIS COURT'S GRANTING OF A WRIT OFCERTIORARI 13

A. The court of appeals decision does not conflict with this court's rulings on diminishment 13

B. "Cession and sum certain" language in the agreement is not dispositive 16

C. Liquor provisions and common school language do not indicate an intent to diminish 18

IV. THE COURT SHOULD DENY THE WRIT OF CERTIORARI BECAUSE THE STATE IS BARRED FROM RELITIGATING THE BOUNDARY ISSUE AND BECAUSE THE TRIBE WAS NOT A PARTY AT THE STATE PROCEEDING 19

A. The State is barred from relitigating the boundary issue under the doctrine of collateral estoppel . . . 20

B. The Tribe is not bound by the state supreme court decision because it was not a party to the proceedings 24

CONCLUSION 25

TABLE OF AUTHORITIES

FEDERAL CASES

Benjamin v. Coughlin, 708 F. Supp. 570 (S.D.N.Y. 1989), affd, 905 F.2d 571 (2nd Cir. 1990) .. 22

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) ... 21

DeCoteau v. District County Court, 420 U.S. 425 (1975) 24

Dick v. United States, 208 U.S. 340 (1908) 15

Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981) 21

Georgia v. South Carolina, 497 U.S. 376 (1990) 24

Hagen v. Utah, 510 U.S. 399 (1994) ..... *passim*

Hercules Carriers, Inc. v. Claimant State of Florida, 768 F.2d 1558 (1985) 22

Mattz v. Arnett, 412 U.S. 481 (1973) 24

McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973) 10

Montana v. United States, 440 U.S. 147 (1979) . 20, 21, 23

Oldham v. Pritchett, 599 F.2d 274 (8th Cir. 1979) 21

Oregon Department of Fish and Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985) 14

Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) ... 21

Perrin v. U.S., 232 U.S. 478 (1914) 3

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) 15, 18

Solem v. Bartlett, 465 U.S. 463 (1984) 24

Southern Pacific R. Co. v. United States, 168 U.S. 1 (1897) 20

United States v. Mendoza, 464 U.S. 154 (1984) 21, 22

United States v. Southern Ute Tribe or Band of Indians, 402 U.S. 159 (1971) 15

Weddell v. Meierhenry, 636 F.2d 211 (8th Cir. 1980) .. 12

White Earth Band of Chippewa Indians v. Alexander, 683 F.2d 1129 (8th Cir. 1982) 23

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 10

Yankton Sioux Tribe v. Southern Missouri Waste Management Dist., 890 F.Supp. 878 (D.S.D. 1995) ..... *passim*

Yankton Sioux Tribe v. Southern Missouri Waste Management Dist., 99 F.3d 1439 (8th Cir. 1996) .. passim

Yankton Sioux Tribe v. United States, 623 F.2d 159 (Ct. Cl. 1980) 4, 12

STATE CASES

Ex Parte Gurganus, 603 So. 2d 903 (Ala.1992) 11

St. Cloud v. Leapley, 521 N.W.2d 118 (S.D. 1994) 11

State v. Daly, 454 N.W.2d 342 (S.D. 1990) 11

State v. Greger, 1997 S.D. 14 (1997) ..... *passim*

State v. Spotted Horse, 462 N.W.2d 463 (S.D. 1990), cert. denied, 500 U.S. 928 (1991) 11

State v. Thompson, 335 N.W.2d 349 (S.D. 1984) 12

Wood v. Jameson, 130 N.W.2d 95 (S.D. 1964) 12

FEDERAL STATUTES

11 Stat. 743 (1859) 2, 3, 4, 6

24 Stat. 388, General Allotment Act (Dawes Act) in 1887, codified at 18 U.S.C. § 331 et. seq ... 4

25 Stat. 676 (1889) 26

28 Stat. 286 (1894) ..... *passim*

53 Cong. Rec. 6425, Senate Document 27 ..... *passim*

MISCELLANEOUS

Restatement (Second) of Judgments § 28, comment b (1982) 23

South Dakota Enabling Act, § 10, 25 Stat. 676 (1889) 1, 11, 15

South Dakota Constitution, Art. XXVVI, § 18 ... 1, 11, 15

Supreme Court Rule 10 8

LEGISLATIVE HISTORY, CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Treaty with the Yankton Sioux, 1858, ratified 11 Stat. 743 (1859), reprinted in State's App. 99.

Agreement with the Yankton Sioux or Dakota Indians, in South Dakota, 1892, ratified, 28 Stat. 286 (1894), reprinted in State's App. 111.

South Dakota Enabling Act, § 10, 25 Stat. 676 (1889), reprinted in App. 1.

South Dakota Constitution, Art. XXVVI, § 18, reprinted in App. 1.

Legislative History and Negotiations, Ex. 605, S. Exec. Doc. No. 27, 53 Cong., 2d Sess. (1894).

INTRODUCTION

Petitioner, State of South Dakota ("State"), has petitioned that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit entered in this matter on October 24, 1996. The Eighth Circuit affirmed the ruling of the federal district court, which ruling retained intact the boundaries of the Yankton Sioux Reservation as established in the 1858 Treaty between the Yankton Sioux Tribe and the United States.

Respondents Yankton Sioux Tribe and Darrell Drapeau respectfully request that the Court deny the State of South Dakota's Petition for Writ of Certiorari.

STATEMENT OF THE CASE

A. Procedural History.

The Yankton Sioux Tribe, *et al* ("Tribe"), brought an

injunction action in the United States District Court for the District of South Dakota, Southern Division, against the Southern Missouri Waste Management District ("District"), seeking to enjoin the planned construction of a landfill on privately owned land located within the boundaries of the Yankton Sioux Reservation ("Reservation"). By agreement with the State, the District brought in the State as a third party defendant, enabling the State to challenge the existence of the Reservation's boundaries.

Following a five day trial, the district court ruled that the boundaries of the Reservation were undiminished, pursuant to the 1858 Treaty between the Tribe and the United States, 11 Stat. 743. The district court ruled that the terms of an 1892 surplus land sales agreement between the Tribe and the United States government, ratified by Congress in 1894, 28 Stat. 286, did not evince an intent by Congress to diminish, or to disestablish, the Reservation. *Yankton Sioux Tribe v. Southern Missouri Waste Management District,* 890 F.Supp. 878 (D.S.D. 1995) reproduced in State's Appendix ("State's App.") 66, 89. Immediately following the trial, the district court granted the State's request for a stay of execution of its ruling. The stay was later revoked on the Tribe's motion due to an unstable law enforcement situation on the Reservation which resulted from the stay. The State applied for a stay directly to the court of appeals, which was denied.

The State then appealed the district court's ruling on the merits to the Court of Appeals for the Eighth Circuit. The Eighth Circuit, in a two to one decision, affirmed the trial court. *Yankton Sioux Tribe v. Southern Missouri Waste Management District,* 99 F.3d 1439 (8th Cir. 1996) reproduced in State's App. 1. The Eighth Circuit then denied the State's request for rehearing, as well its suggestion for a rehearing *en banc.* State's App. 98.

The decision of the trial court, as well as the affirmation

by the Eighth Circuit, centered on the savings clause in Article XVIII of the 1894 statute, ratifying the 1892 surplus land sales agreement. *Agreement with the Yankton Sioux or Dakota Indians, in South Dakota*, 1892, ratified, 28 Stat. 286 (1894) reprinted in State's App. 111. Both the district court and the court of appeals ruled that Congress intended that the Reservation boundaries established by the 1858 Treaty were maintained intact by the language of the savings clause. State's App. 27-29, 34, 82-84. *Treaty with the Yankton Sioux*, 1858, ratified 11 Stat. 743 (1859), reprinted in State's App. 99.

As a basis for its application for a Writ of Certiorari, the State relies heavily upon the conflict set up by a recent South Dakota Supreme Court decision. That decision repudiates the Eighth Circuit's finding that the Reservation's boundaries remain undiminished. *See State v.Greger,* 1997 S.D. 14 (1997) reprinted at State's App. 125. Further, the State relies on what it terms, "cession and sum certain" language in the 1894 Act that creates, in its words, "an almost insurmountable presumption" of diminishment. The State also relies on dicta by this Court in a 1914 case, *Perrin v. U.S.*, 232 U.S. 478 (1914), in which Justice Vandevanter made casual mention of, " . . . lands formerly included in the Yankton Sioux Reservation . . . ." The State has parlayed this brief mention into what it views as a holding of diminishment by this Court. The State glosses over the fact that in *Perrin,* the Court's decision did not investigate, analyze, or even consider the question of diminishment.

B. Historical Background.

In 1858, the Yankton Sioux Tribe occupied in excess of 13 million acres of land in what is now the Dakotas, Nebraska, and Minnesota. At that time, the United States government negotiated a purchase of some 11 million acres from the Tribe.

The purchase and sale of the land was set out in the Treaty of 1858, 11 Stat. 743, between the Tribe and the government. The Treaty guaranteed the Tribe peaceable possession of a newly created reservation of some 400,000 acres located in what is now southern Charles Mix County, South Dakota, along the eastern bank of the Missouri River. The Treaty laid out a precise metes and bounds description of the boundaries of the new Reservation. 11 Stat. 743. A later survey indicated that, in reality, the Reservation described in the Treaty comprised a total of 430,195 acres. S. Exec. Doc. No. 27, 53rd Cong., 2d Sess. at 5 (1894) (hereafter S.Doc. 27).

After passage of the General Allotment Act (Dawes Act) in 1887, 24 Stat. 388, codified at 18 U.S.C. § 331 *et. seq.* the United States government forced upon the Tribe (as it did on other tribes) the policy of allotting collectively owned Tribal lands to individual Tribal members. When the United States completed the allotment of acreages to Tribal members, there remained unallotted approximately 200,000 acres of "surplus lands." S. Doc. 27 at 5; *Yankton Sioux Tribe v. United States,* 224 Cl. Ct. 62, 623 F.2d 159 (1980).

By 1892, in response to pressure from non-Indian settlers to open the newly allotted Reservation to settlement, the United States sent a team of three Commissioners to the Yankton Sioux Reservation to begin negotiations with the Tribe for the sale of these surplus lands. S.Doc. 27 at 7-8.

Following lengthy negotiations with Tribal leaders, amid allegations of outright bribery of Yankton Sioux Tribal members by the Commissioners in order to obtain Tribal approval for the sale, and in addition, to pressure to sell upon members of the Tribe by religious missionaries, a sale agreement was signed in 1892 between the Tribe and the United States. *Id.* at 35, 83-84, 95. The agreement was ratified by Congress in 1894. 28 Stat. 286 (1894).

During the negotiations there was debate about the best

way to handle the purchase of the surplus lands. The Tribe wanted an "appraisal and sale" method, whereby each parcel would be appraised and sold separately to the highest bidder. The government ultimately believed not only that this method would be cumbersome and that some of the less desirable parcels would remain unsold, but that another commission would have to return later to negotiate for the sale of the unsold parcels. *Id.* at 12. The parties ultimately agreed upon the government's outright purchase of the surplus lands at a fixed price per acre--for a total of $600,000. *Id.* at 13-14. The 1894 statute, 28 Stat. 286, included Article XVIII, a savings clause vastly different from any other in all the surplus land Acts drafted by the United States government. At the conclusion of the trial of this action in 1995, the district court requested briefs from all the parties to assist the Court in determining whether savings clauses in other surplus land sales Acts contained language as definite and as strong as that of Article XVIII. *Yankton Sioux Tribe,* 890 F.Supp. at 885, App. 81. None of the parties could find similar language in any other surplus land sales Acts.

Article XVIII states as follows:

> Nothing in this agreement shall be construed to abrogate the treaty of April 19, 1858, between the Yankton Tribe of Sioux Indians and the United States. And after the signing of this agreement and its ratification by Congress, all provisions of said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19, 1858.

28 Stat. 286. Both the district court and the court of appeals in this case viewed Article XVIII as the anchor which held fast the boundaries of the Yankton Sioux Reservation, and which distinguished the Yankton surplus land sales act from other Acts

in which this Court, in past cases, has determined the boundaries to be diminished. Not only was there no limiting language in the clause, but the clause twice mandated that the 1858 Treaty should remain intact. The Tribe's expert witness, Professor Herbert Hoover, a professor of history at the University of South Dakota, and a specialist in Yankton Sioux Tribal history, testified at trial that the portion of Article XVIII relating to annuities had its genesis in a fear by Tribal leaders that the government would cut off their annuities as punishment for any perceived sins of the Tribe, much as the government did to one of the Minnesota Sioux Tribes in prior years. Trial Transcript ("T") at 62-70.

After close examination of the statute's language as a whole, and of the extensive legislative history and events near the time of passage, a majority of the court of appeals determined that Article XVIII indicated Congress's intent to retain the boundaries intact. *Yankton Sioux Tribe,* 99 F.3d at 1453-54, State's App.31-33. Neither in the record of the negotiations, nor in the legislative history does there appear any manifestation of Congressional intent to diminish or to disestablish the Reservation boundaries. *Id.*

The Treaty executed by the Tribe and the United States in 1858, did, in fact, diminish the Yankton Sioux Reservation from 13 million acres down to some 400,000 acres. However, the new boundaries were clearly set out in that Treaty, which described in metes and bounds the new boundaries of the newly diminished reservation of 430,195 acres. *See* 11 Stat. 743. In contrast, the 1894 statute contains neither an indication of any new reservation boundaries, nor any diminishment of the 1858 boundaries. 28 Stat. 286.

C. Corrections of Misstatements in the Petition

In its Petition, the State selectively describes the

legislative history and historical events presented to the federal courts. Space does not allow Respondents to correct every misrepresentation of the historical record made by the State. The Tribe invites the Court's attention to the opinions of the district court and the court of appeals in this action, and to the actual documents contained in the parties' appendices in order to determine the accurate legislative history and historical events relevant to this action. Much of the legislative history referred to by the parties and by the lower courts is contained in Senate Document No. 27, which appears in the record of the trial. The opinions, both of the trial court and of the Eighth Circuit, provide a complete analysis of the legislative history, as well as evidence of historical events presented by the parties.

The State further makes misstatements in its assertion that other land sales agreements between Indian tribes and the government are "equally strong" as that between the Yankton Sioux Tribe and the government. State's Petition at 8-9, 19-20. The parties provided the district court with separate briefs on this issue alone, and neither the State nor the Tribe were able to find any surplus land sales agreement that contained similar language, or that contained language as strong, or with as much force as the savings clause at issue here. *Yankton Sioux Tribe,* State's App. 16-17.

The Tribe also objects to the map referred to in the State's brief and located at State's App. 159, as being new material inserted by the State, not included in the record at trial, which the State admits. *See* State's Petition at 7, n.8. Respondents respectfully request that the map not be considered by this Court.

Finally, the Tribe takes issue with the States' misreading of the court of appeals decision, in which it stated that the court "recognized [that] its decisions put the court of appeals in conflict with prior decisions of the South Dakota Supreme Court." State's Petition at 12. In actuality, the court of appeals

found that the issue of whether the Yankton Reservation was diminished or disestablished had never been squarely litigated and decided either in federal court or in state court in such a manner that would provide full development of the issues, or a full analysis required by the United States Supreme Court. The court distinguished the prior federal and state decisions cited by the State. *Yankton Sioux Tribe,* 99 F.3d at 1451, n. 18-19 (citations omitted), State's App. at 25-26.

REASONS FOR DENYING THE WRIT

I.

THE PETITION FOR WRIT OF CERTIORARI IS NOT APPROPRIATE IN THIS CASE BECAUSE THE STATE ALLEGES ERRONEOUS FACTUAL FINDINGS AND THE MISAPPLICATION OF A PROPERLY STATED RULE OF LAW.

As a basis for its application for writ of certiorari, the State claims that the court of appeals erred in failing to follow the Court's analytical structure of *Hagen v. Utah,* 510 U.S. 399 (1994) and other precedents. State's Petition at 15. However, a reading of the Eighth Circuit's carefully thought out opinion belies this allegation. The Eighth Circuit faithfully followed this Court's canons of construction and its analytical structure as set out in *Hagen.* The State's argument is nothing more than a disagreement with the court of appeals' interpretation of the 1894 statute, which, under Supreme Court Rule 10, is not to be considered, and is inappropriate as a ground for granting an application for a writ of certiorari.

Moreover, a writ of certiorari is not appropriate when the alleged error consists of erroneous factual findings. *See* Supreme Court Rule 10. The determination of whether

language in surplus land sales agreements either diminishes or retains a reservation's boundary is totally fact driven. Applying the *Hagen* principles to the language existing in a variety of different savings clauses will inevitably result in a different outcome for each case. The State's allegation that the court of appeals' opinion conflicts with this Court's precedent is pure and simple a disagreement with the court of appeal's factual findings and with its application of the proper rules of law under *Hagen. See* State's Petition at 15-23. The State asserts in its Petition that the court of appeals erroneously applied the evidence, including the language of the 1894 Act, the legislative history, and historical record specific to this case. *Id.* The State argues that the language of the 1894 Yankton Act and the historical record should be interpreted to mean that diminishment was accomplished by the Act. *Id.* Further, the State argues that the factual findings relative to the jurisdictional history of the reservation and the application of these facts were in error. *Id.* at 24-26. The State is arguing that the court of appeals made erroneous factual findings and that it misapplied the law. *Id.* at 15-28. The State's Petition for Writ of Certiorari is inappropriate and should be denied.

II.

GRANTING OF CERTIORARI WILL ENCOURAGE STATE COURTS TO IGNORE PRINCIPLES OF COMITY AND IGNORE FEDERAL DECISIONS INTERPRETING ISSUES OF FEDERAL LAW.

The State asserts that this Court should grant the Writ of Certiorari due to the conflict resulting from the recent South Dakota Supreme Court's decision in *State v. Greger*, 1997 S.D. 14 (1997). However, it is important to note that the Tribe was not a party to any level of the *State v. Greger* court proceedings.

The State seeks to use Fred Greger's criminal offense in an opportunistic manner to persuade this Court to re-decide an issue that has already been decided by two levels of federal courts. The State seeks a second bite of the apple simply because it does not like the outcome of the federal decisions. By strategically and intentionally seeking a ruling in the State court on a federal issue so as to create a conflict between the state and federal courts, the state seeks to persuade this Court to review an issue that has been extensively reviewed and decided. Granting certiorari in this case will give the state exactly what its strategy seeks: a second chance at this issue, despite the inappropriateness of the state court's decision which refuses to defer to the federal courts on this issue of exclusive federal law.

As well, the decision in *Greger* completely ignores Article VI of the United States Constitution, which provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

The Supremacy clause, along with Article I, §8 of the United States Constitution, giving Congress plenary power over Indian tribes, makes clear that the federal government is supreme in dealing with Indian tribes. *See Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 561 (1832). As an aspect of Indian tribes' inherent sovereignty and grant of authority to the United States government, state interference with Indian tribes is generally prohibited except to the extent Congress has granted the state authority. *See id.* at 561-62. This policy of "leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *McClanahan v. Arizona State Tax Comm'n.,* 411 U.S. 164, 168 (1973). The State of South Dakota

recognized this policy as a condition in the South Dakota Constitution and in its Enabling Act. *See South Dakota Constitution,* Art. XXVI, §18; *South Dakota Enabling Act* §10, 25 Stat. 676 (February 22, 1889), reprinted in App. 1.

In its decision in *State v. Greger*, the South Dakota Supreme Court completely ignores its own previous ruling in *St. Cloud v. Leapley,* 521 N.W.2d 118, at 122 (S.D. 1994), which holds:

> However, "with respect to what is essentially a federal question, we are guided and bound by federal statutes and decisions of the federal courts interpreting those statutes." (citations omitted).

Additionally, in *St. Cloud,* the South Dakota Supreme Court cited the holding of *Ex Parte Gurganus,* 603 So.2d 903, 906 (Ala.1992), in which the Alabama Supreme Court stated:

> Federal decisional law interpreting a federal statute ... and delineating the rights and obligations thereunder is binding on this Court under the Supremacy Clause of Article VI of the United States Constitution . . . .

The South Dakota Supreme Court has failed to follow its own policy of deferring to federal courts on matters of federal law. The South Dakota Supreme Court has recognized that "federal courts are the ultimate decision maker as to whether federal, state or tribal courts have jurisdiction in a particular Indian law case." *State v. Daly,* 454 N.W.2d 342, 344 (S.D. 1990). The South Dakota Supreme Court has even overruled its own ruling in recognition of the federal court of appeal's ruling concerning state jurisdiction over Indians. *See State v. Spotted Horse,* 462 N.W.2d 463, 467 (S.D. 1990), cert. denied, 500 U.S. 928 (1991). The South Dakota Supreme Court ignored its own well established precedent for deferring to federal decisions in matters of Indian law. In this case federal statutory provisions are at issue, as well as the federal supremacy clause. Given the federal trust relationship assumed by the federal government

toward Indian tribes, and the fact that federal courts decided this issue of exclusive federal law prior to the decision by the State Supreme Court, the state court was obligated to defer to the federal interpretation of this issue.

It is important to realize that, although the State alleges that the South Dakota Supreme Court has previously determined that the Yankton Sioux Reservation was diminished by the 1894 Act, prior to *Greger,* the issues regarding diminishment were never fully presented to the court. The court, in previous cases, did not address the legislative history and surrounding circumstances of the Act or the savings clause contained in Article XVIII, but relied almost exclusively on the language of Articles I and II. *See State v. Thompson,* 335 N.W.2d 349 (S.D. 1984); *Wood v. Jameson,* 130 N.W.2d 95 (S.D. 1964). In addition, the Tribe has never been a party to any case before the state court which has squarely considered the issue of diminishment in light of Article XVIII.

The Eighth Circuit recognized that the South Dakota Supreme Court had never fully decided the issue of diminishment, and had never before considered the savings clause or the legislative history. *Yankton Sioux Tribe,* 99 F.3d at 1451 n.19, State's App. 26. The court of appeals further recognized that other cases relied upon by the State did not decide the issues of diminishment. *Id.* at n.19. *See Yankton Sioux Tribe v. United States,* 623 F.2d 159 (Cl. Ct. 1980) (focus of case was fair market value of unallotted land sold by tribe, comments relating to diminishment were dicta); *Weddell v. Meierhenry,* 636 F.2d 211 (8th Cir. 1980), cert. denied (1981) (habeas relief requested, diminishment not litigated or raised by the parties). Granting certiorari in this case, will, in effect, encourage the state court to ignore the doctrine of comity in the future as well. Comity concerns are heightened where, as here, the South Dakota Supreme Court is asked by the State to revisit already decided issues of federal law for the sole purpose of

creating a conflict with the federal courts.

As well, granting certiorari in this case inevitably will encourage forum shopping. It will also encourage litigating parties to persuade a state's highest court to review issues previously decided in federal courts in order to set up such a conflict, needlessly upsetting previously settled areas of law, and achieving jurisdictional clash. Therefore, the State's Petition should be denied.

III.

THE STATE'S ARGUMENTS DO NOT SUPPORT THIS COURT'S GRANTING OF A WRIT OF CERTIORARI.

The State relies heavily upon three arguments to buttress its case in favor of granting certiorari in this matter: (1) the opinion of the Eighth Circuit Court of Appeals conflicts with this Court's diminishment jurisprudence; (2) a conflict was set up by the recent decision of the South Dakota Supreme Court; and (3) this case raises issues of national importance. None of these arguments support this Court's granting of a writ of certiorari in this case.

A. The court of appeals decision does not conflict with this court's rulings on diminishment.

This Court, in *Hagen v. Utah,* 114 S.Ct. 958 (1994), articulated its most current standard for deciding whether or not surplus land sales acts have diminished or disestablished reservation boundaries. This Court stated:

> The effect of any given surplus land Act depends on the language of the Act and the circumstances underlying its passage. In determining whether a reservation has been diminished, [o]ur precedents in

the area have established a fairly clean analytical structure, directing us to look to three factors. The most probative of diminishment is, of course, the statutory language used to open the Indian lands. We have also considered the historical context surrounding the passage of the surplus land Acts, although we have been careful to distinguish between evidence of the contemporaneous understanding of the particular Act and matters occurring subsequent to the Act's passage. Finally, on a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land Act diminished a reservation. Throughout the inquiry, we resolve any ambiguities in favor of the Indians, and we will not lightly find diminishment. Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit. (Citations omitted). *Hagen* 114 S.Ct. at 965-966.

In reaching its decision that the Tribe's boundaries were not diminished or disestablished, the court of appeals faithfully followed this Court's canons of construction.

First of all, understanding that the language of the statute is the "most probative" factor in determining Congressional intent, the court of appeals analyzed in detail the pertinent sections of the 1894 statute effectuating the agreement as a whole. The majority compared savings clauses in other surplus land acts and found that each contained limiting words which completely distinguish all other savings clauses from the Yankton Sioux agreement. *Yankton Sioux Tribe*, 99 F.3d at 1447. For example, some of the clauses spoke of treaty provisions "not inconsistent" with the other provisions of the agreement in question and are distinguishable. *See e.g., Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S.

753, 760-61 (1985) ("nothing in this agreement shall be construed to deprive [the tribe] of any benefits to which they are entitled under existing treaties not inconsistent with the provisions of this agreement"); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 623 (1977) (benefits of existing treaties and agreements continue unless "inconsistent with the provisions of this agreement"); *United States v. Southern Ute Tribe or Band of Indians*, 402 U.S. 159, 162 (1971) (all treaty provisions "not altered by this agreement are hereby continued in full force and effect"); *Dick v. United States*, 208 U.S. 340, 352 (1908) (treaty provisions "not inconsistent with the provisions of this agreement are hereby continued in full force and effect").

Article XVIII in the Yankton Sioux agreement contains no such limiting language. In the court of appeals' analysis, reading Article XVIII together with Articles I & II, the savings clause gives all of the parts of the agreement both consistency and force, stating that the unusually expansive language of Article XVIII "suggests that other sections should be read narrowly to minimize any conflict with the 1858 Treaty." *Yankton Sioux Tribe*, 99 F.3d at 1447.

The State, asserting a conflict with the 1858 Treaty, argues for a literal reading of Article XVIII, which, if read literally, would prevent the Tribe from selling any of the land to the government or to anyone else. However, acceding to the State's theory would have also prevented the State from exercising jurisdiction over parts of the Reservation, as it boasts of having done ever since 1894. The State's exercise of jurisdiction over parts of the Reservation has been patently illegal from its inception, primarily because of South Dakota's Enabling Act §10, 25 Stat. 676 (February 22, 1889), reprinted in App. 1 and because of South Dakota's Constitution, S.D. Const. Art. XXVI, §18, reprinted in App. 1 each of which forever foreswore any claim of jurisdiction over Indian lands.

In response to the State's argument that Article XVIII relates only to the continuation of annuities, the majority of the court of appeals panel understood that Congress knew how to limit the reach of the annuities provision based on previous Congressional actions, but it did not limit such reach, leading to the conclusion that the Article covers much more than annuities. *Yankton Sioux Tribe*. 99 F.3d at 1448, State's App. 18-19.

Moreover, beyond its clear holding that Congress intended no diminishment in this case, the court of appeals majority concluded that, if an ambiguity exists in the language of the 1894 statute, then, according to this Court's direction in *Hagen*, any such ambiguity must be resolved in favor of the Indians. *Id.* at 1449, State's App. 19. *See Hagen*, 510 U.S. at 410-11.

However, what is really at issue here, despite the State's rambling effort to create a distinction between this Court's rulings of law and that of the court of appeals, is simply a factual interpretation by the federal courts that the State does not like. In asking this Court to resolve a factual dispute, the State goes far beyond any rationale for the granting of a Writ of Certiorari. *See Supreme Court Rule 10.* The State is, in essence, arguing that the court of appeals erred in its factual findings and misapplied the Court's canons of construction and precedent. These arguments are not appropriate for this Court's review. *Id.*

B. "Cession and sum certain" Language In The Agreement Is Not Dispositive.

The key question identified by the Eighth Circuit in its interpretation of the 1894 statute is, "whether Congress intended that the tribe's governmental authority be transferred with the land sale." This is, in reality, the heart of the diminishment or

non-diminishment question.

The State's heavy reliance on cession and sum certain language becomes misplaced when one considers this Court's holdings with respect to the probative value of a surplus land statute. Under this Court's canons of construction, if there is no clear direction concerning congressional intent from any part of the statute, the Courts then are directed to use a juridical ouija board to plumb the intent of Congress. If there is no savings clause, as there is in the Yankton Agreement, then other language, such as cession and sum certain, would come under consideration. However, where there is strong language present in the statute clearly indicating congressional intent, as there is in Article XVIII, and especially where it is read together with Articles I & II, the ouija board becomes totally unnecessary. There is no need for the courts to play the conjecture game by turning to the vagueness of cession and sum certain language.

Secondly, this Court's inquiry into the questions of *de facto* changes in demography of the Reservation diminishes in importance when there exists a clear intent by Congress to preserve the Reservation's boundaries, as Article XVIII does in this case. Even without the savings clause, the fact that non-Indian settlers purchase surplus lands should be of minimal shock value, especially when one considers that the sole purpose of the sale and purchase of surplus lands was to bring non-Indian settlers into the reservation. The government believed that the allotment policy would benefit the Indians by forcing individual ownership, by enforcing individual responsibility, by requiring the Indians to abandon communal notions of property and social organization, and encouraging them to learn the techniques of productive farming from their new non-Indian neighbors. *Hagen*, 510 at 402-04. *See also* S. Doc. 27.

As the federal courts point out, the State's reliance on the fact that it began exercising jurisdiction over these areas as

early as 1895 is not dispositive and does not confirm the appropriateness or the legality of the exercise of state jurisdiction, nor is it inconsistent with the existence of shared jurisdiction by Tribal, state, and federal governments. *Yankton Sioux Tribe,* 99 F.3d at 1453; 890 F.Supp. at 887, State's App. 33, 87. The federal courts here recognized that the evidence was simply inconclusive and did not support *de facto* diminishment. *Id.*

C. Liquor Provisions and Common School Language Do Not Indicate An Intent to Diminish.

The contemporary discussion on the statute by the Commissioners indicates that the Tribal leaders wanted to make certain that, if the surplus lands were sold, liquor would not be brought into the reservation by virtue of opening it up to white settlement. In the words of the government's Commissioners:

> . . . It is certainly to the credit of these people that they demand that this condition [Article XVII] should be put into the agreement, and we hope that Congress will fix a penalty for the violation of this provision which will make it most effective in preventing the introduction of intoxicants ***within the limits of the reservation.*** (Emphasis added). S. Doc. 27 at *21.*

The court of appeals concluded that the liquor provision was not inconsistent with the intent to preserve the 1858 boundaries. The court found this case distinguishable from *Rosebud,* 430 U.S. at 613 in which the court found the liquor clause gave rise to an inference of diminishment. *Yankton Sioux Tribe,* 99 F.2d at 1449-50; State's App. 23-25. In this case, the court found that the language was not surplusage as in *Rosebud,* because the negotiations between the Yankton Sioux Tribe and the government were conducted shortly after the 1892 liquor act, and there was no evidence that either party was aware

of it at the time the 1892 Agreement was negotiated. Further, the liquor statute would have ceased to apply if the Reservation were eliminated in the future, but the liquor provision the Tribe insisted on in the agreement would remain. Therefore, the court of appeals correctly found that the liquor provision did not demonstrate an intent to diminish. *Id.*

The State similarly attempts to apply the rationale of *Rosebud* to this case, alleging that the language of the 1892 Yankton Agreement reserving land for common school purposes indicated an intent to diminish the Reservation. Congress added a provision to the 1892 Yankton Agreement that "the sixteenth and thirty-sixth section in each Congressional township . . . shall be reserved for common-school purposes and be subject to the laws of the State of South Dakota." However, as the court of appeals recognized, *Rosebud* does not have force in this case because the 1894 Act makes the common school sections subject to state law and if Congress intended to diminish the Reservation, the common school sections would have been subject to the laws of the state in any event, and the grant of jurisdiction to the State of South Dakota would have been unnecessary. *Id.* at 1450. The court of appeals determined that the common school language was consistent with the conclusion that Congress desired to ensure that the "infrastructure would exist for common schools for all future residents into the assimilated area." *Id.* The State's reliance on these provisions is misplaced as they do not, in the Eighth Circuit's analysis, demonstrate an intent to diminish the Yankton Sioux Reservation.

IV.

THE COURT SHOULD DENY THE WRIT OF CERTIORARI BECAUSE THE STATE IS BARRED FROM RELITIGATING THE BOUNDARY ISSUE AND

BECAUSE THE TRIBE WAS NOT A PARTY AT THE STATE PROCEEDING.

A. The State is barred from relitigating the boundary issue under the doctrine of collateral estoppel.

The doctrine of collateral estoppel does not bar a cause of action, but it bars relitigation of an essential fact or issue involved in an earlier suit from a court of competent jurisdiction. As this Court has explained:

> A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privities . . . ." *Southern Pacific R. Co. v. United States,* 168 U.S. 1, 48-49, [18 S.Ct. 18, 27, 42 L.Ed. 355] (1897).

Montana v. United States, 440 U.S. 147, 153 (1979). Under collateral estoppel, "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation . . . ." *Id.* (citations omitted). The Court elaborates on the policy underlying this doctrine:

> To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

Montana, 440 U.S. at 153-54 (footnote omitted). This Court has further explained:

> Public policy dictates that there be an end to litigation; that those who have contested an issue shall be bound by the result of that contest, and that matters once tried shall be considered forever settled as between the parties.

Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 401 (1981) (citations omitted). *See also Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326 (1979); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313, 328-29 (1971).

Federal courts apply a four-part test to determine whether collateral estoppel applies: (1) was the issue decided in a prior adjudication identical with the one presented in the action in question; (2) was there a final judgment on the merits; (3) was the party against whom the plea was asserted a party or in privity with a party to the prior adjudication; and (4) did the party against whom the plea is asserted have a full and fair opportunity to litigate the issue in the prior adjudication. *Montana,* 440 U.S. at 1147-53; *Oldham v. Pritchett,* 599 F.2d 274 (8th Cir. 1979).

In this case, the issue of whether the boundaries of the Yankton Sioux Reservation remain intact was clearly the identical issue decided by the federal courts but redecided by the state court in *State v. Greger.* There was a final judgment on the merits in both federal actions. The State has never claimed that it did not have a full and fair opportunity to litigate the boundary issue at any proceeding, and given the voluminous record, the State cannot make such a claim. Thus, the requirements for the invocation of the doctrine of collateral estoppel are all present, and the state should be barred from attempting to relitigate the issue of the Yankton Sioux Reservation boundaries.

The fact that the Tribe was not a party to the state court *State v. Greger* action does not preclude the use of collateral estoppel. This Court has recognized that nonmutual offensive collateral estoppel can be used so that a nonparty to a prior

action can use collateral estoppel in a later action against a party to the prior action. *See Parklane Hosiery,* 439 U.S. 322 (1979). In *United States v. Mendoza,* 464 U.S. 154, 162 (1984) the Court limited the use of collateral estoppel against the United States Government.

There are very few cases that apply *Mendoza* to prohibit the use of collateral estoppel against a state government. In fact, the Eleventh Circuit is the only federal decision to apply the decision to prevent collateral estoppel against a state government, *Hercules Carriers, Inc. v. Claimant State of Florida,* 768 F.2d 1558 (1985), and other circuit courts have failed to follow this decision. *See e.g., Benjamin v. Coughlin,* 708 F.Supp. 570 (S.D.N.Y. 1989), aff'd 905 F.2d 571 (2nd Cir. 1990).

Mendoza involved allegations of a violation of the United States Constitution. The Court expressed the policy that the rule should apply only against the United States Government on issues that involve public issues affecting citizens throughout the land. The Court said the proscriptions of the United States Constitution are generally directed against the government and often arise in a case in which the government is a party. Thus, the Court explained, the government is more likely than a private party to be involved in lawsuits against different parties involving the same issue, and a rule allowing collateral estoppel against the government would thwart the development of important legal questions. *Id.* at 160.

Such policy considerations do not apply in this case. Here, the issue arises in a fact-specific dispute involving specific federal statutes geared to one site only, including federal conduct applied to a remote and relatively isolated area in South Dakota. Collateral estoppel is available against the State of South Dakota in this case, unlike in *Mendoza* in which the Court limited its ruling to the "issues such as those involved in this case." *Mendoza,* 464 U.S. at 162.

None of the exceptions to the rule of collateral estoppel

are available in this case. The two most important exceptions are whether the controlling facts have changed significantly since the first judgment, and whether the controlling legal principles have changed significantly since the first judgment. *Montana,* 440 U.S. at 155. The facts necessary to decide the boundary issue have remained the same throughout the federal actions and the state court action. The opinions reveal that the courts considered virtually the same evidence. The same controlling legal principles are applied by both the state court and the federal courts. No new authority has since emerged.

The doctrine of collateral estoppel is no less meaningful in the context of a case involving the diminishment of an Indian reservation, and in fact has been applied in cases involving this issue. *See White Earth Band of Chippewa Indians v. Alexander,* 683 F.2d 1129 (8th Cir. 1982), cert. denied sub. nom. *Counties of Mahnomen and Clearwater, Minnesota v. White Earth Band of Chippewa Indians and Alexander,* 459 U.S. 1070 (1982).

The State's allegations of the boundary issue as one of substantial public importance is not enough to give the State carte blanche to disregard another court's judgment altogether so that it may relitigate the same issue in another forum. The State should be barred from again seeking review of the boundary issue. *See also* Restatement (Second) of Judgments § 28, comment b (1982) (it is not necessary to determine whether the issue is one of fact or law for issue preclusion, it is an unnecessary burden on the courts to allow repeated litigation of the same issue).

This is the first opportunity for the Tribe to assert collateral estoppel against the State. The Tribe was not a party to the proceedings in *State v. Greger* at any stage and could not have pressed the issue below. This Court's review of the boundary issue in this case would give credibility to the state court decision which has exceeded its authority by ignoring the supremacy clause, and by refusing to defer to the federal courts

on this exclusive issue of federal law. Review of this case would send a message to state courts that they are free to re-decide federal issues whenever they do not like the outcome decided by the federal courts. The State should be estopped from seeking yet another review of the boundary issue in this case.

B. The Tribe Is Not Bound By The State Supreme Court Decision Because It Was Not A Party To The Proceedings.

This Court has ruled that a sovereign is not bound by a decision purporting to resolve a boundary dispute affecting that sovereign when the sovereign was not a party to the proceedings. *Georgia v. South Carolina,* 497 U.S. 376 (1990). Thus, the Tribe, which was never a party to the proceedings in *State v. Greger*, is not bound by the South Dakota Supreme Court's interpretation of the issue, and in effect, there really is no conflict. The State, on the other hand, was a party to the proceedings in the federal court actions and should be bound by the federal decisions in this case.

Although the State may argue that this Court has decided cases involving the boundaries of an Indian reservation in cases in which the tribe was not a party, none of these cases involved relitigation of a reservation boundary issue directly involving the affected tribal, state, and local governments as parties. *See e.g., Solem,* 464 U.S. 463; *DeCoteau,* 420 U.S. 425; *Mattz v. Arnett,* 412 U.S. 481 (1973).

It is inequitable to hold a party bound by a decision in which it was not even a party, and had no opportunity to be heard before the court, especially in view of the fact that the same party in this case, the State, had litigated precisely the same issue in a different forum and is now seeking relitigation of the issue because it did not like the outcome in the federal system. This forum shopping should be discouraged.

CONCLUSION

For the reasons discussed above, the Tribe respectfully requests that this Court deny the State's Petition for Writ of Certiorari.

Respectfully submitted,

JAMES G. ABOUREZK
Counsel of Record
BOBBIE J. RASMUSSON
Abourezk Law Offices, P.C.
P.O. Box 1164
Sioux Falls, South Dakota 57101-1164
Counsel for Respondents
Tel: (605) 334-8402
Fax: (605) 334-9404

APPENDIX

APPENDICES

South Dakota Enabling Act, § 10,
25 Stat. 676 (1889). ..... App. 1

South Dakota Constitution, Art. XXVVI,
§ 18.. ..... App. 1

THE ENABLING ACT

(Act of February 22, 1889, Ch. 180, 25 Statutes at Large 676.)

§10. That upon the admission of each of said states into the union, sections numbered sixteen and thirty-six in every township of said proposed states, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any action of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said states for the support of common schools, such indemnity lands to be selected within said states in such manner as the Legislature may provide, with approval of the secretary of the interior; provided, that the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grant nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military or other reservations of any character, be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain.

CONSTITUTION OF SOUTH DAKOTA

(Adopted October 1, 1889; yeas, 70,131; nays, 3,267.)

§ 18. **Freedom of religion -- Public lands -- Indian lands -- Uniformity of taxation -- Territorial debt -- Public schools -- Federal reservations -- Irrevocability.**

That we, the people of the state of South Dakota do ordain:

First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship.

Second. That we, the people inhabiting the state of South Dakota, do agree and declare, that we forever disclaim all right and title to the unappropriated public lands lying within the boundaries of South

Dakota; and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States residing without the said state, shall never be taxed at a higher rate than the lands belonging to residents of this state. That no taxes shall be imposed by the state of South Dakota on lands or property therein belonging to or which may hereafter be purchased by the United States, or reserved for its use. But nothing herein shall preclude the state of South Dakota from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relation and has obtained from the United States, or from any person a title thereto by patent or other grant save and except such lands as have been, or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation, all such lands which may have been exempted by any grant or law of the United States, shall remain exempt to the extent, and as prescribed by such act of Congress.

Third. That the state of South Dakota shall assume and pay that portion of the debts and liabilities of the territory of Dakota as provided in this Constitution.

Fourth. That provision shall be made for the establishment and maintenance of systems of public schools, which shall be open to all the children of this state, and free from sectarian control.

Fifth. That jurisdiction is ceded to the United States over the military reservations of Fort Meade, Fort Randall and Fort Sully, heretofore declared by the president of the United States: provided legal process, civil and criminal, of this state shall extend over such reservations, in all cases of which exclusive jurisdiction is not vested in the United States, or of crimes not committed within the limits of such reservations.

These ordinances shall be irrevocable without the consent of the United States, and also the people of the said state of South Dakota, expressed by their legislative assembly.

Supreme Court, U.S.
FILED
MAY 16 1997
OFFICE OF THE CLERK

(8)

No. 96-1581

In The

Supreme Court of the United States

October Term, 1996

STATE OF SOUTH DAKOTA,

Petitioner,

v.

YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,

Respondents,

and

SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

MARK W. BARNETT
Attorney General
State of South Dakota
Counsel of Record

JOHN PATRICK GUHIN
Deputy Attorney General
500 East Capitol Avenue
Pierre, SD 57501-5070
Telephone: (605) 773-3215
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

13 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT BETWEEN THE SOUTH DAKOTA SUPREME COURT AND THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT. 1

II. CERTIORARI SHOULD BE GRANTED TO CORRECT THE DIVIDED PANEL'S MISUNDERSTANDING OF THIS COURT'S DISESTABLISHMENT JURISPRUDENCE..... 5

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES CITED:

Asarco, Inc. v. Kadish, 490 U.S. 605, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989) 4

Braxton v. United States, 500 U.S. 344 (1991) 1, 3

DeCoteau v. District County Court, 420 U.S. 425 (1975) 2, 6, 8, 9, 10

Hagen v. Utah, 510 U.S. 399 (1994) 1, 5, 6, 7

Kreimerman v. Casa Veerkamp, S.A. de C.V., 22 F.3d 634 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 577 (1994) 7

Oregon Wildlife Department v. Klamath Tribe, 473 U.S. 753 (1985) 9

Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994) 7

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) 2, 7, 8, 9

Sioux Tribe v. United States, 500 F.2d 458 (Ct.Cl. 1974) 7

Solem v. Bartlett, 465 U.S. 463 (1984) 5, 6

State v. Greger, 559 N.W.2d 854 (S.D. 1997) 3, 4, 5

State v. Thompson, 355 N.W.2d 349 (S.D. 1984) 2, 3

State v. Williamson, 211 N.W.2d 182 (S.D. 1973) 2

State v. Winckler, 260 N.W.2d 356 (S.D. 1977) 2

Wood v. Jameson, 130 N.W.2d 95 (S.D. 1964) 2

Yankton Sioux Tribe v. United States, 623 F.2d 159 (Ct.Cl. 1980) 8

MISCELLANEOUS:

18 U.S.C. § 1151(c) 2

Ex. Doc. 27, 53 Cong., 2d Sess. (1894) 8

Supreme Court Rule 10(a) 3

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Prior to the federal decision at issue here, the South Dakota Supreme Court had four times found that the Yankton Sioux Reservation had been disestablished; likewise, the South Dakota Supreme Court found disestablishment after the decision at issue here. Respondent Tribe has failed to demonstrate the non-existence of the federal-state conflict as to this "important question of federal law." Further, the Tribe has failed to demonstrate that the federal decision spurning this Court's "cession and sum certain" jurisprudence should remain unreviewed.[1]

I

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT BETWEEN THE SOUTH DAKOTA SUPREME COURT AND THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

According to a recent decision of this Court, a "principal" reason motivating the use of certiorari "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991). We review below the Tribe's attempts to avoid the force of this practice.

---

[1] South Dakota respectfully suggests that the May 8, 1997, decision of the Tenth Circuit in the post-*Hagen v. Utah*, 510 U.S. 399 (1994) litigation indicates the very practical advantages to the parties, the affected governments and the courts of resolving the conflict at this time. *Ute Indian Tribe v. Utah*, No. 96-4073 (10th Cir. May 8, 1997).

A. Contrary to the Tribe's argument, the South Dakota Supreme Court had decided the disestablishment issue on four occasions prior to the federal court decision.

The Tribe argues that, prior to the federal case at issue here, the South Dakota Supreme Court had "never fully decided" the diminishment issue. Respondents' Brief (RB) 12. The allegation is without merit; the South Dakota Supreme Court in fact had decided the issue four times before the recent federal decisions.

In *Wood v. Jameson*, 130 N.W.2d 95, 99 (S.D. 1964), the South Dakota Supreme Court held, when denying a writ of habeas corpus:

> Construing the Indian treaty and the 1894 ratifying Act together we think it was the purpose of Congress to disestablish the reservation. . . .

In *State v. Williamson*, 211 N.W.2d 182, 183 (S.D. 1973), a tribal member defendant appealed on the ground that his offenses occurred "within the boundaries of the Yankton Sioux Reservation." The South Dakota Supreme Court held that the "Act of 1894 disestablished that portion of the Yankton reservation which was ceded and sold to the United States. . . ." *Williamson*, 211 N.W.2d at 184. In *State v. Winckler*, 260 N.W.2d 356, 360 (S.D. 1977), the Court recognized the existence of limited "Indian country" in the area by virtue of 18 U.S.C. § 1151(c) but stated flatly that "this Court has ruled that the Yankton Indian Reservation was disestablished. . . ."

Finally, in 1984, in *State v. Thompson*, 355 N.W.2d 349, 350 (S.D. 1984), the Court addressed this question: "IS THE YANKTON SIOUX RESERVATION DISESTABLISHED?" (Emphasis in original.) The Court examined the 1894 Agreement, decisional law including *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), and its own cession

precedent. The South Dakota Supreme Court found that its disestablishment methodology was the "same" as that adopted by this Court. *Thompson*, 355 N.W.2d at 351. The Court thus found the reservation to be disestablished and affirmed the conviction. *See also State v. Greger*, 559 N.W.2d 854, 860 (S.D. 1994), App. 138-139 (reviewing the four state court decisions); Dissent, App. 61 and n.38.

These decisions of the South Dakota Supreme Court as to the "meaning" of "federal law," *Braxton*, 500 U.S. at 347, provide an adequate basis for the grant of certiorari jurisdiction on the basis of the subsequent conflict created by the federal opinion now before this Court. S.Ct. Rule 10(a).

The Tribe's assertion that the South Dakota Supreme Court had not "fully decided" the disestablishment issue is apparently based on a theory that no disestablishment issue is "fully decided" unless each provision of an agreement is individually addressed. *See* RB 8, 12. No decision of this Court, however, has ever required such a separate analysis. Indeed, the majority opinion below omits any reference to thirteen of the twenty provisions in the 1894 Agreement. The Tribe's argument falls under its own weight.

B. Contrary to the Tribe's assertions, the Tribe, not the State, initiated the actions which created the conflict.

The Tribe asserts that the *State's* actions somehow created the conflict between the federal and state courts. RB 10, 12, 13. This is inaccurate. Prior to the federal decisions at issue here, the South Dakota Supreme Court had four times found the Yankton Reservation disestablished, as we set forth above. *Subsequent* to those decisions, in the instant litigation, the *Tribe* "sought a declaratory judgment that the boundaries established in

the 1858 treaty still define the extent of the reservation. . . . " Majority Opinion, App. 4. The Tribe, not the State, sought this conflict.[2]

C. Contrary to the Tribe's assertions, *State v. Greger* solidly reinforced the conflict which came about as a result of the decision of the federal courts.

The Tribe goes to some length to dissuade this Court from consideration of *State v. Greger*, App. 125, in which the South Dakota Supreme Court unequivocally maintained the conflict created by the federal decision at issue here. First, the Tribe appears to argue that once a federal court has made a decision on a federal issue, the state courts are required, as a matter of *state* law, to follow the prior federal decision. RB 11-12. We note that this argument was made by the defendant and rejected in *Greger*, App. 135, n.5:

> We do not consider ourselves bound, however, by the Eighth Circuit's decision, for as the United States Supreme Court held in *Asarco, Inc. v. Kadish*, 490 U.S. 605, 617, 109 S.Ct. 2037, 2045, 104 L.Ed.2d 696, 715 (1989):
>
> > state courts . . . possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law.

The Tribe in effect complains that by following *Asarco*, the South Dakota Supreme Court undermined certain of its own *state court* precedent. Whatever the accuracy of that assertion, the South Dakota Supreme Court certainly did

---

[2] Of course, the defendant in *State v. Greger* (and not the State) raised the disestablishment issue in state court. *Greger*, App. 135.

not err by conforming its practice to the holdings of this Court.

Second, the Tribe appears to argue that the principles of "collateral estoppel" are somehow relevant here. RB 20-24. The Tribe's actual argument is presumably that the South Dakota Supreme Court in *Greger* should have, on the basis of "collateral estoppel," followed the recent decision of the lower federal courts. The South Dakota Supreme Court decision in *Greger* is not, however, on review here. The Tribe's argument is thus badly misplaced.

The Tribe also implies, without citation of authority, that it should have the benefit of "collateral estoppel" in this case *because* it did not participate in *Greger*. RB 23-24. The Tribe was well aware of the *Greger* litigation, (and does not claim otherwise), and evidently chose not to participate as amicus.

II

CERTIORARI SHOULD BE GRANTED TO CORRECT THE DIVIDED PANEL'S MISUNDERSTANDING OF THIS COURT'S DISESTABLISHMENT JURISPRUDENCE.

A. Contrary to the Tribe's position, the use of "cession and sum certain" language in a surplus land act creates an "almost insurmountable presumption" of disestablishment.

This Court has adopted the principle that when "cession and sum certain" language is adopted in a surplus land act, an "almost insurmountable presumption" of disestablishment is created. *Solem v. Bartlett*, 465 U.S. 463, 470-71 (1984); *Hagen v. Utah*, 510 U.S. 399, 411 (1994). Because Articles I and II of the 1894 Yankton Act contained language of "cession" of land for a "sum certain" the "almost insurmountable presumption" arose. App.

112-113. Like the majority below, *see* App. 13, 14; *see also Dissent*, App. 47, n.30, the Tribe credits the *State of South Dakota*, and not this Court, with recognition of the presumption.[3] RB 3. We need hardly point out the error of this approach.

The Tribe also offers, necessarily without citation of authority, a theory that "cession and sum certain" language amounts to a "juridical ouija board" which comes into play only in the absence of a savings clause. RB 17. In the presence of the savings clause, the Tribe's argument continues, "cession and sum certain" language is simply irrelevant. *See id.* The Tribe's theory simply cannot be squared with *Solem* and *Hagen* which recognize the very weighty presumption of disestablishment created by "cession and sum certain" language. *See also DeCoteau*, 420 U.S. at 445.[4]

B. Contrary to the Tribe's position, the issue before this Court – the proper interpretation of the 1894 Act – is a question of law and is not "totally fact driven."

The Tribe alleges, without citation of authority, that:

> The determination of whether language of surplus land sales agreements either diminishes or retains a reservation's boundary is totally fact driven.

---

[3] According to the Tribe, "the *State* relies on what *it* terms, 'cession and sum certain' language in the 1894 Act that creates, *in its words*, 'an almost insurmountable presumption' of diminishment." RB 3 (emphasis added).

[4] The State respectfully submits that the weakness of the Tribe's argument and of the majority decision below as to this central point suggests that this Court may wish to consider whether this case is appropriate for summary reversal.

RB 8-9. This is incorrect. The interpretation of an agreement of the United States with an Indian Tribe which has been incorporated in a federal statute is certainly a matter of law. *See Sioux Tribe v. United States*, 500 F.2d 458, 462 (Ct.Cl. 1974). *See generally Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312 (1994); *Kreimerman v. Casa Veerkamp, S.A. de C.V.*, 22 F.3d 634, 639 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 577 (1994). It is, of course, the failure of courts below to respect this Court's exposition of the law of disestablishment which has given rise to the present Petition.

The Tribe further alleges that the essence of the State's case is a disagreement with the factual findings of the court of appeals. *See* RB 9, 16. The Tribe, however, fails to specifically identify any alleged factual dispute. The Tribe at RB 9, cites the State's Petition, 24-26, as a source for its contention as to the "factual findings" in dispute, but these pages emphasize the *agreement* of the majority with the position that the State, and not the tribe, has consistently exercised jurisdiction over the non-Indian lands within the area.[5] *See also* App. 38-39. The critical importance of this factor is noted in *Hagen*, 510 U.S. at 420-421, and *Rosebud*, 430 U.S. at 603.

---

[5] State's Petition, 26, n.16, does refer to a tribal "claim" which the court of appeals does not resolve. The State has pointed the correct way to the disposition of that claim in the footnote, and the tribe does not refute the state's assertion that it would be improvident to rely upon the tribal claim. *Id.* We note further that RB 18 seems to suggest that, although the *state* has exercised jurisdiction, this is not "inconsistent with the existence of jurisdiction of the tribal, state, and federal government." No *evidence* to support "shared" civil or criminal jurisdiction is cited, however, and the record is to the contrary. *See* State's Petition 24-25; App. 38-39; DCO, App. 88.

C. The Tribe has failed to disturb the accuracy of the historical record presented by the State.

The Tribe as a practical matter concedes the accuracy of the historical record presented by the State.[6] Certain of the Tribe's attempts to augment that record, however, deserve response.

First, the Tribe seems to imply that, because the 1858 Treaty with the Tribe set out boundaries and the 1894 Act did not, this implies no change in the boundaries. RB 6. The opposite implication, however, assuredly arose – the elimination of boundaries in the 1894 Act meant exactly that there *would be* no boundaries. *See generally DeCoteau*, 420 U.S. at 452 (boundaries in 1867 Treaty); *id.*, 420 U.S. at 455-460 (no boundaries in 1891 Act); *Rosebud*, supra.

Second, the Tribe implies that the Agreement was somehow tainted by "allegations" of bribery. *See* RB 4. The Tribe fails to note that the "allegations" were rejected by Indian Inspector Cadman, whose report was submitted to Congress, along with the negotiation record. Ex. Doc. 27, 53 Cong., 2d Sess. (1894), p. 38. *See also Yankton Sioux Tribe v. United States*, 623 F.2d 159, 176 (Ct.Cl. 1980).

Third, we note the agreement of the Tribe that the "cession and sum certain" arrangement was adopted over the "appraisal and sale" method. *See generally* RB 4-5, 16-17. *See also Yankton Sioux Tribe*, 623 F.2d at 176 (Tribe's attempt to induce Claims Commission to treat 1894 Agreement as "appraisal and sale" rejected). The use of this "cession and sum certain" arrangement was, of

---

[6] The Tribe argues only that, although it used but 25 pages of its 30 page brief, "[s]pace does not allow Respondents to correct every misrepresentation of the historical record made by the state." RB 7. The Tribe does not, however, pause to "correct" any alleged "misrepresentations." Rather, the Tribe has "invite[d]" this Court to make its own analysis of the voluminous record. *Id.*

course, "precisely suited" to disestablishment. *DeCoteau*, 420 U.S. at 445.

D. The Savings Section does not operate as the Tribe argues.

The Tribe's discussion of the language of the savings section is flawed because it fails to point out that the savings section is *itself* ambiguous and thus not nearly as strong as the Tribe claims. While the section contains language which indicates "preservation of all provisions of the said Treaty of April 19, 1858," it also contains language which provides for preservation of "annuities under the said treaty of April 19, 1858." App. 120. If the first passage means what the Tribe has argued, the second passage is entirely superfluous. The savings section is thus internally ambiguous, a significant point which the Tribe fails to discuss. *See* RB 7, 14-16.

The Tribe also incorrectly asserts that "neither the State nor the Tribe" could find agreements which contained "similar language" or "language as strong, or with as much force as the savings clause at issue here." RB 7. *See also* RB 14-15. The Tribe, and majority below (*see* App. 20), unaccountably failed to address the two Crow Tribe clauses set out verbatim at Petition 19-20 which were, according to the Dissent, App. 50, n.31, "similarly 'strong.' " Moreover, we submit, in fact, that the ambiguity of the savings section here renders it substantially *weaker* in effect than those of the Crow Agreements (which did not themselves prevent diminishment), and further makes it analogous to or "similar" to the five sections cited by the Tribe at RB 14-15, among many others. *See also Oregon Wildlife Department v. Klamath Tribe*, 473 U.S. 753, 760-770 (1985) and *Rosebud*, 430 U.S. at 623 (Marshall, J. dissenting) (indicating the narrow effect given savings sections generally).

The Tribe finally relies upon its own ambiguity argument. *See* RB 16. As we point out above, that ambiguity, if it exists at all, arises from the savings section *which is itself internally ambiguous*. The Tribe cannot, moreover, rely on the canons of construction. As explained in *DeCoteau*, 420 U.S. at 447: "A canon of construction is not a license to disregard clear expressions of tribal and congressional intent." Because Article XVIII is itself ambiguous, the canons of construction certainly do not allow it to overcome the strong presumption of disestablishment created by "cession and sum certain" language.

In sum, the Tribe has failed to overcome the Dissent's analysis, App. 55-56, that the majority's construction of the savings clause

> is based neither on the text – which referred only to annuities – nor the legislative history of the 1894 Act, and has as its source, as best I can discern, a single-minded desire to avoid diminishment at all costs.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MARK W. BARNETT
Attorney General
Counsel of Record

JOHN PATRICK GUHIN
Deputy Attorney General
500 East Capitol Avenue
Pierre, SD 57501-5070
(605) 773-3215

MOTION FILED

MAY - 7 1997

No. 95-1581

(3)

In The

Supreme Court of the United States

October Term, 1996

STATE OF SOUTH DAKOTA,

Petitioner,

v.

YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,

Respondents,

and

SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

MOTION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF THE MONTANA ASSOCIATION OF COUNTIES FOR THE RESERVATION COUNTIES IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI

THANE P. JOHNSON
WERNER, EPSTEIN & JOHNSON, P.L.L.C.
Attorneys at Law
14 E. Main, P. O. Box 428
Cut Bank, MT 59427-0428
(406) 873-2277

Counsel for Montana Association of Counties – Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

39 pp

MOTION TO FILE AMICUS CURIAE BRIEF BY MONTANA ASSOCIATION OF COUNTIES (MACO) IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI

Comes now the Montana Association of Counties (hereinafter MACO) and respectfully moves this Court for leave to file an Amicus Curiae brief in support of Petitioner's Petition for Writ of Certiorari. MACO makes the aforementioned motion pursuant to Rule 37 of United States Supreme Court Rules.

MACO represents all of the Counties of Montana. Montana has seven federally recognized reservations. At least 20 of the 56 counties in Montana either border a reservation or have land lying within a reservation.

Five of the seven reservations were the subject of surplus land acts similar to the 1894 Yankton Sioux Act. Only two of the five Acts have been litigated in the Courts, and one of these two involved an arguably incomplete decision. The remaining three reservations have not faced diminishment litigation. The question of whether diminishment occurred on the remaining three or four reservations is of extreme importance to the counties that either encompass or border the reservations. The question of reservation status affects the extent to which Montana and the impacted counties may exercise civil and criminal jurisdiction. Montana and its counties rely on the precedents established by the Eighth Circuit and this Court in determining their jurisdictional role.

MACO is familiar with issues in Indian law. MACO recently sponsored an Amicus Curiae Brief in the case of *Montana, et al. v. United States Environmental Protection*

Agency, C.A. No. 96-35508 before the Ninth Circuit Court of Appeals. This case directly addresses the issue of tribal jurisdiction over non-Indians and non-members. Because MACO is familiar with the principles of Indian law, it believes that it can provide a fresh outlook and argument to the issues before this Court in the *Yankton Sioux Tribe* case.

Counsel for MACO has contacted counsel for State of South Dakota and Southern Missouri Waste Management District and both have consented to the filing of this brief. A copy of said consent is provided.

Counsel for MACO has contacted counsel for Yankton Sioux Tribe but was unable to obtain their written consent.

Dated this 7th day of May, 1997.

WERNER, EPSTEIN & JOHNSON

THANE P. JOHNSON
Attorney for MACO

QUESTION PRESENTED

WHETHER THE YANKTON SIOUX RESERVATION HAS BEEN DIMINISHED BY VIRTUE OF AN 1894 ACT ADOPTING A "CESSION AND SUM CERTAIN" AGREEMENT BETWEEN THE YANKTON SIOUX TRIBE AND THE UNITED STATES AND BY VIRTUE OF ITS CENTURY LONG TREATMENT AS DIMINISHED?

TABLE OF CONTENTS

Page

QUESTION PRESENTED..... i

INTEREST OF THE AMICI MONTANA ASSOCIATION OF COUNTIES..... 1

STATEMENT OF THE CASE..... 1

SUMMARY OF THE ARGUMENT 2

I. THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI WHEN THE EIGHT CIRCUIT FAILED TO USE THIS COURT'S PRESUMPTION LEAVING THE QUESTION OF JURISDICTION IN ALL AREAS BORDERING SURPLUS LAND ACT RESERVATIONS IN DISARRAY..... 3

A. The Eighth Circuit erred in failing to apply the statutory presumption 4

B. Reaffirming the statutory presumption will lead to predictability making this case of extreme national importance 5

C. Failure to use the presumption conflict's with this Court's prior diminishment decisions..... 10

II. THE COURT OF APPEALS ERRED IN FAILING TO CONSIDER THE JURISDICTIONAL ASSUMPTIONS AND FUTURE PROBLEMS AS A PART OF THE SURROUNDING CIRCUMSTANCES 12

A. The Court of Appeals erred in failing to give any weight to the jurisdiction assumptions of the State and the Tribe 12

B. The Court of Appeals should have considered the jurisdictional effect of a finding of no diminishment 15

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

Agri West v. Koyama Farms, Inc., 933 P.2d 808 (1997) 17

Brendale v. Yakima Indian Nation, 492 U.S. 408 (1989) 16

Concerned Landowners Assoc., Inc. v. Blackfeet Tribe, CV-95-124-GF-PGH (Sept. 12, 1996)..... 17

Confederated Salish Kootenai Tribes, Etc. v. Namen, 665 F.2d 951 (9th Cir. 1982).....7, 8

DeCoteau v. District County Court, 420 U.S. 446 (1975).....4, 10

Duncan Energy v. Three Affiliated Tribes, 27 F.3d 1294 (8th Cir. 1994)..... 16

Hagen v. Utah, 510 U.S. 399 (1994) 3

Hawkins v. Crist, No. CV-76-99-BLG (D.Mont. January 27, 1978).....7, 12

Hinshaw v. Mahler, 42 F.2d 1178 (9th Cir. 1994) 17

Mattz v. Arnett, 412 U.S. 481 (1973) 12

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 16

Montana v. United States, 450 U.S. 544, 101 S.Ct. 1245 (1981).....3, 7, 15, 16, 19

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) 10, 11, 12, 13

Seymour v. Superintendent, 368 U.S. 355 (1962) 4, 10

Solem v. Bartlett, 465 U.S. 463 (1984) ..... *passim*

State of Montana v. United States, CV-95-56-M-CCL (Mar. 29, 1996) 17

TABLE OF AUTHORITIES – Continued

Page

Strate v. A-1 Contractors, et al., U.S.W.L. 202022 (1997) 17

United States v. Wheeler, 435 U.S. 313 (1978) 15

Williams v. Lee, 358 U.S. 217 (1959) 16

MISCELLANEOUS:

17 Cong. Rec. 103, 1633 (1886) 6

18 U.S.C. Section 1151(a) (1982 ed.) 13

24 Stat. 388 (1887) – General Allotment Act 2, 6

26 Stat. 1039-1040 (1891) 7

29 Stat. 350 (1896) 8

29 Stat. 353 (1896) App. 4 8

33 Stat. 302 (1904) App. 5 8

33 Stat. 352 (1904) App. 2 7

35 Stat. 558 (1908) 8

34 Stat. 80 (1906) 10

33 U.S.C. Section 1313 – Clean Water Act 17

Art. I, 27 Stat. 120 (1892) 5

F. Cohen, Handbook Federal Indian Law 127-134 (1982 ed.) 6

Rosebud Sioux Act of 1904 .....9, 10

United States Court of Appeals, Eighth Circuit (Oct. 24, 1996).....1, 13

INTEREST OF THE AMICI MONTANA ASSOCIATION OF COUNTIES

The Montana Association of Counties (hereinafter MACO) represents all of the Counties in Montana. Montana has 7 federally recognized reservations. At least 20 of the 56 counties in Montana either border a reservation or have land lying within a reservation.

Five of the seven reservations were the subject of surplus land statutes similar to the one at issue in this case. At least 14 counties either encompass or border these reservations. The issue of whether those areas continue as reservations today is of extreme importance to the 14 counties directly affected by the reservations. The question of reservation status affects the extent to which Montana and the 14 political subdivisions may exercise criminal and civil jurisdiction within a reservation. A decision by this Court affecting the reservation boundaries also poses a major impact to the extent the 14 counties can tax.

Montana and the 14 counties impacted by their locality to reservations, rely on the precedents established by the Eighth Circuit Court of Appeals and this Court in determining their future jurisdictional role. A decision by this Court will hopefully link other precedents involving disestablishment and diminishment into a predictable rule for Montana and the 14 counties.

STATEMENT OF THE CASE

Amici curiae adopt the Statement of the Case set forth in the Petition for a Writ of Certiorari.

SUMMARY OF THE ARGUMENT

This case encompasses an issue of extreme importance to the Western States of the United States. In the late 1800's and early 1900's, Congress passed several Surplus Land Acts to effectuate the General Allotment Act of 1887. A substantial majority of the Indian reservations in the West felt the impact of the Surplus Land Acts. Many of the States with reservations subject to the Acts, are looking to this decision for guidance.

The Eighth Circuit's decision has left this Court's diminishment decisions in disarray. The Eighth Circuit failed to follow the statutory presumption created by this Court's decision in *Solem v. Bartlett*, 465 U.S. 463, 470-471, 104 S.Ct. 1161, 1166 (1984).

This Court should accept Petitioner's Writ of Certiorari in order to reaffirm the statutory presumption. The Western states and the local governments affected by the Surplus Land Acts require predictability in order to make future decisions regarding construction, services and taxation. The presumption provides this predictability.

The Eighth Circuit's decision ignoring the presumption conflicts with this Court's prior diminishment decisions. Prior decisions containing the cession language and an unconditional commitment to compensate lead this Court to find diminishment. The Yankton Sioux Act of 1894 also contained cession language and an unconditional commitment to compensate the Tribe. The Eighth Circuit erred in failing to follow this Court's decisions.

The Court of Appeals also erred when it failed to give any weight to the jurisdictional history and assumptions of

South Dakota, its local governments and the Yankton Sioux. The State exercised civil and criminal jurisdiction over the entire area of the 1858 Treaty. The Tribe, however, declined "until recently" to exercise any authority over the surplus land. South Dakota and the local governments affected by the Act have invested substantial resources, services and money in the area. The Court of Appeals should have given the State's jurisdictional assumption and expectations substantial weight.

Finally, the Court of Appeals should have considered the future jurisdictional problems when it found no-diminishment. A no-diminishment decision, creates a multitude of issues for courts to decide under the *Montana v. United States*, 450 U.S. 544 (1981) test. These issues make this case one of extreme national importance. This Court should grant Petitioner's Writ of Certiorari.

I. THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI WHEN THE EIGHTH CIRCUIT FAILED TO USE THIS COURT'S PRESUMPTION LEAVING THE QUESTION OF JURISDICTION IN ALL AREAS BORDERING SURPLUS LAND ACT RESERVATIONS IN DISARRAY.

This Court examines the effects of Surplus Land Acts using a three factor test. *Hagen v. Utah*, 510 U.S. 399, 409 (1994). First the Court examines the statutory language of the Surplus Act. Second, the court considers the historical context surrounding the passage of the Act. Finally, the Court pragmatically asks who moved into the opened area. Id.

The most probative evidence of diminishment stems from the statutory language itself. *Hagen v. Utah, supra.*

Congress must clearly state its intent to change boundaries before making a finding of diminishment. *Solem v. Bartlett*, 465 U.S. 463, 470-471 (1984). In *DeCoteau v. District County Court, supra,* this Court began the framework of a presumptive rule interpreting Surplus Acts. In *Solem v. Bartlett, supra,* this Court laid out in plain and simple terms an interpretive rule for all to understand. The *Solem* Court stated:

> Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands. *DeCoteau v. District Count Court, supra,* at 444-445; *Seymour v. Superintendent,* 368 U.S. 353, 355 (1962). When such language of cession is buttressed by an unconditional commitment from Congress to compensate the Indian Tribe for its opened land, there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished.

Id.

The Eighth Circuit failed to apply the statutory presumption. Their failure to utilize the rule will lead to uncertainty and unpredictability making this case critical for all states and governmental bodies affected by Surplus Land Acts.

A. The Eighth Circuit erred in failing to apply the statutory presumption.

In 1892 the Yankton Sioux Tribe of Dakota agreed to, "cede, sell, relinquish, and convey to the United States **all their claim, right, title, and interest** in and to all of the unallotted lands within the limits of the reservation . . . ". Art. I. 27 Stat. 1120 (1892).

> In consideration for the lands ceded, sold, relinquished, and conveyed to the United States as aforesaid, the United States stipulates and agrees to pay to the said Yankton tribe of Sioux Indians the sum of six hundred thousand dollars ($600,000.00), as hereinbefore provided for.

Id at Art. II.

The language of Articles I and II fit squarely within the statutory presumption as stated in *Solem v. Bartlett, supra.* The 1892 language plainly states that the Yankton Sioux agreed to cede property to the United States. The 1892 agreement combines the cession language with an absolutely unconditional commitment to pay the Yankton Sioux $600,000.00.

Articles I and II of the agreement left the Court of Appeals with two choices, either declare the presumption of *Solem v. Bartlett, supra,* a misstatement of law, or follow the presumption. The Court of Appeals did neither. The Court of Appeals only mentions the presumption as a part of South Dakota's argument. At best the Court of Appeals simply ignores *Solem v. Bartlett, supra.*

B. Reaffirming the statutory presumption will lead to predictability making this case of extreme national importance.

In the late 1800's Congress set aside large portions of the Western United States for Indian Reservations. *Solem v. Bartlett, supra,* at 466. In 1887, Congress passed the

General Allotment Act. 24 Stat. 388 (1887). The Allotment Act authorized the President to allot the lands of the reservations in severalty to individual Indians and families. Id. "After lands have been allotted to all Indians of any tribe, . . . or sooner if in the opinion of the President it shall be for the best interests of said tribe," the Secretary of the Interior may negotiate with the tribe for the purchase and release of any lands on the tribe's reservation that have not been allotted. Id. at 389. Congress labeled the excess land, "surplus", and envisioned opening the "surplus" to homesteaders. Id. at 390.

Congress intended the Indians to learn to farm, become civilized, and slowly assimilate into society. 17 Cong. Rec. 103, 1633 (1886). Congress hoped the reservations would then cease to exist.[1] Because of the Congressional intent and the pressure of homesteaders seeking new land, Congress passed several surplus land Acts in the late 1800's and early 1900's. See F. Cohen, Handbook

[1] Representative Stevens from the Committee on Indian Affairs, stated, "By these provisions your committee believe the Indian will be stimulated to personal action; the prospect of securing a home that shall be his own will be such an incentive to labor that he will gradually but surely abandon his nomadic habits and settle down to a life of comparative industry. Individual rights, action, and responsibility can only work this change in the condition of the Indian; he must no longer be surrounded by a "Chinese Wall." H.R. Rep. No. 2247, 48th Cong., 2nd Sess. (1895).

Senator Maxey also stated, "He can no longer depend upon this Government to support him in idleness; that the system of herding Indians on reservations to lie idle and be provided for by the Government is to cease." 17 Cong. Rec. 103, 1632 (1886).

Federal Indian Law 127-134 (1982 ed.) The Surplus Acts impacted several Western States.

Five Montana tribes felt the effect of a Surplus Land Act. These Tribes include the Crow, the Blackfeet, the Indians of the Fort Belknap Reservation, the Confederated Salish Kootenai Tribes, and the Indians of the Fort Peck Reservation.

In 1891, the Crow Tribe agreed to dispose of and sell part of its property for the sum of $946,000.00. 26 Stat. 1039-1040 (1891). App. 1. Again in 1904, the Crow Tribe also agreed to "cede, grant, and relinquish," to the United States all of its right, title, and interest in real property for the sum of not less than $4.00 per acre. 33 Stat. 352 (1904). App. 2. This Court stated that these acts "reduced the reservation." *Montana v. United States,* 101 S.Ct. 1245, 1249, 450 U.S. 544, 548 (1981). An unreported District Court decision did, however, find the 1904 Act diminished the Crow reservation. *Hawkins v. Crist,* No. CV 76-99-BLG (D.Mont.January 27, 1978). App. 3. See also *Confederated Salish Kootenai Tribes, Etc. v. Namen,* 665 F.2d 951, 957 n.13 (9th Cir. 1982).[2] Unless the decision in *Montana v. United States, supra,* and *Hawkins v. Crist,*

[2] The 1891 Act contains a similar "savings clause" as the 1894 Yankton Sioux Act. It provides, "That all existing provisions of the treaty of [1868] and the agreement . . . dated [1882] shall continue in full force." The *Montana v. United States, supra,* decision and the *Hawkins v. Crist, supra,* decision did not find that this language denied a finding of diminishment.

supra, equal the litigation of the 1891 Act, then no party has fully litigated the effect of the 1891 Act.

In 1895, the Blackfeet Tribe also agreed to "convey, relinquish and release" to the United States all of its right, title, and interest in real property. 29 Stat. 353 (1896). App. 4. In consideration of the "cession" the United States paid to the Tribe $1,500,000.00. Id.

In 1896 the Indians of the Fort Belknap Reservation also agreed to "convey, relinquish, and release" all their rights in real property. 29 Stat. 350 (1896). App. 5. In consideration for the "cession" the Tribe received $360,000.00. Id. The result of the 1896 Act with regard to the Blackfeet and the Indians of Fort Belknap have never been litigated.

In 1904, Congress "opened to settlement and entry" lands of the Confederated Tribes. 33 Stat. 302 (1904). App. 6. The Act required the money from the sale of the opened land to be given to the local land officer and placed in the United States Treasury. Id. The United States paid the Confederated Tribes in accordance with Section 14 of the Act. Id. The Ninth Circuit held that Congress did not intend to diminish the Flathead Reservation. *Confederated Salish & Kootenai Tribes, Etc. v. Namen*, 665 F.2d 951 (9th Cir. 1982).

In 1908, Congress "opened to settlement and entry" lands of the Indians of the Fort Peck Reservation. 35 Stat. 558 (1908). App. 7. The United States paid the Fort Peck Indians in a manner similar to the Confederated Tribes. Id.

Numerous reservations throughout the United States face similar histories to the Yankton Sioux, and the five Surplus Land Act Tribes of Montana. Many tribes have not experienced the litigation of their Surplus Land Acts. Most states, which encompass these reservations, lie in wait wondering the result of possible diminishment litigation. These states and counties encompassing and surrounding the reservations have invested substantial public funds in developing highways, bridges, and public buildings. Tax dollars pay for services including law enforcement, waste management and road maintenance. The states and counties have made these investments assuming they have civil and criminal jurisdiction over the areas affected by the various Congressional Acts. They also assume they can tax the fee property and the persons in the area.

In reviewing the Congressional Acts affecting the Crow, the Blackfeet, and the Indians of Fort Belknap, all of the Acts contain cession language "buttressed by an unconditional commitment" to compensate for the opened land. Applying the *Solem v. Bartlett, supra*, presumption, the 1891, and 1904 Acts diminished the Crow Reservation and the 1895 Acts diminished the Blackfeet and Fort Belknap Reservations.

Application of the statutory presumption leads to predictability for the states and counties. If this Court reaffirms the statutory presumption of *Solem v. Bartlett, supra*, then the states and counties of the West can rest easy knowing that their investments are subject to their civil and criminal control. The states and counties can make future decisions regarding construction, maintenance, services, and employment. The states and counties

will know that they can tax the fee land in the area and the people in order to fund the construction and services.

C. Failure to use the presumption conflicts with this Court's prior diminishment decisions.

In *Solem v. Bartlett, supra,* at 469 n. 10, this Court compared prior diminishment decisions by creating a spectrum. The *Solem v. Bartlett, supra,* Court placed the *DeCoteau, supra,* decision at the extreme end showing clear diminishment. At the other end of the spectrum the Court placed *Seymour v. Superintendent, supra,* as the clear example showing no-diminishment.

In *DeCoteau, supra,* the Lake Traverse Tribe agreed to "cede, sell, relinquish, and convey" its surplus land for a sum certain of $2.50 per acre. *DeCoteau, supra,* at 437. In *Seymour, supra,* on the other hand, the Act authorized the Secretary of the Interior to "sell or dispose of" the unallotted lands of the Colville Reservation in consideration of any proceeds the sales generated. 34 Stat. 80 (1906). *Solem v. Bartlett, supra,* at 469. The Colville Tribe did not agree to a sum certain, Id.

Finally, the Court found in the middle of the spectrum the Rosebud Sioux Act of 1904. Id. The 1904 Act incorporated the cession language of the Tribe's 1901 agreement but lacked the sum certain language. *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 596 (1977). Instead, the Act guaranteed the Tribe only the proceeds from the sale of the surplus lands. Id.

The presumption would apply in *DeCoteau, supra.* The Lake Traverse agreement contained cession language

combined with a commitment to compensate creating a presumption of diminishment.

The Colville agreement, however, contained neither cession language, nor a commitment to compensate. As a result, the presumption cannot apply. The language of the Act, the legislative history and the pragmatic circumstances required a finding that Congress did not intend the Colville Reservation to be diminished.

In the *Rosebud, supra,* decision, the presumption probably applies because Congress provided an unconditional commitment to compensate. Even if the presumption did not apply, the surrounding circumstances and the legislative history caused a finding of diminishment.

In the *Yankton Sioux* case, the presumption applies. The agreement contained express cession language combined with an unconditional commitment to compensate. The *Solem v. Bartlett, supra,* presumption applied.

Despite the statutory presumption found in this Court's precedence, the Court of Appeals did not acknowledge its existence. The Court of Appeals should have required Respondents to rebut the presumption. The Circuit Court should have examined the legislative history and pragmatic circumstances only to see if they rebutted the presumption. Instead, the Court of Appeals ignored the presumption and used the savings clause in Article XVIII to manufacture ambiguity. Finally, the Court of Appeals used inconclusive legislative history and other suspect sources to mold their decision.

II. THE COURT OF APPEALS ERRED IN FAILING TO CONSIDER THE JURISDICTIONAL ASSUMPTIONS AND FUTURE PROBLEMS AS A PART OF THE SURROUNDING CIRCUMSTANCES.

As stated above, the Courts look to the face of the Surplus Land Act, the legislative history, and the "surrounding circumstances" to determine whether diminishment has occurred. *Rosebud, supra,* at 587, quoting *Mattz v. Arnett,* 412 U.S. 481, 505 (1973). Consideration of the jurisdictional history and assumptions constitutes a part of the subsequent history and surrounding circumstances. See *Rosebud, supra,* at 603. "The element of subsequent history which provides the strongest index of congressional intent is the 'jurisdictional history'." *Hawkins v. Crist, supra,* at App. 3, p. 8.

The jurisdictional assumptions by South Dakota and the Yankton Sioux Tribe strongly support a finding of diminishment. These issues are of extreme importance to the State and the local governments around the 1858 Treaty boundaries.

A. The Court of Appeals erred in failing to give any weight to the jurisdiction assumptions of the State and the Tribe.

As the *Solem v. Bartlett, supra,* Court pointed:

> The Modern legacy of the surplus land Acts has been a spate of jurisdictional disputes between state and federal officials as to which sovereign has authority over lands that were opened by the Acts and have since passed out of Indian ownership. As doctrinal matter, the States have

> jurisdiction over unallotted opened lands if the applicable surplus land Act freed that land of its reservation status and thereby diminished the reservation boundaries. On the other hand, federal, state, and tribal authorities share jurisdiction over these lands if the relevant surplus land Act did not diminish the existing Indian reservation because the entire opened area is Indian country under 18 U.S.C. Section 1151(a) (1982 ed.).

Solem v. Bartlett, supra, at 467. The "jurisdictional history" of the area and the assumption of jurisdiction by the State are two factors entitled to weight. *Rosebud, supra,* at 604-605. As the *Rosebud, supra,* Court stated, "The long-standing assumption of jurisdiction by the State . . . not only demonstrates the parties' understanding of the meaning of the Act, **but has created justifiable expectations** which should not be upset by so strained a reading of the Acts of Congress." Id.

By making broad assumptions, the Court of Appeals determined that 32 to 44 percent of the population within the 1858 boundaries are Indians. Opinion of the United States Court of Appeals for the Eighth Circuit, at 35 (Oct. 24, 1996). Only 37,000 acres remain in trust within the 1858 Treaty boundaries. Id. at n.25. This equals less than 10 percent of the total 1858 treaty acres. Id.

The Court of Appeals found that South Dakota "has quite consistently exercised various forms of governmental authority over the opened lands." Id. at 32. South Dakota has exercised criminal and civil jurisdiction over the opened areas and has "played a significant regulatory role," over many issues affecting the opened area. Id. The

counties and municipalities patrol the opened areas with county and city law enforcement and maintain over 500 miles of roads within the Treaty boundaries. Id. The Bureau of Indian Affairs maintains only 20 miles of roads in the area. Id.

The Yankton Sioux, on the other hand, has not exercised criminal, civil, or regulatory jurisdiction over non-trust lands, "until recently." Id. at 33. The Tribe also struggles with its exercise of self-government. Id.

The Court of Appeals gave these important jurisdictional assumptions no weight at all. The entire jurisdictional history covers little more than one page in the decision. More importantly, the Court of Appeals attempts to rebut a strong jurisdictional assumption by the State with the weak and inconclusive testimony of one State bureaucrat. The Court also makes very little of the fact that the Tribe itself has not exercised jurisdiction until recently on non-trust property.

The assumption of jurisdiction constitutes the most striking evidence comprising the surrounding evidence of diminishment. The State and local governments took the affirmative step of investing time, resources, and labor into the area. The Tribe, however, failed to invest anything in the area, yet they now claim jurisdiction. If the Tribe believed they had possession to the open lands, they would have attempted to maintain its tribal character using Tribal ideals. If the Tribe believed that the lands were part of the reservation, then they would have regulated the use and environmental quality of the area so as to promote the tribal character. Instead, the Tribe completely and unequivocally left the definition of the land to

the State. Because the Tribe chose to ignore the opened land, the land has developed under the ideals of South Dakota void of any tribal character. Tribal and State officials of the past, therefore, understood the reservation had been diminished.

B. The Court of Appeals should have considered the jurisdictional effect of a finding of no-diminishment.

Tribes reserve the inherent sovereign rights not divested by treaty, an express act of Congress, or by their domestic dependent status. *Montana v. United States, supra,* at 564. See also *United States v. Wheeler,* 435 U.S. 313, 326 (1978). The Tribe's inherent sovereignty generally extends only to what is necessary to protect tribal self-government or to control internal relations. *Montana v. United States, supra,* at 563. This Court has found an implicit divesture of sovereignty in areas involving the relations between tribes and non-members. Id. at 1258, U.S. at 564. The *Montana v. United States, supra,* Court found as a general proposition the inherent sovereign powers of a tribe fail to extend to the activities of non-members. Id. at 565. The Court qualified the general proposition with the following two exceptions:

> [1] To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its

> members, through commercial dealing, contracts, leases, or other arrangements. *Williams v. Lee*, 358 U.S. 217, 233. [2] A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, economic security, or health or welfare of the tribe.

Id. 565.

A finding of no-diminishment opens a pandora's box of jurisdictional issues to clog the federal courts. Although this Court has narrowed the *Montana v. United States, supra,* exceptions,[3] the Federal and State Courts struggle with the issues raised by *Montana v. United States*. A finding of no-diminishment will require the federal and state courts of South Dakota to determine whether the Yankton Sioux can enforce their Tribal Employments Rights Ordinance (TERO) upon non-members on fee land. See *Duncan Energy v. Three Affiliated Tribes*, 27 F.3d 1294 (8th Cir. 1994). Courts may have to determine whether the Tribe can pass a resolution placing

---

[3] A mere ownership of land within the reservation does not constitute consent within the first *Montana v. United States*, exception. *Brendale v. Yakima Indian Nation*, 492 U.S. 408, 427 (1989). Consent requires a finding that the non-member utilizes the services provided by the tribe. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 138 (1982).

The plurality of Justice White, Scalia, and Kennedy interpreted the second *Montana v. United States, supra,* exception as an authorization to regulate that is dependent upon the finding of "demonstratably serious" circumstances. *Brendale, supra,* at U.S. 430.

a right of first refusal on the sale of fee and trust land. See *Concerned Landowners Assoc., Inc. v. Blackfeet Tribe*, CV-95-124-GF-PGH (Sept. 12, 1996). If the Yankton Sioux make a request under 33 U.S.C. Section 1313 of the Clean Water Act to be treated as a state, the courts will determine whether the Tribe can regulate non-member use of water on fee land. See *State of Montana v. United States*, CV-95-56-M-CCL (Mar. 29, 1996) (appeal before the Ninth Circuit).

A finding of no-diminishment will cause the Court to determine whether the Tribal Court has jurisdiction over a dispute between two non-members. See *Strate v. A-1 Contractors et al.*, U.S.W.L. 202022 (1997) finding that the tribal court did not have jurisdiction. *Hinshaw v. Mahler*, 42 F.3d 1178 (9th Cir. 1994), finding the tribal court had jurisdiction. See also *Agri West v. Koyama Farms, Inc.*, 933 P.2d 808 (1997).

A finding of no-diminishment also creates a quagmire of problems for criminal jurisdiction. The State and the Tribe must address the issue of enforcing the criminal laws of conflicting jurisdictions. The questions include what a State trooper does when arresting a Tribal member for driving under the influence, and does the district attorney extradite from the Yankton Reservation.

These issues are of extreme importance to South Dakota and the local governments affected by a no-diminishment decision. The Court of Appeals erred when it did not consider the future jurisdictional problems in light of Tribal regulational void. The Tribe has little or no experience in regulating the fee property within the 1858 boundaries. The Tribe has little or no experience with

effective self-government and no experience in handling effective law enforcement over an area as broad as the 1858 boundaries.

Certainly, the Tribe will face financial constraints in developing a sufficient regulatory body and law enforcement team. Finally, the new territory and its demands will require the Tribe to expand its court including hiring more judges and staff, prosecutors, and constructing new courts. The Court of Appeals should have considered the jurisdictional assumptions, the governmental void, and the practical jurisdictional realities.

CONCLUSION

This Court should issue a writ of certiorari. The Eighth Circuit failed to use the *Solem v. Bartlett, supra,* presumption. Because the Eighth Circuit ignored the presumption, this case stands at the center of all diminishment decisions. Either this Court reaffirms the *Solem v. Bartlett, supra,* presumption and provides predictability, or the Eighth Circuit's decision will stand creating an unforeseeable future for States and local governments throughout the West.

The Eighth Circuit erred in following this Court's diminishment decisions when it gave no weight to the jurisdictional history and assumptions of South Dakota and the Yankton Sioux. South Dakota has consistently exercised civil and criminal authority within the 1858 Treaty boundaries while the Tribe exercised no authority. The Court of Appeals paid no attention to these realities.

Finally, the Eighth Circuit should have considered the jurisdictional problems a no-diminishment decision creates under the *Montana v. United States, supra,* test. A no-diminishment decision opens a quagmire of issues for the courts.

For the reasons stated in this Brief, Amicus respectfully requests this Court to issue Petitioner's Writ of Certiorari.

Respectfully submitted,

THANE P. JOHNSON
WERNER, EPSTEIN & JOHNSON
14 E. Main, P. O. Box 428
Cut Bank, MT 59427
Counsel for Maco – Amicus

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

SHERMAN P. HAWKINS, Petitioner, -vs- ROGER W. CRIST, Warden of the Montana State Prison, and THE STATE OF MONTANA, Respondents.	)	CV-76-99-BLG MEMORANDUM AND ORDER (Filed Jan. 27, 1970)

Sherman P. Hawkins is currently in the custody of the State of Montana, serving a life sentence for first degree murder. He filed the instant application for a writ of habeas corpus, alleging that the State Court which rendered the judgment against him lacked jurisdiction. Hawkins alleges that the offense occurred in "Indian country,"[1] and was therefore under the exclusive criminal

---

[1] Under 18 U.S.C. § 1152, "the general laws of the United States as to punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States . . . shall extend to Indian country." Under 18 U.S.C. § 1153, homicide committed in Indian country is within the exclusive jurisdiction of the United States. 18 U.S.C. § 1151 defines "Indian country" to mean, *inter alia*, "all land within the limits of any Indian reservation." It therefore follows that if the land on which the offense occurred remained "Indian country", the state courts were without jurisdiction.

jurisdiction of the United States. The offense occurred on a tract of land within the original exterior boundaries of the Crow Reservation, established under the Treaty of May 7, 1868, 15 Stat. 649. Pursuant to an agreement ratified by the Act of April 27, 1904, 33 Stat. 352, the Tribe agreed to "cede, grant and relinquish" its interest in the tract in exchange for certain consideration. The Court concludes that this Act has the effect of disestablishing the tract as "Indian country," thereby rendering it subject to state criminal jurisdiction. The petitioner's application will therefore be denied.[2]

In *United States v. Celestine*, 215 U.S. 278, 285 (1909), the Supreme Court announced the general rule governing questions of disestablishment: "[W]hen Congress has once established a reservation, all tracts included within its remain a part of the reservation until separated therefrom by Congress." The applicability of this rule is demonstrated in four subsequent Supreme Court decisions. *Seymour v. Superintendent*, 368 U.S. 351 (1962), presented basic facts somewhat similar to those in the case at bar. Seymour was convicted in state court of a burglary committed within the original boundaries of the Colville Reservation, on land opened to settlement by the Act of March 22, 1906, 34 stat. 80. He petitioned for a writ of habeas corpus, alleging that the state lacked criminal

---

[2] It is uncontested that petitioner has exhausted his State remedies, satisfying the requirements of 28 U.S.C. § 2254(b). This Court, therefore properly has jurisdiction. Neither party has requested an evidentiary hearing, *see* Rule 8, Rules Governing Section 2254 Cases, and I conclude that none is required on this record.

jurisdiction since the offense occurred in "Indian country." The Supreme Court agreed. The Court compared the language of the 1906 Act with that of an 1892 statute which provided that the North Half of the Colville Reservation was "vacated and restored to the public domain." In contrast, the 1906 Act merely "provided for the sale of mineral lands and for the settlement and entry under homestead laws of other surplus lands *remaining on the diminished Colville Reservation* after allotments were first made the patents issued for 80 acres of land to 'each man, woman, and child' " among the tribal members. 368 U.S. at 355 (emphasis added).

The Court found that the language of the 1892 statute explicitly disestablished the North Half of the Reservation. However, the Court concluded that the 1906 "Act did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards." *Id.* at 356. The Court found further support for this interpretation in subsequent legislation referring to "the existing reservation," and in the construction of the 1906 Act followed by the Department of the Interior. The Court concluded that the South Half of the reservation was not disestablished, and that the State was therefore without criminal jurisdiction.

In *Mattz v. Arnett*, 412 U.S. 481 (1973), the petitioner, a Klamath River Indian, intervened in an action seeking forfeiture of certain gill nets confiscated from him within the confines of the original Klamath River Reservation in California. The respondent game warden argued that he was entitled to confiscate the nets since the confiscation

took place in land under state jurisdiction. Petitioner claimed that the area was "Indian country" and therefore under the exclusive jurisdiction of the federal government.

The Court initially examined the history of the reservation, from its creation in 1855 to June 17, 1892, the date of the Act which allegedly disestablished the reservation. The Court concluded that the reservation was clearly in existence prior to the date of the Act. The Court then examined the terms of the Act, which were quite similar to those considered in *Seymour.* It provided "[t]hat all lands embraced in what was Klamath River Reservation . . . are hereby declared to be subject to homestead, entry, and purchase under the laws of the United States granting homestead rights. . . . "[3] The Act further provided that homestead by white settlers would only be allowed as to land not allotted to Indians, and that the "proceeds arising from the sale of said lands shall constitute a fund . . . for the maintenance and education of the Indians. . . . " *Id.* at 495. The Court found this arrangement to be "completely consistent with continued reservation status", citing *Seymour. Id.* at 497.

[3] The fact that the Act referred to the reservation in the past tense was found to be of no moment, in light of the peculiar history of the reservation. Due to legislation limiting the number of reservations in California, the Klamath River reservation had previously been connected to and incorporated in the Hoopa Valley Reservation. The Court found the past tense usage in the Act to be insignificant for disestablishment purposes. 412 U.S. at 498-99.

Prior legislative history was found to support the Court's construction. The 1892 Act was markedly different from prior legislative attempts to explicitly abolish the reservation. Further support was found in the construction placed on the Act by the Department of the Interior and in subsequent Congressional Acts. The Court concluded that the reservation was not disestablished by the 1892 Act.

The Court reached an opposite conclusion in *DeCoteau v. District County Court,* 420 U.S. 425 (1975), a case involving the Lake Traverse Reservation in South Dakota. The case presented the consolidated appeal of two criminal defendants charged in state court with offenses committed on alleged reservation land, and the appeal of an Indian mother contesting state jurisdiction to adjudicate child custody matters on the alleged reservation. The State alleged that its assumption of jurisdiction was proper, based on an 1891 Act which ratified an agreement between the Indians and the Department of the Interior. The Act provided that the reservation land would be allotted in 160 acre tracts to each tribal member, and that the remaining unallotted land would be "ceded" to the United States in exchange for payment to $2.50 per acre. The Act appropriated funds by which to make this payment.

The Court initially noted that a reservation will not be held to be disestablished unless the "congressional determination to terminate [is] expressed on the face of the Act or [is] clear from the surrounding circumstances and legislative history." 420 U.S. at 444, quoting *Mattz,* 412 U.S. at 505. The Court then held that these factors clearly disclosed a Congressional intent to terminate.

The Court found that the Act ratified an agreement whereby for a sum certain in money the Indians agreed to "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest" in the unallotted land. The Court contrasted this language with that from *Seymour* and *Mattz*, which merely allowed settlement of unallotted lands. The Court held that in the face of clearly established Congressional intent to disestablish, it could not construe the Act as providing for retention of exclusive federal jurisdiction.

The Court concluded its opinion in *DeCoteau* by distinguishing the case from *Mattz* and *Seymour*. The Court found it significant that this case involved a bilateral agreement whereby the Tribe agreed to relinquish its land in exchange for a sum certain, while *Mattz* and *Seymour* only dealt with a unilateral opening of reserved lands to settlement, with the Indians receiving a fund established by uncertain future sales. The Court concluded that *Mattz* and *Seymour* presented the "guiding principles" for decision of such cases, but that *DeCoteau* provided sufficiently dissimilar facts to justify a contrary result.[4]

The final Supreme Court statement on the point is found in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), which dealt with the effect of statutory enactments of 1904, 1907, and 1910 on the reservation status of a large portion of the Rosebud Sioux Reservation. The acts in question ratified in amended form a 1901 agreement

[4] *DeCoteau* specifically reaffirmed the precedential vitality of *Mattz* and *Seymour*, 420 U.S. at 449. Any suggestion that these cases are no longer good law is therefore clearly wrong; *DeCoteau* and *Rosebud Sioux* merely explain the prior cases.

between the Department of the Interior and the Tribes. The agreement was virtually identical to that considered in *DeCoteau;* it provided for the cession of some 416,000 acres in exchange for a lump sum payment of $1,040,000. In considering ratification, the Congress balked at payment for the land outright. Therefore, in ratifying the agreement, Congress amended the portion dealing with payment to provide (1) that the Indians would only receive consideration for the lands actually sold; and (2) that the United States would not "guarantee to find purchasers but agreed only to 'act as trustee for said Indians to dispose of said lands.' " 430 U.S. at 596.

The Court agreed that in technical usage a "cession" requires bilateral consent. However, the Court did not feel bound by technical usage. The Court found that the intent of Congress, when presented with the original 1901 agreement, was to disestablish the ceded portion. It held the mere change in method of payment to be insufficient to manifest a change in intent.

The Court also noted that other provisions of the Act disclosed an intent to disestablish. For example, the conveyance of land to the United States reserved two sections of each township conveyed "for use of the common schools", which sections were conveyed to the State of South Dakota. The Court found this grant to the State to be consistent with the establishment of State jurisdiction over the ceded land on the same footing as that exercised over any non-reserved land.

It is clear from the foregoing cases that the determination of whether a reservation has been disestablished involves a case-by-case analysis of three factors to

determine the legislative intent:[5] (1) the language used by Congress; (2) the prior and subsequent history of the reservation; and (3) the legislative history. Of these, I think the most critical factor is the language of the statute, which obviously constitutes the clearest barometer of Congressional thinking. In this case, I find that the language strongly indicates disestablishment. The Tribe agreed to "cede, grant, and relinquish to the United States all right, title, and interest" in the tract. This language was found in *DeCoteau* to be "precisely suited" to a purpose of disestablishment.[6] 420 U.S. at 445. Further, the agreement contained clauses identified in *Rosebud Sioux* as being indicative of a Congressional intent to disestablish. The 1904 Act reserved two sections out of each township for state school purposes.[7] Further, Indians holding allotments in the ceded tract were permitted by the 1904 Act to apply for allotments within the "portion

---

[5] The Court in *Rosebud Sioux* made clear that the factors identified in these cases are not absolutes. Rather, the Court must balance a number of co-equal factors to arrive at a conclusion on the question of legislative intent. 430 U.S. at 588 n. 4.

[6] In *Russ v. Wilkins*, 410 F.Supp. 579 (N.D. Cal. 1976), the Court collected in table form the operative language of the several cases dealing with disestablishing acts. The cases there collected illustrate the distinction between disestablishment language and language which merely opens a reservation for settlement. *Id.* at 584.

[7] The states of Montana and South Dakota were created by the same enabling act of February 22, 1889, 25 Stat. 679. It therefore appears that the Supreme Court's reasoning regarding the "school sections" provisions in *Rosebud Sioux*, 430 U.S. at 599-601, would apply with equal force here.

of the reservation not ceded, granted or relinquished."[8] Finally, the agreement and the 1906 Act expressly contemplated new boundary lines "for the purpose of segregating the ceded lands from the diminished reservation." This language unmistakably points to a Congressional intent to diminish the amount of land within the reservation boundaries.

Petitioner contends that the legislative history of the 1904 Act is sparse, and that such legislative history as can be found supports the conclusion that the tract was intended to remain Indian land. The items of legislative history cited by respondents flatly contradict this assertion. In fact, the legislative history of the 1904 Act closely parallels that of the 1904 Act in Rosebud Sioux. Both were passed to amend and ratify prior agreements. In both cases the prior agreements provided for an outright sale which would constitute a disestablishment under *DeCoteau*. *See, Rosebud Sioux*, 430 U.S. at 591. In both cases, the original agreements were amended as to method of payment, reflecting Congressional dissatisfaction with the lump sum method of payment. These similarities are not coincidental. Respondents cite the final Senate Report on the Crow Act, which states:

> This bill is almost identical with H.R. 10418, known as the Rosebud Indian bill, which has already passed this house at the present session of Congress.

---

[8] *See, Rosebud Sioux* at 613.

It is clear that the enactment of the 1904 Act was a result of the same "familiar forces" which motivated the Congress to disestablish the Rosebud Reservation. *See, Rosebud Sioux*, 430 U.S. at 590. I therefore conclude that here, as in *Rosebud Sioux*, the legislative history supports a finding of disestablishment.[9]

The element of subsequent history which provides the strongest index of congressional intent is the "jurisdictional history." For example, the Court in *Rosebud Sioux* found that the State of South Dakota had exercised "unquestioned . . . jurisdiction over the unallotted lands . . . since the passage of the 1904 Act. . . . " 430 U.S. at 603. The Court concluded from this fact that

> [T]he longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and land use, not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset by

---

[9] Petitioner suggests in his opening brief at 11-12 that an alternative reading of the statute would construe it to be a "special allotment", *viz.*, one which divides and allots a reservation with the goal of termination at some future time. He contends that the intended termination of the tract was forestalled by the Indian Reorganization Act of 1934. He cites no language in the Act to support this proposition, and my reading of the Act discloses nothing that even remotely suggests it. Further, petitioner offers no reason why the Court should construe this Act as a "special allotment act" when the Supreme Court in *Rosebud Sioux* held that a virtually identical statute effected a disestablishment of the reservation there in question. *See generally, Rosebud Sioux*, 430 U.S. at 604 n. 27, regarding the effect of the Indian Reorganization Act.

> so strained a reading of the Acts of Congress as petitioner urges.

Id. at 604-5.

In this case, it is unclear whether the State of Montana has consistently exercised its criminal jurisdiction over the tract. However, respondents argue that the Crow Tribe and the federal government have, since 1905, treated the tract as non-reservation land. This is not denied by the petitioner, and the maps and data filed by respondents with their brief tend to support respondents' claim. I find it highly unlikely that the Crow Tribe would relinquish its claim to the tract were it not of the opinion that the tract had been disestablished. Thus, the subsequent history of the tract has not been shown to be inconsistent with a Congressional intent to disestablish.[10]

---

[10] Petitioner relies heavily on the Supreme Court's decision in *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920). In that case, the Supreme Court held that the 1904 Act did not make the tract "public lands" as that term is defined in an act relating to the grazing of livestock. The Court held that the land was held by the United States in trust until sold, and that the trust relationship required the land to be considered "Indian land" rather than "public land" for grazing purposes.

The Supreme court considered the impact of *Ash Sheep* on the disestablishment question in Rosebud Sioux. The Court held the "public land-Indian land" dichotomy of *Ash Sheep* to be substantially irrelevant to the question of disestablishment; stating

> As recognized by the Court of Appeals [in *Rosebud Sioux*, 521 F.2d 87 (8th Cir. 1975)], "the fact that a beneficial interest is retained does not erode the scope and effect of the cession made, or preserve to the reservation its original size, shape, and boundaries."

In sum, I find no meaningful distinction between the case at bar and the *Rosebud Sioux* case decided by the Supreme Court. The language and legislative history of the statutes and the subsequent history of the tracts involved are virtually identical. Since petitioner has neither pointed to any meaningful distinctions nor posed any plausible alternative constructions of the Act, I feel bound to decide the case in accordance with the dictates of *Rosebud Sioux*.

In consideration of the foregoing,

IT IS HEREBY ORDERED that the petitioner's application for a writ of habeas corpus be, and the same hereby is, denied.

The Clerk is directed to notify the parties of the entry of this order.

Done and dated this 27th day of January, 1978.

/s/ James F. Battin
United States District Judge

---

521 F.2d at 102. The question of whether lands become "public lands" under [*Minnesota v. Hitchcock*, 185 U.S. 373 (1902)] and *Ash Sheep*, is therefore, logically separate from a question of disestablishment.

430 U.S. at 601 n. 24.

No. 96-1581

Supreme Court, U.S.
FILED
MAY 7 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

STATE OF SOUTH DAKOTA,

Petitioner,

v.

YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,

Respondents,

and

SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF AMICUS CURIAE STATES OF CALIFORNIA, ALABAMA, ALASKA, FLORIDA, IDAHO, MISSOURI AND UTAH

DANIEL E. LUNGREN
Attorney General of California

*THOMAS F. GEDE
Special Assistant Attorney General
1300 I Street
Sacramento, CA 95814
Telephone: (916) 323-7355

**Counsel of Record for Amici States*

[Additional Counsel Listed on Inside Cover]

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BILL PRYOR
Attorney General
State of Alabama

BRUCE M. BOTELHO
Attorney General
State of Alaska

ROBERT A. BUTTERWORTH
Attorney General
State of Florida

ALAN G. LANCE
Attorney General
State of Idaho

JEREMIAH W. (JAY) NIXON
Attorney General
State of Missouri

JAN GRAHAM
Attorney General
State of Utah

TABLE OF CONTENTS

Page

INTEREST OF AMICI STATES 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT BETWEEN THE SOUTH DAKOTA SUPREME COURT AND THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT AS TO THE DISESTABLISHMENT OF THE YANKTON SIOUX RESERVATION .. 4

II. THE FAILURE OF THE COURT BELOW TO APPLY THIS COURT'S BRIGHT-LINE "ALMOST INSURMOUNTABLE PRESUMPTION" OF DISESTABLISHMENT MERITS REVIEW 8

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Arizonans for Official English v. Arizona, 117 S. Ct. 1055 4

Asarco, Inc. v. Kadish, 490 U.S. 605 (1989)..... 4

Brendale Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408 (1989)..... 7

City of Timber Lake v. Cheyenne River Sioux Tribe, 10 F.3d 554 (8th Cir. 1993)..... 7

DeCoteau v. District County Court, 420 U.S. 425 (1975) 5

Grubb v. Public Utilities Commission, 281 U.S. 470 (1930) 4

Hagen v. Utah, 510 U.S. 399 (1994) 5, 10

Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987) 6

Montana v. United States, 450 U.S. 544 (1981) 7

Solem v. Bartlett, 465 U.S. 463 (1984) 2, 5, 9, 11

South Dakota v. Bourland, 508 U.S. 679 (1993) 6

State v. Greger, 559 N.W.2d 854 (S.D. 1997)..... 4

State v. Thompson, 355 N.W.2d 329 (S.D. 1984)..... 4

State v. Williamson, 211 N.W.2d 182 (S.D. 1973)..... 4

State v. Winckler, 260 N.W.2d 356 (S.D. 1977) 4

Strate v. A-1 Contractors, No. 96-1872, 1997 WL 202022 (U.S. Apr. 28, 1997) 6

United States v. Mazurie, 419 U.S. 544 (1975)..... 7

TABLE OF AUTHORITIES – Continued

Page

Williams v. Lee, 358 U.S. 217 (1959)..... 5

Wood v. Jameson, 130 N.W.2d 95 (S.D. 1964) 4

CONSTITUTIONAL PROVISIONS

United States Constitution, art. III 5

COURT RULES

Rules of the Supreme Court of the United States

Rule 10(a) 3, 4

Rule 37..... 1

OTHER AUTHORITY

American Indian Law Deskbook xii (Nicholas J. Spaeth et al. eds., 1993) 8

Felix S. Cohen's Handbook of Federal Indian Law 1 (Rennard Strickland et al. eds., 1982) 8

BRIEF OF AMICI CURIAE

The States of California, Alabama, Alaska, Florida, Idaho, Missouri and Utah through their respective Attorneys General respectfully submit a brief amicus curiae in support of Petitioner pursuant to S.Ct.R. 37.

INTEREST OF AMICI STATES

The United States has created reservations through treaty, statute, or executive order within each of the amici States.[1] By virtue of those reservations, amici states have two interrelated interests. First, they have a compelling need to shield their citizens and their own governments from the uncertainty fostered by conflicting decisions of state and federal courts regarding reservation status. For example, persons living and doing business on the non-tribal land within the boundaries of the original 1858 Yankton Sioux Reservation have no definitive answer to the basic questions of whether state or tribal law applies to garden-variety commercial transactions and torts, and property transactions when tribal members and nonmembers are involved. South Dakota's sovereign powers are placed no less in doubt – as reflected in the need to conduct a five-day trial in federal district court over its and Yankton Sioux Tribe's power to regulate a proposed solid waste facility – a permitting process that under

[1] Some of amici, such as the State of Missouri, may have reservations established in the future, and have questions arising from reservations bordering the State's boundaries.

ordinary circumstances would have been handled administratively with little cost and no litigation. Moreover, South Dakota's historic authority to enforce criminal laws in a uniform fashion against all offenders has been turned upside down by the court of appeals' decision. This kind of judge-made jurisdictional uncertainty serves generally only to engender public cynicism over the efficacy of government.

Second, the profound jurisdictional consequences of reservation boundaries mean that the amici States have a strong interest in ensuring that this Court's efforts to create a reasonably clear body of analytical standards for purposes of determining disestablishment or diminishment questions are honored rigorously by lower courts. Such a situation exists here. In *Solem v. Bartlett*, 465 U.S. 463, 470-71 (1984), this Court articulated a bright-line rule that the inclusion of "cession and sum certain" language in a surplus land act creates an "almost insurmountable presumption" of disestablishment. Such "cession and sum certain" language was employed in Articles I and II of the Yankton Agreement with the United States. App. 112-13. The majority of the Eighth Circuit panel below, however, apparently found that the presumption was inapplicable or that it was rebutted by a savings provision whose substantive reach is, at best, ambiguous. This case presents an opportunity to clarify the strength of the presumption identified in *Solem*.

SUMMARY OF ARGUMENT

Supreme Court Rule 10(a) provides that a primary reason for the exercise of this Court's certiorari jurisdiction is to resolve conflicts between a federal court of appeals and a state court of last resort. The conflict between the state and federal courts here raises the question of whether the Yankton Sioux Reservation has been disestablished. This type of conflict regularly has led to the grant of certiorari because it calls into question the validity of virtually all forms of civil and criminal regulation. Certiorari is also appropriate in this case to vindicate a comparatively rare "bright-line rule" distilled by this Court from its Indian law precedents. The Court has found that when a surplus land act utilizes "cession and sum certain" language, an "almost insurmountable presumption" is raised that the reservation has been disestablished. In this and other areas of Indian law that bear a close relationship to the authority of States and tribes to exercise governmental powers, reasonably concrete and settled standards are critical and the scrupulous adherence to them by lower courts should be monitored closely by this Court. The application of the "cession and sum certain" presumption by the divided panel below raises a substantial question over the panel's fidelity to this Court's prior disestablishment and diminishment decisions.

ARGUMENT

I

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT BETWEEN THE SOUTH DAKOTA SUPREME COURT AND THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT AS TO THE DISESTABLISHMENT OF THE YANKTON SIOUX RESERVATION.

State and federal courts have equal authority under the Constitution to resolve questions of federal law unless Congress has otherwise directed. *See Asarco, Inc. v. Kadish*, 490 U.S. 605, 617 (1989); *Grubb v. Public Utilities Commission*, 281 U.S. 470, 476 (1930); *see also Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, ___ n.11. Pursuant to that authority and prior to the Eighth Circuit's decision, the South Dakota Supreme Court on four occasions found that the Yankton Sioux Reservation had been disestablished. *State v. Thompson*, 355 N.W.2d 329, 349 (S.D. 1984); *State v. Winckler*, 260 N.W.2d 356, 360 (S.D. 1977); *State v. Williamson*, 211 N.W.2d 182 (S.D. 1973); *Wood v. Jameson*, 130 N.W.2d 95 (S.D. 1964). Despite these decisions, the district court concluded that the Reservation had not been diminished, App. 66, and a divided panel of the Court of Appeals for the Eighth Circuit affirmed. App. 1. Moreover, shortly after the decision below the South Dakota Supreme Court again determined that the Yankton Sioux Reservation had been diminished. *State v. Greger*, 559 N.W.2d 854 (S.D. 1997); App. 125.

Supreme Court Rule 10(a) provides that conflicts between a court of appeals and a state court of last resort are of the "character" which counsel exercise of this Court's certiorari jurisdiction. As demonstrated by the

Court's action in several recent cases, situations where state and federal courts disagree as to the disestablishment of a reservation present especially compelling arguments for the grant of certiorari. *See, e.g., Hagen v. Utah*, 510 U.S. 399 (1994); *Solem v. Bartlett*, 465 U.S. 463, 466 (1984); *DeCoteau v. District County Court*, 420 U.S. 425, 430-31 (1975). As a doctrinal and practical matter, the grant of certiorari to resolve a state-federal conflict simply reasserts this Court's position as the ultimate arbiter of federal law. *See* U.S. Const. art. III. The present case constitutes a paradigm of when this Court's intervention is essential, since the Eighth Circuit and South Dakota Supreme Court decisions over the existence of the Reservation have created a controversy resolvable *only* by this Court.

The present controversy, however, is not merely academic. It has an immediate and pernicious impact on governance within the affected geographical area.

Commercial Transactions. The state-federal conflict at issue here undermines the ability of members and nonmembers alike to engage in commercial transactions, at least on the 91 percent nontribal land within the Reservation's 1858 boundaries, by disrupting established commercial practices and understandings. Prior to the federal decisions below, it was clear that a commercial transaction on nontribal land would be governed by state law and that any attendant disputes would be heard in state court absent federal jurisdiction. In view of the court of appeals' decision, a tribal member defendant almost certainly will argue that the proper venue for disputes regarding such a transaction is in tribal court and that tribal law provides the rule of decision. *See, e.g., Williams*

v. Lee, 358 U.S. 217 (1959). Well-established commercial practices and understandings thus are disrupted by the conflict.

Tort Claims. The conflict raises potentially daunting problems with respect to the resolution of tort claims. Prior to the decision below, it was clear that a tort claim arising on nontribal lands within the 1858 boundaries would be heard in state court under state law. Now, however, a tribal member may well bring a tort action in tribal court or, should he be joined as a state court defendant, deny the jurisdiction of the state court. *See, e.g., Strate v. A-1 Contractors*, No. 96-1872, 1997 WL 202022 (U.S. Apr. 28, 1997); *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).

Civil Regulatory Matters. Prior to the decisions of the federal courts, it was undisputed that South Dakota exercised general civil regulatory jurisdiction over all persons with respect to activities on the nontribal lands. The conflict between the state and federal courts puts such jurisdiction into dispute. It is, therefore, unknown whether the State can continue to exercise its jurisdiction over tribal members on nontribal lands for hunting and fishing, taxation, zoning and environmental purposes. Likewise, the extent of potential tribal claims of tribal jurisdiction over nonmembers with regard to these areas is unknown. Even if this Court affirms the decisions of the federal courts that the reservation has not been disestablished, the residents of the area can expect constant unsettling litigation over whether the tribe can exercise jurisdiction over nonmember in nontribal areas. *See, e.g., Strate*, supra (adjudicatory jurisdiction over motor vehicle accident); *South Dakota v. Bourland*, 508 U.S. 679 (1993)

(hunting and fishing); *Brendale Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (zoning); *Montana v. United States*, 450 U.S. 544 (1981) (hunting and fishing).

Alcohol Regulation. Prior to the decisions of the federal courts, South Dakota exercised unrestricted jurisdiction over alcohol within the non-tribal lands of the now-recognized boundaries. Under *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554 (8th Cir. 1993), this decision raises the possibility that the tribe will attempt to exercise jurisdiction over non-Indians selling liquors on non-Indian lands within the 1858 boundaries. Regardless of tribal jurisdiction, moreover, the United States may seek to enforce tribal law through prosecutions under 18 U.S.C. § 1161. *United States v. Mazurie*, 419 U.S. 544 (1975).

Criminal Matters. Prior to the decision of the federal courts, the state courts exercised general criminal jurisdiction over Indians and non-Indians alike with respect to conduct on nontribal lands. *See, e.g.*, Tr. 315-319, 330-31, 646-47, 727-28. The conflict between the state and federal courts leaves the proper jurisdiction of any criminal case involving an Indian as an unknown; likewise, the question of the appropriate criminal jurisdiction of a non-Indian committing a crime against a tribal member is an unknown.

Amici understand that habeas corpus proceedings are now proceeding through the court systems with regard to Indians who have been convicted in state court; others are expected. Without a decision from this Court, however, the appropriate answer to the criminal jurisdictional questions is simply unknown.

The conflict between the state and federal courts with regard to the diminishment of the Yankton Sioux Reservation produces legal questions that permeate the daily lives of each of the residents of the purported reservation area. Only the grant of certiorari by this Court and disposal of the matter on the merits can resolve these questions.

II

THE FAILURE OF THE COURT BELOW TO APPLY THIS COURT'S BRIGHT-LINE "ALMOST INSURMOUNTABLE PRESUMPTION" OF DISESTABLISHMENT MERITS REVIEW.

A 1982 treatise observes that Indian law is woven from a

> fabric with threads drawn from constitutional law, international law, federal jurisdiction, conflict of laws, real property, contracts, corporations, torts, domestic relations, procedure, trust law, intergovernmental relations, sovereign immunity and taxation. Typically, as those fields meld into Indian law, the blend produces a new variation that could not have been predicted by analysis of the applicable law from these other fields.

Felix S. Cohen's Handbook of Federal Indian Law 1 (Rennard Strickland et al. eds., 1982); *see also American Indian Law Deskbook* xii (Nicholas J. Spaeth et al. eds., 1993) ("shifts in U.S. Indian policy have created a complicated legal structure"). The complexity of legal analysis regarding Indian law questions raises difficult challenges for federal, state, and tribal governments and for Indians and

non-Indians alike. Therefore, when this Court derives a clear rule of law to be applied to a particular issue in the Indian law field, it would be thought that the lower courts would readily and dutifully adopt that rule. A divided panel of the Court of Appeals in the Eighth Circuit failed to do so in this case, giving rise to the present controversy.

In *Solem v. Bartlett*, 465 U.S. 463 (1984), this Court distilled much of its disestablishment jurisprudence into a single illuminating paragraph. That paragraph recognized an "almost insurmountable presumption of disestablishment when "cession" language is accompanied in a surplus land act by an unconditional commitment of Congress to pay for the opened lands. The critical paragraph read:

> Diminishment, moreover, will not be lightly inferred. Our analysis of surplus land Acts requires that Congress clearly evince an 'intent . . . to change . . . boundaries' before diminishment will be found. . . . The most probative evidence of congressional intent is the statutory language used to open the Indian lands. Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands. . . . *When such language of cession is buttressed by an unconditional commitment from Congress to compensate the Indian tribe for its opened land, there is an almost insurmountable presumption that Congress meant the tribe's reservation to be diminished.*

Solem, 465 U.S. at 470-71 (citations omitted; emphasis added). Ten years later, in *Hagen v. Utah*, 510 U.S. 399 (1994), this Court reiterated the presumption finding that the "statutory expression of congressional intent to diminish, coupled with a provision of sum certain payment, would establish a nearly conclusive presumption that the reservation had been diminished." *Id.* at 411.

In the case now before this Court, the "almost insurmountable presumption" of disestablishment was created by the "cession and sum certain" language of Articles I and II of the Agreement of the Yankton Sioux Tribe with the United States. App. 112-13. Nonetheless, the divided panel below essentially ignored the presumption. The majority did acknowledge that the state had *made the argument* that the "cession and sum certain" language of the 1894 Yankton Act gave rise to the presumption, App. 14, but it gave little or no weight to the presumption, relying instead largely on a savings provision in Article XVIII of the 1892 agreement to conclude that diminishment had not taken place. As Judge Magill commented in his lengthy dissent: "[T]he majority never acknowledges that the presumption of diminishment exists, nor does it hold that the presumption of diminishment has somehow been rebutted." App. 47-48 (footnote omitted). In the accompanying footnote, he remarked further that

> [w]hile the majority makes two passing references to this critical presumption, it couches each reference as a mere restatement of the appellant's argument. . . . Nowhere in its opinion does the majority acknowledge that the appellant is correct that this almost insurmountable presumption of diminishment was created by Articles I and II.

App. 47.

This case, in short, turns on the strength of the presumption identified in *Solem*. The court of appeals, however, did not directly apply the presumption, and can only be implied to have determined that the presumption was, for some reason, inapplicable, or that it had been overcome on the basis of the savings provision. Although amici harbor significant doubts over either approach, at the least the decision raises substantial questions over the applicability of the "almost insurmountable" presumption created by cession and sum certain language and the weight to be assigned to such a presumption in a surplus land act. These are questions this Court should resolve now not only to give guidance to lower courts in future cases but also to put an end to the jurisdictional nightmare resulting from the inconsistent resolution of the diminishment issue by the court of appeals and the South Dakota Supreme Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of California

*THOMAS F. GEDE
Special Assistant Attorney General
1300 I Street
Sacramento, CA 95814
Telephone: (916) 323-7355

**Counsel of Record for Amici States*

(5)

Supreme Court, U.S.
FILED
MAY 7 1997
CLERK

No. 96-1581

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF SOUTH DAKOTA,
Petitioner,

v.

YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,
Respondents,

and

SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF CITIES DANTE, GEDDES, LAKE ANDES, PICKSTOWN, PLATTE, RAVINIA AND WAGNER, *AMICI CURIAE,* IN SUPPORT OF PETITIONER, STATE OF SOUTH DAKOTA

TIMOTHY R. WHALEN
WHALEN LAW OFFICE, P.C.
P.O. Box 127
Lake Andes, SD 57356
Telephone: (605) 487-7645
Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

24 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI* CITIES	1
REASONS FOR GRANTING THE PETITION	11
I. THE AGREEMENT IN THE *YANKTON* CASE NOW BEFORE THIS COURT IS THE "FUNCTIONAL TWIN" OF THE AGREEMENT AT ISSUE IN *DECOTEAU v. DISTRICT COUNTY COURT*, AND THEREFORE THIS COURT SHOULD REVERSE ON THE BASIS OF *DECOTEAU*	11
II. FACTORS DEMONSTRATING THE YANKTON AND SISSETON AGREEMENTS ARE FUNCTIONAL TWINS	13
CONCLUSION	20

TABLE OF AUTHORITIES

CASES: Page

Burlington Northern R.R. v. Red Wolf, 106 F.3d 868 (9th Cir. 1997) 10
DeCoteau v. District County Court, 420 U.S. 425 (1975) ..... *passim*
Hagen v. Utah, 510 U.S. 399 (1994) 11, 12, 15
Perrin v. United States, 232 U.S. 478 (1914) 16
Primeaux v. Lee, Memorandum Opinion and Order, Civ. 94-9022 (D.S.D. 1995); *aff'd per curiam Primeaux v. Lee*, 74 F.3d 1243 (8th Cir. Jan. 1996) 4
Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 ..... 11, 15, 16, 18
Solem v. Bartlett, 465 U.S. 463 (1984) 11
State v. Greger, 559 N.W.2d 854 (S.D. 1997) 14
State v. Williamson, 211 N.W.2d 182 (S.D. 1973) 4
State v. Winckler, 260 N.W.2d 356 (S.D. 1977) 4
United States v. Forty-three Gallons of Whiskey, 93 U.S. 188 (1876) 16, 17
Weddell v. Meierhenry, 636 F.2d 211 (8th Cir. 1980) 5
Wood v. Jameson, 130 N.W.2d 95 (S.D. 1964) 4, 5
Yankton Sioux Tribe v. Southern Missouri Waste District, 99 F.3d 1439 (8th Cir. 1996) 18

STATUTES:

Treaty of April 19, 1858, 11 Stat. 743 ..... 16, 19
Act of April 11, 1892, 27 Stat. 1017 14
Act of August 15, 1894, 28 Stat. 286 ..... 3, 13, 16
Yankton Proclamation of May 16, 1895, 29 Stat. 865 ..... 3, 14
18 U.S.C. § 1151(a) 4
18 U.S.C. § 1151(b) 4

CONGRESSIONAL MATERIALS:

H.R. Rep. No. 101-60, 101st Cong., 1st Sess. (1989) 9
26 Cong. Rec. 6425, 53d Cong., 2d Sess. (1894) 14
Investigation and Prosecution of Federal Crimes on Indian Reservations: Hearing Before the Committee on Interior and Insular Affairs, House of Representatives, 101st Cong., 1st Sess. (1989) 9

TABLE OF AUTHORITIES—Continued

Page

Investigation and Prosecution of Federal Crimes on Indian Reservations: Oversight Hearings Before the Committee on Interior and Insular Affairs, 100th Cong., 2d Sess. (1988) 9
Jurisdiction on Indian Reservations—Part 2: Hearing Before the Senate Select Committee on Indian Affairs, 96th Cong., 2d Sess. (Aug. 11, 1980) 9
Tribal Sovereign Immunity: Hearing Before the Committee on Indian Affairs, S. Hrg. 104-694, 104th Cong., 2d Sess. 45 (1996) 11

OTHER AUTHORITIES:

A. Gnirk, *Epic of the Realm of Ree* (1984) 3, 6, 7
A. Gnirk, *Epic of the Great Exodus* (1985) 7
A. Gnirk, *Epic of Papineau's Domain* (1986) 3, 5, 6
Brief for Respondent, *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975) (No. 73-1148) 7
Brief of Respondent, Southern Missouri Waste Management District, in Support of Petitioner, State of South Dakota, *Yankton Sioux Tribe v. Southern Missouri Waste District* (No. 96-1581) (April 28, 1997) 1, 12
E. Peterson and L. Peterson, *1906 Atlas of Charles Mix County, South Dakota* (1906) 1, 2, 3
Sup. Ct. R. 37(4) 1
Transcript of Oral Argument, *Yankton Sioux Tribe v. Southern Missouri Waste Dist.*, 890 F.Supp. 878 (D.S.D. 1995) (No. 96-1581) 9, 10
1990 Census of Population and Housing, Summary Population and Housing Characteristics, South Dakota 3, 5, 6, 7

BRIEF OF CITIES DANTE, GEDDES, LAKE ANDES, PICKSTOWN, PLATTE, RAVINIA AND WAGNER, *AMICI CURIAE*, IN SUPPORT OF PETITIONER, STATE OF SOUTH DAKOTA

The cities of Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner, respectfully submit this brief as *amici curiae*, in support of Petitioner pursuant to Supreme Court Rule 37(4).

INTEREST OF *AMICI* CITIES

Five of the *amici* cities, Wagner, Lake Andes, Ravinia, Dante and Pickstown are located within the 1858 boundaries of the reservation recently declared to exist by the court of appeals for the Eighth Circuit; two of the *amici* towns, Geddes and Platte, lie close to the purported boundaries. Each of the cities within the newly recognized boundaries of the Yankton Sioux Reservation has operated, since its founding a few years after the 1894 Surplus Land Act in question, as if no reservation boundaries exist. Each of the cities respectfully expresses its profound shock to this Court over the decision of the court of appeals. Importantly, we understand that this is only the second time that any federal court of appeals has ever held that a congressional act of this nature did not disestablish the reservation area affected; the first and only other case with a similar holding was promptly reversed in *DeCoteau v. District County Court*, 420 U.S. 425 (1975). Brief of Respondent, Southern Missouri Waste Management District, in Support of Petitioner, State of South Dakota at 10, *Yankton Sioux Tribe v. Southern Missouri Waste District*, (No. 96-1581) (April 28, 1997). And each of the cities requests this Court to grant review of the decision of the court of appeals, a decision which conflicts with both the prior and subsequent decisions of the South Dakota Supreme Court, and resolve the issue created by the federal decision.

Prior to the organization of Charles Mix County, South Dakota, this area was visited and occupied by various Indian tribes. E. Peterson and L. Peterson, *1906 Atlas*

of Charles Mix County, South Dakota, (1906) at 48. The Ree or Aricara Indians are among the earliest residents, dating back more than three hundred years. *Id.* at 48. The Ree were eventually driven out by the Oglala Sioux branch of the Tetons, who, in turn, were partially displaced by the Yankton Sioux in the early 1800's. *Id.* at 48. "Few of the Indians, however, had made this part of the state their principal place of abode as other localities seemed to them more desirable. This part of the state was therefore used only as a hunting ground." *Id.* at 48. By the mid-1800's, the Charles Mix County area was rarely hunted by the Indians, "for large game had sought better pastures farther west and north, and the Indians had gone with the game." *Id.* at 50. The Yankton Sioux eventually settled the area pursuant to the treaty of 1858. *Id.* at 48.

In the late 18th century and throughout the entire 19th century a continual non-Indian presence was felt in the area in the form of resident French trappers, explorers, river traders, wood cutters and the U.S. Army, whose influence culminated in 1857 with the completion of Ft. Randall. *Id.* at 48.

> In speaking of the history of Charles Mix county we shall see that it is in no sense a "new" county. It had a community life along the river before Dakota Territory was organized and had been visited by more white men before that time than any of the "old" counties not having a Missouri river front. *Id.* at 48.

The 1858 treaty with the Yankton Sioux established the Yankton Sioux Reservation which consisted of approximately 430,000 acres in the eastern portion of what is now Charles Mix County. The Yankton Sioux settled the reservation on July 10, 1859, a date commonly associated with the restoration of all of Charles Mix County, except the Yankton reserve, to the public domain. *Id.* at 49. Charles Mix County was created at the first territorial legislature of Dakota by its act of May 8, 1862. *Id.* at

49. The Yankton Indian reservation was later incorporated into the county boundaries in 1873, although the reservation continued to have "little or nothing to do with county affairs and took no part in our community life until after the treaty of 189[4]." *Id.* at 48.

In 1892, the government negotiated with the Yanktons for the sale of their surplus lands, resulting in a treaty signed by a majority of the Tribe and ratified by Congress on August 15, 1894. *Id.* at 49. These lands were opened to homesteading by the president's proclamation of May 16, 1895 and were quickly populated. *Id.* at 49. By early 1900, virtually all of the surplus lands had been homesteaded. A. Gnirk, *Epic of the Realm of Ree*, (1984), p. 8. The population of Charles Mix County by 1900 was 8,498. 1906 *Atlas of Charles Mix County, South Dakota, supra*, 46.

Several of the cities which are *amici* here were created along the Milwaukee Railroad through the "former Indian lands from Napa to Platte," South Dakota. A. Gnirk, *Epic of Papineau's Domain*, (1986), p. 143. In fact, the area of Charles Mix County which contains a majority of the country's towns was once part of the "Yankton Sioux Reservation until 1895 when the land of eastern Charles Mix County was thrown open to homesteaders." *Id.* at 143.

Wagner was created by the Milwaukee land company in 1900, just six years after the 1894 Act which opened the Yankton Reservation. A Gnirk, *Epic of the Realm of Ree*, (1984), p. 62. According to the 1990 Census, Wagner's population was 1462, of whom 281 are Indian. 1990 Census of Population and Housing, Summary Population and Housing Characteristics, South Dakota, pp. 33, 57. City and county records indicate that there are approximately 1510 properties within the city limits of Wagner; approximately 1450 are owned by non-Indian persons or entities, four are owned by the Yankton Sioux Tribe, six are held in trust by the United States for an

Indian person, and fifty are owned in fee by individual Indians.

The decision of the court of appeals would convert the entirety of Wagner to "Indian country" pursuant to 18 U.S.C. § 1151(a) by designating it as a reservation. Paradoxically, even as this case was being litigated, an Indian person failed in a claim that a housing development in Wagner qualified as "Indian country" presumably as a dependent Indian community under 18 U.S.C. 1151(b). *See Primeaux v. Lee*, Memorandum Opinion and Order, Civ. 94-9022 (D.S.D. 1995); *aff'd per curiam, Primeaux v. Lee*, 74 F.3d 1243 (8th Cir. 1996). The Defendant in that case failed *even to make the claim* that the entirety of Wagner should be declared Indian country as a "reservation"; the failure of the district court and court of appeals to find the housing area to be Indian country simply reaffirmed the long-held understanding of all the residents of the area that Wagner was not "Indian country" as a reservation pursuant to 18 U.S.C. 1151(a) or partly "Indian country" pursuant to 18 U.S.C. 1151(b).

The residents of Wagner can also point to *State v. Winckler*, 260 N.W.2d 356 (S.D. 1977), another case which arose within Wagner and in which the South Dakota Supreme Court stated that it had "ruled that the Yankton Indian reservation was disestablished. . . ." *Id.* at 360.

In addition, as recently as 1980, a unanimous court of appeals was of the same opinion:

> In our opinion, the district court correctly determined that the crimes of grand larceny and burglary did not occur in "Indian Country" as defined in 18 U.S.C. § 1151(b), so as to preclude state court jurisdiction.[2]
>
> [2] The Supreme Court of South Dakota has twice determined that the original Yankton Indian Reservation had been diminished by an Act of Congress. *Wood v. Jameson*, 81 S.D. 12, 130 N.W.2d 95, 99 (1964); *State v. Williamson*, 211 N.W.2d 182, 184 (S.D. 1973). Appellant does not challenge these holdings in this appeal.

Weddell v. Meierhenry, 636 F.2d 211, 213 (8th Cir. 1980).

Lake Andes was established as a railroad siding stop in 1900 and became a full-fledged town in 1904. *Epic of Papineau's Domain, supra*, 143. Lake Andes was named the Charles Mix County seat in 1916 and remains the county seat to date. *Id.* at 143. Lake Andes submits the unlikelihood of the residents of Charles Mix County selecting a town within a "reservation" to be a county seat, when only half the county is within the purported boundaries. In any event, according to the 1990 Census, the population of Lake Andes was 846 persons, of whom 246 were Indians. *United States Census, supra* at 33. City and county records indicate that there are approximately 1060 properties within the city limits of which approximately 998 are owned by non-Indians or non-Indian entities, two of which are owned by the Tribe, eight are held in trust by the United States for an individual Indian, two are owned by the Native American Women's Resource Center and fifty are owned in fee by individual Indian persons.

Most of the county offices or headquarters are located in Lake Andes, as are various state offices. The Charles Mix County Law Enforcement Center is located in Lake Andes and provides services to the entire county and surrounding area. The city provides drinking water to all the Yankton Sioux tribal housing units within Lake Andes and to the approximately 70 housing units in the Yankton Sioux Tribe housing units southeast of Lake Andes. The city itself maintains twenty-four separate housing units, through its city housing authority; many or most of these units are occupied by Indian persons. Like Wagner, Lake Andes can point to specific judicial authority which assured it, had there been any doubt, that the reservation had long been disestablished. In *Wood v. Jameson*, 130 N.W.2d 95 (S.D. 1964), the South Dakota Supreme Court held that it was the purpose of the 1892 agreement

and 1894 Act of Congress "to disestablish the reservation. . . ." *Id.* at 99.

The town of Ravinia was also created as a railroad stop in 1909. A. Gnirk, *Epic of the Realm of Ree*, (1984), p. 157. The 1990 Census sets the population of Ravinia at 79, 34 of whom are Indian. Of the 185 properties within its boundaries, approximately 182 are held by non-Indians and non-Indian entities and three are held in trust by the United States for an Indian person.

Dante was likewise founded as a railroad stop. According to the 1990 Census, its population is 98, of whom 12 are Indian. City and county records indicate that approximately 185 properties exist within its boundaries; no properties are owned by the Tribe, individual Indians, or by the United States in trust.

Pickstown, like each of the towns identified above, now finds itself within the purported boundaries of the Yankton Sioux reservation. Pickstown was created in 1947 by the United States Army Corps of Engineers to accommodate construction workers and their families while working on the Fort Randall Dam. *Epic of Papineau's Domain, supra* at 527. Pickstown was released from its federal domination in 1986 and the properties were sold, ceded or relinquished to its residents. According to the 1990 Census, its population was 95, of whom 6 were Indian. The official records of the city indicate there are approximately 190 properties within the city limits; 186 are owned by non-Indians or non-Indian entities and four are owned by Indians. There are no properties owned by the Yankton Sioux Tribe or held in trust by the United States government.

Generally speaking, the demography of the situation in this entire area parallels the area under consideration in *DeCoteau v. District County Court*, 420 U.S. 425 (1975). Keeping in mind that in this litigation the contested area, as in *DeCoteau*, involves essentially the non-Indian fee lands, only one other point need be specially noted. In *DeCoteau*, approximately 90% of the tribal

members were said to actually reside on trust lands (in HUD community housing projects and other individual homes). Brief for Respondent at 196, *DeCoteau v. District County Court*, 420 U.S. 425 (1975) (No. 73-1148). In this 1858 Yankton reservation area, that percentage is apparently somewhat less, though a clear majority of the Yankton tribal members are similarly situated. And while the trust allotments of the members do constitute approximately 10% of the total land base, only a small fraction of that area is actually resided upon or farmed by members of the Yankton Sioux Tribe. Again, this fact situation parallels that presented in *DeCoteau*. *Id.*

The five cities above, all of which find themselves within the 1858 boundaries of the Yankton reservation, are joined in this *amici* brief by two sister cities, Geddes and Platte. Geddes is located approximately fifteen miles northwest of Lake Andes, or one mile west of the eastern 1858 boundary. Platte was established in 1900 as the last city on the railroad line running west in Charles Mix County. A. Gnirk, *Epic of the Great Exodus*, (1985), p. 92. Both cities are demographically similar to those noted above.[1]

---

[1] Although not included as *amici*, two additional towns in Charles Mix County which were not created or established due to the railroad were Marty and Greenwood. Marty was founded in 1913 and is located 10 miles south of Ravinia and 13 miles southwest of Wagner and was named for the Rt. Rev. Martin Marty a pioneer Catholic bishop in South Dakota. A. Gnirk, *Epic of the Realm of Ree* (1984), pp. 12, 186. The town of Marty is, perhaps, best known for the mission and Indian school located there. *Id.* at 186. According to official county records, all of the land within the boundaries of Marty is held in trust by the United States government for the benefit of an Indian person or is owned by an individual Indian person. According to the 1990 census, the population of Marty was 436 persons, 412 of which were Indian persons.

The town of Greenwood is located approximately 5 miles southeast of Marty and was first established as an Indian agency. All of the property located within the boundaries of Greenwood is held in trust by the United States government for individual Indian persons.

Each of the *amici* cities within the 1858 boundaries has experienced immediate dramatic adverse impacts as a result of the decisions of the district court and court of appeals, despite the subsequent decision of the South Dakota Supreme Court. Problems involving law enforcement, zoning, landlord-tenant, provision of utilities, and foreclosures, all difficult in the best of situations, have become permeated with uncertainty. Local officials cannot reliably and finally say that state, or federal law actually applies to a diverse variety of situations which occur on the non-Indian lands within the 1858 boundaries and within their cities. The uncertainty provides an additional means by which those who wish to evade the law can do so and provides a similar haven to those who commit civil wrongs against their neighbors.

The jurisdictional uncertainty referred to above has been exacerbated by the failure of the federal authorities to provide adequate resources to meet the responsibilities they now claim as a result of the federal decision. Prior to the decision of the courts below, all law enforcement activities on non-Indian lands were provided locally through a centrally located county law enforcement center; a full-time sheriff, with three full-time deputies and two part-time deputies; and supplemented by local police departments with six full-time officers and two part-time officers. The State circuit court is located in the Charles Mix County courthouse in Lake Andes, South Dakota.

After the decisions, the United States claims that it has jurisdiction of felony investigations involving Native American suspects or Native American victims, but it has provided only one FBI agent based over one hundred miles outside the county in Sioux Falls, South Dakota. The federal court is also located there. Further, the FBI agent's duties are not limited to investigations within the 1858 boundaries; rather, the additional investigations were simply added to the agent's already heavy urban case load. The United States Attorney's Office has not provided additional staff to handle the cases it now

claims.[2] Further, despite its new assertion of jurisdiction, the federal authorities have no plans at present to base any FBI locally, to the cities' knowledge. The result is clearly a decline in effective law enforcement.[3] The crim-

[2] The tribal chairman indicated at trial that he intended that the United States would greatly expand its criminal law jurisdiction if the Tribe were successful in the litigation. T. 330-331. He admitted, however, that he had not discussed the increased jurisdiction with the U.S. Attorney nor did he know the position of the U.S. Attorney on the matter. T. 331. (The cities suggest that the United States was just as shocked by the decisions below finding the 1858 boundaries intact as were the *amici* cities.)

[3] The present situation is not surprising, for even when reservation status is not apparently at issue, reservation law enforcement is generally regarded as ineffective, especially with regard to the "most common crimes." *See, e.g., Jurisdiction on Indian Reservations—Part 2: Hearing Before the Senate Select Committee on Indian Affairs*, 96th Cong., 2d Sess. at 24 (Aug. 11, 1980) (hereinafter *Jurisdiction—Part 2*): "The most common crimes, such as assaults or small burglaries, simply are not prosecuted in the vast majority of instances." (comment of Caleb Shields, Ft. Peck Tribal Executive Board); *Id.* at 56 (comment of Senator Melcher revealing complaints of state judges that federal authorities do not prosecute even major crimes); *Id.* at 32 (comment of local chief of police that only one of ten "felony-type" theft, burglary or assault cases are prosecuted on the reservation); *Id.* at 26 (United States Magistrate's comment on infrequency of prosecution of reservation assaults). Similar testimony was received approximately a decade later. *See, e.g., Investigation and Prosecution of Federal Crimes on Indian Reservations: Hearings Before the Committee on Interior and Insular Affairs*, House of Representatives, 101st Cong., 1st Sess. at 187 (1989): "[O]nly the most aggregious [sic] and clear-cut cases can properly be pursued." (comment of Tribal Chairman Ketachezan); *Id.* at 281: "[W]e see an awful lot of people who probably should be prosecuted for different things just simply slip through because no one is quite sure who is in charge." (comment of Representative Campbell); *see also* H.R. Rep. No. 101-60, 101st Cong., 1st Sess. at 7 (1989). In addition, legislators in both the 1980 and 1989 hearings drew attention to the fact that reservation law enforcement let cases "fall through the cracks." *See Jurisdiction—Part 2, supra* at 21 (comment of Senator Melcher); *Investigations and Prosecution of Federal Crimes on Indian Reservations: Oversight Hearings Before the Committee on Interior and Insular*

inal law problem, however, presents more than the difficulties attendant to a decline in effective law enforcement. The most critical problem is that, without intervention by this Court, there is no solution to the controversy over which entity actually has jurisdiction of the crimes now being committed. Numerous habeas corpus petitions are already ongoing and will continue to challenge the jurisdiction of courts which have in the past or might in the future take jurisdiction of a now disputed criminal case. Uncertainty thus permeates the criminal law, as well as the civil law sphere, within the *amici* cities.

We note further, that, at trial, the tribal chairman was equivocal as to whether the Tribe *intended* to exercise jurisdiction over non-Indians on non-Indian lands, assuming that it was successful in the litigation. *See, e.g.*, T. 322-334. Nonetheless, since the Tribe has been successful in the federal litigation, it has made it very clear to local city officials, in conferences and otherwise, that the Tribe *will* attempt to regulate non-Indian hunting and fishing on non-Indian lands, *will* establish licensing procedures with regard to non-Indians, and *will* attempt to regulate access to state and federal facilities and lands by non-Indians, particularly those on the Missouri River. The Tribe has not exercised such jurisdiction at least since *amici* towns were founded in the early 1900's, and the Tribe thus promises to radically alter the status quo.

The residents of Charles Mix County are, by and large, highly informed as to cases being litigated in other parts of the nation regarding tribal issues. Aberrant tribal court outcomes such as that appealed in *Burlington Northern R.R. v. Red Wolf*, 106 F.3d 868 (9th Cir. 1997) are tremendously unsettling to the non-Indian residents. Further, the inevitability of extensive and burdensome litigation over tribal regulation and control of non-Indian

Affairs, 100th Cong., 2d Sess. 249 (1988); *Prosecution of Federal Crimes, supra* at 249: "Case-by-case determination can lead to a cumbersome, inefficient process which ultimately leads to cases falling through the cracks." (comment of Representative Tim Johnson.)

interests, as detailed above, has caused land owners to suspect that a further and significant decrease in property values is likely in the event the court of appeals decision is not reversed.[4]

REASONS FOR GRANTING THE PETITION

I. THE AGREEMENT IN THE *YANKTON* CASE NOW BEFORE THIS COURT IS THE "FUNCTIONAL TWIN" OF THE AGREEMENT AT ISSUE IN *DECOTEAU v. DISTRICT COUNTY COURT*, AND THEREFORE THIS COURT SHOULD REVERSE ON THE BASIS OF *DECOTEAU*.

Not only did the court of appeals spurn the bright-line "presumption" articulated in *Solem v. Bartlett*, 465 U.S. 463 (1984) and *Hagen v. Utah*, 510 U.S. 399 (1994), the court also failed to apply the precedent of *DeCoteau v. District County Court*, 420 U.S. 425 (1975). In *DeCoteau*, this Court considered an agreement of the United States with the Sisseton-Wahpeton Sioux Tribe which resulted in disestablishment. The Yankton Agreement of three years later is the "functional twin" of the Sisseton Agreement and *DeCoteau* therefore strongly suggests a finding of disestablishment in the *Yankton* case.

The term "functional twin" was employed by the Court in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 609 (1977), and denoted the identity, except for the "operative language" of the Agreements, of a 1907 Agreement

[4] One recent witness at a Senate Indian Affairs Committee hearing, a rancher on South Dakota's Cheyenne River Sioux Reservation, testified that it was his opinion that the prices of property on that reservation "are regularly discounted about 25 percent. These facts make it difficult for non-Indians to either stay or leave." Tribal Sovereign Immunity: Hearing before the Committee on Indian Affairs, S. Hrg. 104-694, 104th Cong., 2d Sess. 45. The recent experience of *amici* towns has led them to surmise that the loss in property value identified in the Senate Hearing will most probably be replicated within the 1858 boundaries, should the decision of the court of appeals remain unreversed.

and an earlier 1904 Agreement. Because the Agreements constituted "functional twins," except for the critical "operative" language, the Court found the later Agreement (which *lacked* cession language) accomplished disestablishment, just as the earlier agreement had accomplished disestablishment. *Id.* As we demonstrate below, the origin, content, and outcome of the Sisseton and Yankton agreements make them even better "functional twins" than the agreements at issue in *Rosebud*.

This argument takes on special importance for the residents of the *amici* cities because of the proximity of the former Sisseton reservation at issue in *DeCoteau* (roughly 150 miles northeast of the *amici* cities) and because the agreements and local histories of the two areas were known to be so similar. *Amici* cities and their residents could and legitimately did, we respectfully submit, continue to assume that no reservation existed at Yankton based on *DeCoteau* and the legal and factual similarities between the two situations.

Summarily, in every respect even arguably significant, the Yankton documents mirror and reflect the same terminology, discussions, considerations, policies, and generalities presented in *DeCoteau*. The Yankton Commissioners even repeatedly referred specifically to the terms of the Sisseton Agreement. Br. of Resp't District in Supp. of Pet'r at 18. *See also*, South Dakota Representative Pickler's remarks in the congressional record ("same kind of a treaty we have always made" . . . "procure these lands in the same way" . . . "we make no departure from our past policy" . . . "just as all other cessions of land" . . .). *Id.* at 28-29. As a result, in both instances the Commissioner of Indian Affairs and the Secretary of the Interior also acknowledged that both reservations were "restored to the public domain." *Id.* at 10-11. *See generally Hagen* at 412-414 (public domain).

In this light, we submit that the "functional twin" characteristics of the two situations do, in fact, demonstrate that this Court's decision in *DeCoteau* should dispose of this case.

II. FACTORS DEMONSTRATING THE YANKTON AND SISSETON AGREEMENTS ARE FUNCTIONAL TWINS.

SISSETON DISESTABLISHMENT	YANKTON DISESTABLISHMENT
Time period equivalent Agreement approved 1891. *DeCoteau*, 420 U.S. at 427.	*Time period equivalent* Agreement approved 1894. 28 Stat. 286 (1894).
Allotment of substantial territory under General Allotment Act. *DeCoteau*, 420 U.S. at 455.	*Allotment of substantial territory under General Allotment Act.* Exhibit 605, p. 5.
Preambles equivalent. The Sisseton Indians "are desirous of disposing of a portion of the land set aside and reserved to them. . . ." *DeCoteau*, 420 U.S. at 455.	*Preambles equivalent.* "The Yankton Tribe . . . is willing to dispose of a portion of land set aside and reserved to said Tribe. . . ." App. 112.
Cession language used. "The Sisseton and Wahpeton Bands of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title and interest. . . ." Art. 1, cited at *DeCoteau*, 420 U.S. 456.	*Cession language used.* "The Yankton Tribe of Dakota or Sioux Indians hereby cede sell, relinquish, and convey to the United States all their claim, right, title, and interest. . . ." Art. 1, App. 112-113.
All unallotted lands ceded. Cession pertains to "all the unallotted lands within the limits of the reservation set apart to said bands of Indians as aforesaid remaining after the allotments and additional allotments provided for in article four of this agreement. . . ." Art. 1, *DeCoteau*, 420 U.S. at 456.	*All unallotted lands ceded.* Cession pertains to "all the unallotted lands within the limits of the reservation set apart to said Indians as aforesaid." Art. 1, App. 112-113.

Sum Certain Language Used.	*Sum Certain Language Used.*
Sisseton Agreement provides "[i]n consideration for the lands ceded, sold, relinquished and conveyed . . . the United States stipulates and agrees to pay . . . the sum of two dollars and fifty cents per acre for each and every acre thereof. . . ." Art. 2, *DeCoteau*, 420 U.S. at 456.	Yankton agreement provides "[i]n consideration for the lands ceded, sold, relinquished, and conveyed to the United States . . . the United States stipulates and agrees to pay . . . the sum of six hundred thousand dollars. . . ." Art. II, App. 113.
Missionaries allowed to purchase lands.	*Missionaries allowed to purchase lands.*
Art. 2, *DeCoteau*, 420 U.S. at 457.	Art. X, App. 117.
United States retained an agency and schools.	*United States retained an agency and schools.*
DeCoteau, 420 U.S. at 435 n.16; *id.* at 438 n.19.	App. 116.
Lands retained were scattered about the former reservation.	*Lands retained were scattered about the former reservation.*
DeCoteau, 420 U.S. at 428.	App. 159.
The proclamation opening the reservation referred to a "schedule of lands within the . . . reservation . . . ."	*The proclamation opening the reservation referred to a "schedule of lands within the . . . reservation . . . ."*
27 Stat. 1017, 1018 April 11, 1892).	29 Stat. 865, 866 (May 16, 1895).
Congress clearly intended to return the land to the public domain.	*Congress clearly intended to return the land to the public domain.*
DeCoteau, 420 U.S. at 440-441.	26 Cong. Rec. 6425 (1894); *id.* at 6426.
State assumed virtually unquestioned jurisdiction.	*State assumed virtually unquestioned jurisdiction.*
DeCoteau, 420 U.S. at 442.	App. 38; Dissent, App. 62; *State v. Greger*, App. 154-155.

Sisseton-Yankton generally treated in parallel fashion on maps.	*Sisseton-Yankton generally treated in parallel fashion on maps.*
Exhibit 33 (1889) (showing both reservations; Exhibit 620 (1901) (eliminates both Yankton and Sisseton reservations); Exhibit 621 (1910) (eliminates both reservations); Exhibit 44 (1909) (BIA adds both Sisseton and Yankton as blank).	Exhibit 33 (1889) (showing both reservations; Exhibit 620 (1901) (eliminates both Yankton and Sisseton reservations); Exhibit 621 (1910) (eliminates both reservations); Exhibit 44 (1909) (BIA adds both Sisseton and Yankton as blank).

As noted above, in *Rosebud*, the Court found a 1907 Act to diminish the Rosebud reservation the same as the 1904 Act even though the 1904 Act *had* contained language of cession and the 1907 Act had *not* contained language of cession. This Court found that "as the legislative comments make clear . . . the change in § 1 language was not intended to modify or change the purposes or operation of the 1904 Act." *Rosebud*, 430 U.S. at 609. *Rosebud* thus strongly indicates that when identical language is used, identical results are intended. This was so, in the case of *Rosebud*, even when the operative language was different and when the "cession language" was eliminated, because the legislative comments made clear that no change from the earlier Act was intended.

In this instance, as Charles Mix County has noted, even the United States has described the Sisseton Agreement as "a similar and contemporaneous cession agreement" containing "the same language." Brief of Charles Mix County, South Dakota, *Amicus Curiae* in Support of Petitioner, State of South Dakota at 18, *Yankton Sioux Tribe v. Southern Missouri Waste Dist.* (No. 96-1581) (May 7, 1997) citing BUS, Co. App. at 166a.

There are a few differences between the agreements. *Both* agreements, however, contain the critical cession and sum certain language as "operative language." *See Hagen*, 510 U.S. at 412-416. Several of the changes from the Sisseton to the Yankton agreement, moreover, make the Yankton agreement even a stronger argument for disestablishment than the Sisseton agreement.

The liquor provision and its history are of special importance for the Yankton Act contained this provision while the Sisseton Act did not. Article XVII of the 1894 Yankton Act provided that intoxicating liquor could not be sold upon reservation lands after they were ceded and opened to settlement:

> No intoxicating liquors nor other intoxicants shall ever be sold or given away upon any of the lands by this agreement ceded and sold to the United States, nor upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the treaty between the said Indians and the United States, dated April 19th, 1858, and as afterwards surveyed and set off to the said Indians. The penalty for the violation of this provision shall be such as Congress may prescribe in the act ratifying this agreement.

App. 120; Act of August 15, 1894, ch. 290, 28 Stat. 286, 318.

Thus, federal liquor laws applied on lands, "as described in the treaty between the said Indians and the United States, dated April 19th, 1858. . . ." *Id.* This provision would be surplusage if the reservation were *not* diminished by the Act of 1894, as intoxicants were *already* forbidden in "Indian country" by federal law. *Perrin v. United States*, 232 U.S. 478, 484 (1914). Furthermore, this Court has said, of a provision in the 1910 Act concerning the Rosebud Sioux Reservation, that:

> the most reasonable inference from the inclusion of this [liquor prohibition] provision is that Congress was aware that the opened, unallotted areas would henceforth not be "Indian country" because not in the Reservation.

Rosebud, 430 U.S. at 613. *See also id.* at n.47.

The legislative history of Article XVII in the Yankton Act also supports this proposition. According to the 1893 Commissioner of Indian Affairs Report to Congress on the Yankton Agreement:

> Article XVII, prohibiting the sale or disposition of intoxicants upon any of the lands now within the Yankton reservation, seems to be a desirable provision, and from the decision of the Supreme Court in *United States v. 43 Gallons of Whiskey* (93 U.S. 188), the stipulation would appear to be valid if ratified by the United States.

Exh. 605, App. 15. The passage implies diminishment in that it referred in 1893 to lands "*now* within the Yankton Reservation. . . ." Thus, before the Yankton agreement was ratified by Congress in 1894, the Commissioner looked to a time when the lands would *not* be "within the Yankton Reservation."

Further significance is found in the citation of *United States v. Forty-three Gallons of Whiskey*, 93 U.S. 188 (1876). In that case, the Court held that Congress may prohibit liquor not only within "Indian country," but also within a "territory in proximity to that where the Indians live." *Id.* at 195. The citation of this case by the Commissioner of Indian Affairs indicates that he believed that the ceded lands would no longer be part of a reservation but that this Court's decision in *Forty-Three Gallons of Whiskey* would nonetheless permit the liquor prohibition of Article XVII.

A further salient distinction, demonstrating that case for disestablishment of Yankton is even stronger than at Sisseton, is found in the tribal constitutions. In 1946, the tribal constitution at Sisseton claimed jurisdiction only as to:

> *Indian owned lands* lying within the territory within the original confines of the Sisseton-Wahpeton Lake Traverse Sioux Reservation.

DeCoteau, 420 U.S. at 443, quoting Article 1 of the October 16, 1946, Constitution (emphasis added). In 1966, three years after the court of appeals had found the 1891 Act terminated the Sisseton Reservation, the Commissioner of Indian Affairs approved a new constitu-

tion which provided that the jurisdiction of the Tribe shall "extend to lands lying in the territory within the original confines of the Lake Traverse Reservation. . . ." *Id.* quoting the 1966 Constitution. Thus, by 1966, the Sisseton Tribe claimed reservation boundaries in its constitution.

The constitutions at Yankton, however, have *never* claimed such boundaries. According to the 1962 Constitution of the Yankton Sioux Tribe, a Constitution which remains in effect *to this day*:

> The territory under which this Constitution shall exist shall extend to all original tribal lands *now owned by the Tribe* under the treaty of 1858.

Exhibit 652 (emphasis added). The Yankton Constitution has never been amended to claim tribal boundaries.

Thus, in coming before this Court, the Yankton Sioux Tribe cannot assert a tribal constitutional claim to reservation boundaries. It would, moreover, be highly anomalous to allow a tribe to succeed on a claim of boundaries in this Court when it had not even made that claim in its own constitution. In this respect also, the Yankton situation presents a stronger and more persuasive case for disestablishment than did the Sisseton case.

The Tribe's attempt to distinguish the two agreements is derived mainly from the Section XVIII savings section. As the Dissent below pointed out, however, there is *nothing in the record which supports the contention that the savings section was meant to preserve the boundaries of the reservation.* Dissent, App. 54-56. Furthermore, the savings section is itself internally ambiguous in providing both for the preservation of *all* provisions of the 1858 agreement *and* the *annuity* provisions of the 1858 agreement. *Id.*

In *Rosebud*, the 1907 Agreement was the "functional twin" of a 1904 Agreement even though the 1907 Agreement lacked the "operative language" of "cession." Here,

the Yankton agreement and the Sisseton agreement both contain the critical "cession and sum certain" language and numerous other indicia that they should be treated equivalently. Furthermore, the Yankton agreement is in certain respects stronger than the Sisseton agreement with regard to disestablishment. Given this situation, the *Rosebud* "functional twin" analysis strongly suggests a finding that the Yankton reservation, like the Sisseton reservation, has been disestablished.

With this background, it is not surprising that the negotiators and Indians at Yankton both equated the Sisseton agreement signed in 1889 with the Yankton agreement signed in 1892. For example, Commissioner Cole said during the Yankton negotiations:

> The Commissioners are now ready to make you an offer for your surplus lands . . . . It is more than the Government paid for the Sisseton reservation and it is the highest price we have ever known the Government to offer.

Exhibit 605, at 80. Tribal member John Cole also said that "[t]he Sisseton Reservation was purchased by the government at $2.50 per acre." *Id.* at 77. Henry Selwyn linked the 1892 Yankton agreement with both the Treaty of 1858 by which the Yankton reservation had been diminished *and* the transaction by which the Sisseton Indians had sold their lands. He stated:

> I will now refer to the treaty of 1858. This is the second time we sold land to the Government. I think they should be very grateful to us for selling our land. . . . If the Sissetons and Titowan had sold their land at the same prices at which we sold ours in 1885 per acre they would have given the Government their lands for nothing.

Id. at 63. The identity of the two agreements makes it logical that the Yankton Indians should perceive the Sisseton agreement as equivalent to theirs. It confirms that the two agreements are, in fact, "functional twins."

CONCLUSION

For the foregoing reasons, and those stated in the Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

TIMOTHY R. WHALEN
WHALEN LAW OFFICE, P.C.
P.O. Box 127
Lake Andes, SD 57356
Telephone: (605) 487-7645
Counsel of Record

No. 96-1581

Supreme Court, U.S.
FILED
MAY 7 1997
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STATE OF SOUTH DAKOTA,
Petitioner,
v.
YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individuals members; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,
Respondents,
and
SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF CHARLES MIX COUNTY, SOUTH DAKOTA, *AMICUS CURIAE* IN SUPPORT OF PETITIONER, STATE OF SOUTH DAKOTA

MATTHEW F. GAFFEY
Charles Mix County
State's Attorney
P.O. Box 370
Lake Andes, SD 57356
(605) 487-7441

TOM D. TOBIN
Counsel of Record
TOBIN LAW OFFICES, P.C.
422 Main Street
P.O. Box 730
Winner, SD 57580
(605) 842-2500

Attorneys for Amicus Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
REASONS FOR GRANTING THE PETITION	2
THE OPINION OF THE PANEL MAJORITY CONFLICTS IN PRINCIPLE WITH THE RELEVANT DECISIONS OF THIS COURT	2
A. A Review of the Arguments Previously Presented and Rejected in This Court Establishes Clear Principles That Undermine the Opinion of the Panel Majority and Make Clear the Extent of the Conflict	2
1. *Seymour v. Superintendent*, 368 U.S. 351 (1962)	4
2. *Mattz v. Arnett*, 412 U.S. 481 (1973)	6
3. *DeCoteau v. District County Court*, 420 U.S. 425 (1975)	9
4. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977)	12
5. *Solem v. Bartlett*, 465 U.S. 463 (1984)	15
6. *Hagen v. Utah*, 510 U.S. 399 (1994)	16
7. *Yankton Sioux Tribe v. South Dakota*, 796 F.2d 241 (8th Cir. 1986), *cert. denied*, 483 U.S. 1005 (1986)	17
8. *Yankton Sioux Tribe v. Southern Missouri Waste District*, 99 F.3d 1439 (8th Cir. 1996) (No. 96-1581)	19
CONCLUSION	20
APPENDIX	
Memorandum for the United States, *Seymour v. Superintendent*, 368 U.S. 351 (1962)	1a

TABLE OF CONTENTS—Contiuned

Page

Brief for the United States as *Amicus Curiae*, *Mattz v. Arnett*, 412 U.S. 481 (1973) 4a

Brief for the United States as *Amicus Curiae*, *DeCoteau v. District County Court*, 420 U.S. 425 (1975) 27a

Brief for the United States as *Amicus Curiae*, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) 55a

Brief for the United States as *Amicus Curiae* Supporting Respondent, *Solem v. Bartlett*, 465 U.S. 463 (1984) 98a

Brief for the United States as *Amicus Curiae* Supporting Petitioner, *Hagen v. Utah*, 510 U.S. 399 (1994) 128a

Brief for the United States in Opposition, *Yankton Sioux Tribe v. State of South Dakota*, 796 F.2d 241 (8th Cir. 1986), *cert. denied*, 483 U.S. 1005 (1986) 157a

TABLE OF AUTHORITIES

CASES: Page

Antoine v. Washington, 420 U.S. 194 (1975) 5
DeCoteau v. District County Court, 420 U.S. 425 (1975) ..... *passim*
Hagen v. Utah, 510 U.S. 399 (1994) ..... *passim*
Johnson v. United States, 163 F. 30 (1st Cir. 1908) 13
Mattz v. Arnett, 412 U.S. 481 (1973) ..... *passim*
Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985) 18
Perrin v. U.S., 232 U.S. 478 (1914) 19
Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) ..... *passim*
Seymour v. Superintendent, 368 U.S. 351 (1962) ..... *passim*
Solem v. Bartlett, 465 U.S. 463 (1984) 3, 15, 16, 18
State v. Greger, 599 N.W.2d 854 (S.D. 1977) 2
United States v. Pelican, 232 U.S. 442 (1914) 5
Yankton Sioux Tribe v. South Dakota, 796 F.2d 241 (8th Cir. 1986), *cert. denied*, 483 U.S. 1005 (1986) 17
Yankton Sioux Tribe v. Southern Missouri Waste Dist., 99 F.3d 1439 (8th Cir. 1996) 1, 19

STATUTES:

Act of June 17, 1892, 27 Stat. 52 ..... 7, 12
General Allotment Act of 1887, 24 Stat. 388 ..... *passim*
Act of March 3, 1891, 26 Stat. 1036 ..... 9, 14
Act of August 15, 1894, 28 Stat. 286 ..... *passim*
Act of April 23, 1904, 33 Stat. 254 13

CONGRESSIONAL MATERIALS:

H.R. Rep. No. 791, 50th Cong., 1st Sess. (1988) 6
S.Rep. No. 664, 52d Cong., 1st Sess. (1892) 5

OTHER AUTHORITIES:

Brief for the United States as *Amicus Curiae*, *DeCoteau v. District County Court*, 420 U.S. 425 (1975) (No. 73-1148) 10, 11
Brief for Uintah County, Utah, *Hagen v. Utah*, 510 U.S. 399 (1994) (No. 92-6281) 4

TABLE OF AUTHORITIES—Continued

Page

Brief for the United States as *Amicus Curiae* Supporting Petitioner, *Hagen v. Utah*, 510 U.S. 399 (1994) (No. 92-6281) 20
Brief for the United States, *Mattz v. Arnett*, 412 U.S. 481 (1973) (No. 71-1182) 10
Brief for the United States as *Amicus Curiae*, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562) 12, 14
Memorandum of the United States, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562) 14
Brief for Petitioner, *Seymour v. Superintendent*, 368 U.S. 351 (1962) (No. 62) 4
Memorandum for the United States, *Seymour v. Superintendent*, 368 U.S. 351 (1962) (No. 62) 5
Brief for the United States as *Amicus Curiae* Supporting Respondent, *Solem v. Bartlett*, 465 U.S. 463 (1984) (No. 82-1253) 16
Brief for the United States in Opposition, *Yankton Sioux Tribe v. State of South Dakota*, 796 F.2d 241 (8th Cir. 1986) (No. 86-1436) 19
Brief for the United States, *Yankton Sioux Tribe v. Southern Missouri Waste District*, 99 F.3d 1439 (8th Cir. 1996) (No. 95-2647) 19, 20
Petition for Writ of Certiorari, *Yankton Sioux Tribe v. Southern Missouri Waste District* (No. 96-1581) (April 7, 1997) 1, 15
Brief for the Cities as *Amici Curiae* in Support of Petitioner, *Yankton Sioux Tribe v. Southern Missouri Waste District* (No. 96-1581) (May 7, 1997) 1
Transcript of Oral Argument, *Erickson v. U.S. ex rel. Feather*, U.S. Supreme Court No. 73-1500, *decided with DeCoteau v. District County Court*, 420 U.S. 425 (1975) 1
Transcript of Oral Argument, *Hagen v. Utah*, 510 U.S. 399 (1994) (No. 92-6281) 17
Transcript of Oral Argument, *Mattz v. Arnett*, 412 U.S. 481 (1973) (No. 71-1182) 7, 8

TABLE OF AUTHORITIES—Continued

Page

Transcript of Oral Argument, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562) 2, 13, 15
54 Interior Dec. 559 (1934) 14

INTEREST OF *AMICUS CURIAE*

> The majority's assertion that 'Article XVIII of the 1894 statute indicated that as much of [the 1858] treaty as possible was to be preserved,' Maj. Op. at 1448, is based neither on the text—which referred only to annuities—nor the legislative history of the 1894 Act, and has as its source only, as best as I can discern, *a single-minded desire to avoid diminishment at all costs.*

Yankton Sioux Tribe v. Southern Missouri Waste Dist., 99 F.3d 1439, 1462 (8th Cir. 1996), J. Magill dissenting. Pet. App. at 56 (emphasis added).

The vital concern that prompts the filing of this *Amicus* Brief can be simply stated. Prior to this litigation, all the courts and parties had recognized that the 1858 Yankton reservation no longer existed. Now, a century later, more than half of the area of Charles Mix County, South Dakota, is at issue. Consequently, the approximately 6,000 people that reside there presently face the prospect of being suddenly thrust into the status of residents of an Indian reservation. If this takes place, their officials would have only limited jurisdiction and the non-members would have no elected voice in the governance of their affairs and property by the Tribe.

The demographics of Charles Mix County in this area are similar to other non-reservation rural counties found in the State of South Dakota and the United States. *Ninety* percent of the land is owned by non-members and over *two-thirds* of the residents are non-members who reside on small farms and in small towns and cities like Dante, Lake Andes, Pickstown, Ravinia and Wagner. *See* Brief for the Cities as *Amici Curiae* in Support of Petitioner. Although this Court has repeatedly recognized in this situation, that the justifiable expectations of the people should not be lightly regarded or simply swept aside, the panel majority ignored that prudential advice. *Hagen v. Utah*, 510 U.S. 399, 421 (1994); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-605 (1977). For these reasons, the issue here is of grave importance to the residents and governments of Charles Mix County, South Dakota.

The Supreme Court of the State of South Dakota subsequently considered the identical disestablishment question in *State v. Greger*, 559 N.W.2d 854 (S.D. 1997), Pet. App. 125. In a unanimous opinion, the State Supreme Court rejected the views of the panel majority and reaffirmed the longstanding position that the Yankton reservation was disestablished. The County would submit that the views of the State Supreme Court are more in line with the principles formulated by this Court, principles that should have been controlling here.

REASONS FOR GRANTING THE PETITION

THE OPINION OF THE PANEL MAJORITY CONFLICTS IN PRINCIPLE WITH THE RELEVANT DECISIONS OF THIS COURT.

The County fully supports the reasons for granting the petition set forth in the Petition of the State. The County also recognizes that the primary consideration governing review will focus on the conflict between the United States Court of Appeals for the Eighth Circuit and the Supreme Court of the State of South Dakota. The County further agrees that the decision of the panel majority conflicts substantially with the relevant decisions of this Court. This brief will focus on that conflict and the role of the United States in the entire process.

A. A Review of the Arguments Previously Presented and Rejected in This Court Establishes Clear Principles That Undermine the Opinion of the Panel Majority and Make Clear the Extent of Conflict.

> Now, this principle that Congress did not intend to disestablish the Reservations is not one that the government has made up out of *whole cloth*. It is supported both by history and by the previous decisions of this Court.

Office of Solicitor General, Tr. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562) (emphasis added).

A fair reading of *Seymour v. Superintendent*, 368 U.S. 351 (1962); *Mattz v. Arnett*, 412 U.S. 481 (1973); *DeCoteau v. District County Court*, 420 U.S. 425

(1975); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *Solem v. Bartlett*, 465 U.S. 463 (1984) and *Hagen v. Utah*, 510 U.S. 399 (1994), clearly undermines the views set forth by the panel majority. The Petition highlights these important principles and, for that reason, they will not be repeated here.

In addition, however, a proper perspective regarding the history of disestablishment litigation before this Court is important in order to accurately assess the views of the panel majority and the dissent in conjunction with the principles set forth in these relevant decisions. This brief is intended to serve that purpose and provide that perspective. The County starts with a brief review of the primary arguments presented and rejected in each case decided by this Court, as well as the historic perspective available or established at the time. Such a review advances three overriding themes.

First, as one would expect, each time the Court was presented with this issue, more primary sources were available from which a proper historical perspective could be reconstructed and the intent of Congress more conclusively ascertained. The Opinions reflect this documentation.

Second, the views of the United States are especially noteworthy. The United States rarely fails to advocate the resurrection of original reservation boundaries, presumably because of a perceived obligation to support the Tribal position. The shifting, but very sophisticated, arguments of the United States (for the most part repeatedly rejected by this Court) have served mainly to perpetuate the confusion and conflicts in this area of Federal Indian law, fueling the prospect of additional litigation.

The central arguments of the United States are therefore closely examined for another reason. As will be seen, the United States repeatedly has made a number of important *concessions* in this Court, subsequent to *DeCoteau*, regarding the *effect of cession agreements*, like this one, on Indian reservations. These cession concessions, made in conjunction with submissions that urged the continued

recognition of other original reservation boundaries, cannot be explained away. The views of the United States in this regard, submitted to this Court, merit continued consideration.[1]

1. *Seymour v. Superintendent*, 368 U.S. 351 (1962). A disestablishment issue was first presented to this Court in *Seymour*. Although we now know that the 1906 Colville Act at issue in that case was one in a series of surplus land statutes enacted pursuant to the General Allotment Act of 1887 (Dawes Act)—a routine matter for Congress by 1906—neither the General Allotment Act of 1887 nor the limited legislative history of the 1906 Act played any real role in the resolution of the question. Act of February 8, 1887, 24 Stat. 388. The *Seymour* Opinion does not cite the General Allotment Act or the legislative history of the 1906 Colville Act. The briefs are similarly silent with respect to the General Allotment Act and the few citations to the 1906 legislative history are set forth almost as an afterthought.

In short, *Seymour* was decided *almost* without the benefit of any historical perspective. "Almost" is used because, although neither the General Allotment Act nor the legislative history of the specific Act in question played any role in the decision, Petitioner Seymour did rely on the contrast between the 1906 Act and the earlier 1892 "public domain" legislation that concededly disestablished the North Half of the Colville Reservation. Pet. Br. at 10, *Seymour* (No. 62). At best, this was a limited perspec-

[1] The briefs of the United States in each of the cases are reproduced verbatim in Co. App. 1a-168a. A "public domain" variation of this same argument was submitted by county government in *Hagen v. Utah*, 510 U.S. 399 (1994), together with an appendix that reproduced most of the briefs the United States had previously submitted. Brief for Uintah County, Utah, *Hagen v. Utah*, 510 U.S. 399 (1994) (No. 92-6281). In that instance, the county argument highlighted the incredibly inconsistent and contradictory position of the United States regarding "public domain" disestablishment terminology. In *Hagen*, as in *DeCoteau* and *Rosebud*, the views of the United States were squarely rejected by this Court. *Hagen*, 510 U.S. at 411-412.

tive, but certainly one that benefited Petitioner by simple contrast. More important matters were not briefed, i.e. the argument that the public domain format of the 1892 Act was the result of a refusal by Congress to ratify a previously negotiated 1891 cession agreement due to the questionable nature of the title to the Colville Executive Order Reservation and the argument that the language was added to deal with a congressional concern that undesirable precedent might be established. *Antoine v. Washington*, 420 U.S. 194, 216 (1975) (Rehnquist, J., dissenting); S. Rep. No. 664, 52d Cong., 1st Sess. (1892). *See also, U.S. v. Pelican*, 232 U.S. 442 (1914). In any event, it is doubtful whether any of the above would have altered the views of the United States, which argued in support of the Reservation boundaries of the South Half of the Colville Reservation ("Solicitor General has urged this construction upon the Court"). *Seymour*, 368 U.S. at 357.

The Solicitor General's three page argument was based predominantly on the 1948 statutory definition of Indian Country which, of course, begs the question. It was also based upon *subsequent* congressional recognition, primarily in 1956, that the Reservation continued to exist. MUS, Co. App. 3a. Neither the General Allotment Act nor the historical perspective of the 1906 Act played any role in the brief for the United States. In this light, *Seymour* concluded, without further citation, that:

> The Act did no more than *open the way for non-Indian settlers* to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards.

Seymour, 368 U.S. at 356 (emphasis added).

The United States later seized on this statement from *Seymour* and tied it to the General Allotment Act of 1887 (which, as previously noted, was not even mentioned in *Seymour*). In effect, the United States attempted to attribute to both *Seymour* and the General Allotment Act, a new congressional plan or purpose consistent with a new

argument that no surplus land statute, passed pursuant to the General Allotment Act of 1887, was ever intended by Congress to disestablish portions of Indian Reservations—a "whole cloth" argument: the revisionist theory of the General Allotment Act.[2]

The United States focused on the General Allotment Act of 1887 for more than one reason. Prior to that time, Congress routinely utilized treaties, cession agreements and other similar arrangements, some of which contained allotment provisions, to disestablish reservations and open territories throughout the United States to settlement for decades:

> [t]he policy of the Government from its earliest days has been to restore Indian reservations or portions thereof to the public domain as the exigencies of advancing population required it. . . .

H.R. Rep. No. 791, 50th Cong., 1st Sess. 3 (1888). No one had ever attempted to even formulate an argument that Congress never intended these actions to disestablish the limits or boundaries of Indian reservations. If similar cession agreements, passed subsequent to 1887, were not intended to have the same effect, the General Allotment Act of 1887 was the only point in history that Congress could have even arguably intended to have altered such a fundamental historical process. This is especially so in the absence of some affirmative evidence that Congress specifically intended to depart from that historical format, either generally or in a certain case. (The United States could not produce such evidence at the time—or, as a matter of fact, ever.) The first opportunity for the United States to advance the new revisionist theory of the General Allotment Act argument in this Court came in *Mattz v. Arnett, supra.* BUS, Co. App. 14a-15a.

2. *Mattz v. Arnett*, 412 U.S. 481 (1973). Although the United States argued forcefully for the broad sweep of *Seymour* tied to the General Allotment Act, this argument met with only limited success in *Mattz*. BUS, Co.

[2] *See* the "whole cloth" disclaimer noted *supra* at 2.

App. 12a-14a. The history of the Klamath River Reservation at issue in *Mattz* was so tortious and fact specific, isolated and atypical, that the *Mattz* dicta regarding the General Allotment Act, while all that the United States could have hoped for, did not really seem pivotal to the decision.

Certainly, the United States repeatedly told the *Mattz* Court:

> The Act of 1892 can properly be understood only in light of the *General Allotment Act* which Congress had recently passed.
>
> In our view, the Act of June 17, 1892, can properly be understood only in light of two considerations: (1) what Congress had done five years earlier in the *General Allotment Act*. . . .
>
> *The policy of the Act* was to continue the reservation system and the trust status of Indian land. . . .
>
> This Court's more recent decision in *Seymour v. Superintendent*, 368 U.S. 351, is, in our view, controlling here. . . .

BUS, Co. App. at 10a, 14a, 24a (emphasis added). *See also, id.* at 11a, 15a n.8.

And at oral argument, the United States squarely placed this issue "into a little bit of historical perspective":

> This same policy is recognized more recently by this Court in *Seymour v. Superintendent*. . . .

Tr. at 19-20, *Mattz* (No. 71-1182). *See also, id.* at 13 14, 15, 21.

At the same time, to shore up this new General Allotment Act argument and supplement this "little bit" of historical perspective for the Court, the United States also discussed certain statutes that concededly disestablished Indian reservations. According to the United States, the Court could, by contrast, look to these examples in determining when congressional action was really intended to disestablish an Indian reservation—an instant historical perspective. BUS, Co. App. 18a-19a. Following Peti-

tioner's lead in *Seymour*, and especially in light of this aspect of the *Seymour* opinion, the controlling example cited by the United States of a congressional mandated disestablishment was the 1892 *Colville* statute, where the operative language restored the north half of the reservation to the public domain. As the United States told this Court in *Mattz*, among other things:

> This Court's more recent decision in *Seymour v. Superintendent*, 368 U.S. 351, is, in our view, *controlling* here. . . . In holding that the Act did not terminate the reservation there at issue, the Court emphasized the absence from the Act of language abolishing the reservations or "restoring that land to the public domain" (368 U.S. at 355).

BUS, Co. App. at 24a (emphasis added).

Other examples were also listed by the United States to support this "by contrast" argument, including a typical cession. *Id.* at 18a-19a (the *cession* example merits special attention *infra*).

At oral argument, the United States repeated the "by contrast" point:

> MR. SACHSE . . . In closing, since I assume I am out of time, I refer the Court to page 17 of our brief where we have samples of language that Congress used when it did want to discontinue a portion of a reservation.

Tr. at 20-21, *Mattz* (No. 71-1182).

(Except for the cession example, the text *infra* establishes that the others on the list were representative of atypical situations encountered by Congress only on rare occasions and decades apart.)

Without question, the *Mattz* opinion reflects both arguments made by the United States. First, with respect to the General Allotment Act:

> Its policy was to continue the reservation system and the trust status of Indian lands, ... See § 6 of the General Allotment Act, 24 Stat. 390; United States Department of the Interior, Federal Indian Law 115-117, 127-129, 776-777 (1958). . . .
>
> . . . This Court unanimously observed in an analogous setting in *Seymour*, *id.*, at 356, . . .

Mattz, 412 U.S. at 496, 497.

Secondly, with respect to the "by contrast" argument, the Court in *Mattz* noted:

> More significantly, throughout the period from 1871-1892 numerous bills were introduced which *expressly* provided for the termination of the reservation and did so in unequivocal terms. . . .
>
> Congress has used clear language of express termination when that result is desired. See, for example. . . .

Id. at 504, n.22 (emphasis added).

Two years later, this Court was actually presented with a typical surplus land statute specifically patterned and enacted pursuant to the terms of the General Allotment Act. With the supporting documentation of both the specific Act as well as the General Allotment Act, the General Allotment Act *dicta* in *Mattz* did not dissuade the Court, including the author of the *Mattz* opinion, from correctly concluding that surplus land statutes passed pursuant to the General Allotment Act were also intended and routinely passed by Congress to disestablish Indian reservations. *DeCoteau v. District County Court*, 402 U.S. 425, 447-449 (1975). Predictably, the United States again argued forcefully for a different result in *DeCoteau*.

3. *DeCoteau v. District County Court*, 420 U.S. 425 (1975). In *DeCoteau*, the surplus land statute at issue was one of eight similar agreements in a cession format jointly ratified in an 1891 Appropriation Act. Each of these agreements was specifically tailored to the provisions in the General Allotment Act, which had recently been passed after nearly a decade of focused debate. For these two reasons, fortuitous in retrospect, the historical record consisted of hundreds of pages directed to this

aspect of the General Allotment Act (Section 5) and the effect the cession agreements were understood and intended to have.

Moreover, for the first time, all of this primary documentation was excerpted and presented to the *DeCoteau* Court in several hundred pages of briefs, setting forth a complete and proper historical perspective. That perspective established that although simple allotment per se (Section 6 of the General Allotment Act) was only intended to disestablish reservations at *some* point in the foreseeable future, a separate and distinct surplus land statute, in a cession format, opening the reservation or a portion thereof to settlement pursuant to Sec. 5 of the General Allotment Act, was intended to disestablish the affected reservation *pro tanto* (on the date of the opening set forth in the Presidential Proclamation). This was in precisely the same manner that pre-1887 cessions had disestablished reservations for decades, when Congress and/or the President authorized similar legislation.

The United States elected to ignore the force of this documentation, and instead urged the *DeCoteau* Court to recognize the continuing existence of the original reservation boundaries on the basis of *Seymour* and *Mattz* and the United States' revisionist theory of the General Allotment Act. While agreeing that the focal point of the issue had to be the General Allotment Act of 1887, the United States pressed the point that *Seymour* and *Mattz* were both openings pursuant to that Act, and that no Act pursuant to the General Allotment Act, was ever intended to effect reservation disestablishment except at some future point in time. (Again, as in the Brief for the United States in *Mattz*, the United States blurred the distinction between allotment per se (Section 6 of the General Allotment Act) which eventually resulted in some non-Indian ownership within the limits of Indian reservations, but was never intended to immediately disestablish the reservations, and surplus land statutes enacted pursuant to Sec. 5 of the

General Allotment Act, which repeatedly accomplished this result). BUS, Co. App. 37a, 38a, 39a, 40a.[3]

In addition, the United States submitted a series of very sophisticated arguments drawn from little scraps of language found in *Seymour* and *Mattz* to support this general proposition. No degree of sophistication, however, could overcome the problem the United States never addressed: namely, the fact that all of the contemporary historical evidence irrefutably pointed to the opposite conclusion. *DeCoteau*, 420 U.S. at 432, 434, 436, 438 and 441.

Further, the cession format utilized by Congress in previous decades—with the end result never questioned in terms of reservation boundaries—was only slightly modified at this point in time (1887 through the early 1900's). As a result, the United States could only argue that the cession format itself was probative of nothing because it was not within the list of self-serving "by contrast" examples the United States *now* said Congress utilized when Congress "clearly" intended to effectuate this result (the list noted previously was compiled by the United States and noted in *Mattz*, 412 U.S. at 497, n.19). In the original version of the list presented to the Court in *Mattz*, the United States had included representative cession language. BUS, Co. App. 18a-19a. When that cession example did not appear in the *Mattz* opinion, the United States omitted any mention of this fact to the Court, simply adopted the *Mattz* list and argued throughout *DeCoteau* that the cession language was meaningless. *Id.* at 40a-41a.

Even without a specific historical point of reference, it is difficult to believe that the *DeCoteau* Court would have found this argument credible when actually presented with a real cession Agreement. When all of the *DeCoteau* documents conclusively established that the *DeCoteau* cession format was still the rule at this point in time *i.e.*, *after* the General Allotment Act, rather than the exception,

---

[3] *See also*, Tr. at 11, 13, 17, 21, *Erickson v. U.S. ex rel. Feather*, U.S. Sup. Ct. No. 73-1500, *decided with DeCoteau v. District County Court*, 420 U.S. 425 (1975).

this argument was soundly rejected. Cession terminology was "precisely suited" to disestablishment and the remainder of the sophisticated arguments of the United States were noted and rejected for that reason. *DeCoteau*, 420 U.S. at 445.

4. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977). The United States subsequently resisted the force of *DeCoteau*. In 1977, in *Rosebud*, this Court considered three Sec. 5 surplus land statutes considered by Congress a decade after the *DeCoteau* surplus land statutes were passed. The United States again argued that, after adopting the General Allotment Act, Congress never intended this type of statute to disestablish portions of Indian reservations. As in the past, reliance for this argument was placed almost entirely upon *Seymour* and *Mattz*. In its brief, the United States specially emphasized that *Mattz* noted:

> Placing the 1892 Act into the historic context of *the General Allotment Act of 1887*, 24 Stat. 388, the [*Mattz*] Court further observed that the Allotment Act "permitted the President to make allotments of reservation lands to resident Indians and, with tribal consent, to sell surplus lands. Its policy was to *continue the reservation system*. . .

BUS, Co. App. 65a (emphasis in original text).

In its discussion of *DeCoteau*, the United States failed to mention the role played by Sec. 5 of the General Allotment Act and the cessions in the *DeCoteau* process. *Id*. According to the United States, *DeCoteau* was important primarily because of the differences between the cession Act there and the *Rosebud* legislation, i.e., the unilateral nature of the congressional action in *Rosebud* and the uncertain payment in trust for the *Rosebud* land.

At oral argument, the United States repeatedly stressed its revisionist theory of the General Allotment Act. The United States maintained that after this Act, Congress never intended reservation disestablishment. *DeCoteau* was mentioned only in passing and then primarily to some-

how support continued reservation boundaries throughout this period. Tr. at 20, 21, 27, 29, *Rosebud* (No. 75-562).

The *Rosebud* Court proceeded, in the most definitive Opinion to date, to squarely address each and every argument—sophisticated arguments to be sure (and there were many)—advanced in support of the Court restoring the original boundaries of the Rosebud Reservation. Although one or two minor exceptions might exist, a careful reading of *Rosebud*, together with *DeCoteau* as recognized historical background, establishes that the United States, the Yankton Sioux Tribe and supporting *Amici*, can not advance any argument of substance that has not already been answered. (And, as in *DeCoteau*, the public domain concept, whether expressed on the face of the act or in the legislative history, was still important in *Rosebud* and equated with reservation disestablishment.)

Unquestionably, as time went on, the cession format of the earlier period was modified but these changes in format reflect no change in congressional intent. Thus, it ultimately mattered little that the 1904 *Rosebud* Act was technically not a "cession." As the Court in *Rosebud* explained:

> As a matter of strict English usage, petitioner is undoubtedly correct; "cession" refers to a voluntary surrender of territory or jurisdiction, rather than a withdrawal of such jurisdiction by the authority of a superior sovereign. But as Mr. Justice (then Judge) Holmes commented, we are not free to say to Congress: "We see what you are driving at, but you have not said it, and therefore we shall go on as before." *Johnson v. United States*, 163 F. 30, 32 (CA1 1908). . . .
>
> The use of the word "cession" in the 1904 Act, which was not consented to by the required extraordinary majority of the Tribe, does not make the meaning of the Act ambiguous. . .
>
> The word is technically misused but the meaning is quite clear.

Rosebud, 430 U.S. at 597.

In the instant case, of course, the word "cession" is not technically misused. And the United States' comments regarding real cessions in *Rosebud* (alternatively, in an attempt to distinguish *DeCoteau*), bear repeating now:

> The court of appeals, however, failed to recognize the *crucial difference* that in *DeCoteau* the United States itself purchased the land in the reservation pursuant to an agreement with the Indians; this, the Court held, restored the land to the public domain and extinguished the reservation. 420 U.S. at 446-447.

Memorandum of the United States at 13, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562) (emphasis added).

> . . . The 1891 Act was a *straightforward cession for a sum certain in amount*. . . . These *distinctions* led to the conclusion that the Lake Traverse Reservation was extinguished and the land restored to the public domain. . . .

BUS, Co. App. at 66a, *see also id.* at 67a (emphasis added).

The United States also reminded this Court of the 1934 Interior Department Opinion which they continued to rely upon for *traditional* confirmation that real *cessions disestablished reservations*:

> In this way the *exterior boundaries* of a reservation were further reduced. The lands thereby separated from a reservation were no longer looked upon as being part of that reservation.

54 Interior Dec. 560 (1934) (emphasis added), cited and quoted in part in Memo. of the United States at 19-21 *Rosebud* (No. 75-562) and BUS, Co. App. 79a ("The Secretary noted that many reservation lands had been ceded for a sum certain and concluded that '[t]he lands thereby separated from a reservation were no longer looked upon as being a part of that reservation'" (54 I.D. at 560)). *Id.*

It is beyond dispute that both the Sisseton and the Yankton reservation agreements are within the purview

of this analysis. For this reason, as the United States pointed out, the list in the 1934 Opinion included some 26 "reservations." It did not include *either* the Sisseton or Yankton cession. BUS, Co. App. at 80a.

In oral argument, United States reiterated, by negative implication, this same dominant point:

> [W]henever Congress *without* a binding agreement opens lands to white settlers, it does *not* pay for them and does *not* guarantee any payment but only agrees to act as trustee for future uncertain sales and leaves the property interest in the Indians—as they did in this case—that act does *not* remove the lands from the boundaries of the Reservation.

Tr. at 22, *Rosebud* (No. 75-562) (emphasis added).

A few minutes later, the same cession distinction was stressed in a different context:

> [I]n *DeCoteau*, which distinguishes both cases in a case where sale was made for a sum certain and an agreement was made, as counsel for the Tribe has discussed. . . .

Id. at 28.

5. *Solem v. Bartlett*, 465 U.S. 463 (1984). In *Solem*, the United States combined and restated so many variations of earlier arguments that even a summary review is difficult to present here. Moreover, since the United States did not participate in oral argument, that source is not available. In short, however, it can be fairly stated that the United States in *Solem* argued whatever was necessary to resist reservation disestablishment.

Most important for the present case are the concessions of the United States regarding cessions which were adopted in the Court's Opinion. *Solem*, 465 U.S. at 470, 473 n.15, 474, 476, 478. The Petition addresses these points. Pet. Br. at 7, 15-16, 23.

For example, the United States said:

> [C]*ritically different* from the situation in *DeCoteau* and *Rosebud* in at least the following respects: (1)

> the relevant legislation contains *no* language of "cession"; (2) there was *no* prior tribal agreement to cede the relevant area. . . .

Br. for the United States as *Amicus Curiae* Supp'ng Resp't (opposing Pet. for Cert.) at 4 n.3, *Solem* (No. 82-1253) (emphasis added).

On the merits, the cession theme was restated with unmistakable clarity:

> The *critical* question remains whether the statute invoked worked an immediate and irrevocable cession. . . .
>
> To be sure, as *DeCoteau* and *Rosebud* illustrate, there are instances in which a Reservation *must* be found to have been irrevocably terminated or diminished. . . . In the climate of the times, the *only meaningful question* is whether the legislation meant to accomplish a *present, unequivocal* and *irrevocable* transfer of Reservation lands from the Tribe to the United States.
>
> The *critical* fact in all these cases is that Congress exacted a *present and total surrender of all tribal interest* in the ceded land in return for an *unconditional commitment* by the United States to an agreed payment. . . .
>
> [T]he clear line between *outright* cession and mere opening up of tribal lands was not always observed. . . . But we do not read *Rosebud* as erasing the *traditional distinction.*
>
> What is relevant, however, is that, at the end of the day, *no cession resulted.*

BUS, Co. App. at 103a, 109a, 110a, 111a, 113a, 122a (emphasis added).

In this light, it is not surprising that *Solem* repeatedly made these same cession observations.

6. *Hagen v. Utah*, 510 U.S. 399 (1994). *Hagen* reflects the most recent views of this Court in resolving disestablishment issues. Due to the history of the Utah legislation, the United States devoted most of its arguments in *Hagen*—naturally in favor of a recognition of original reservation boundaries—to "public domain" terminology. These arguments were generally rejected in *DeCoteau.* Again, in *Hagen* this Court squarely rejected them. (*See supra* at 4 n.1).

The United States also strongly argued that a cession and sum certain agreement was broadly understood to effect disestablishment:

> [N]one of the relevant documents . . . uses the *indisputable language of cession* that was a feature of all of the relevant documents in *Rosebud.* Moreover, in our view, the *requirement* in *Solem* that the "understanding" be "widely held" requires *proof* that the Indians shared in an understanding that alteration of the Reservation's boundaries was at hand; the *only* obvious manifestation of such an understanding on the part of the Indians is *an agreement of cession*, like the one approved in *Rosebud.*

BUS, Co. App. at 150a (emphasis added). *See also id.* at 138a, 141a n.20, 142a, 143a, 149a.

Significantly, in this instance the United States also participated in oral argument and made explicit representations as to the effect of the use of cession language:

> MR. MANN: . . . [*T*]*he language of cession.* That seems to be—that phrase seems to be the phrase *Congress used when it intended to alter the boundaries of a reservation.*
>
> QUESTION: Well, when it intended to alter the boundaries of the reservation by cession. That much is clear.

Tr. at 26, *Hagen* (No. 92-6281).

The County certainly would not attempt to improve upon the gist of this exchange. Nothing more need be said on this point.

7. *Yankton Sioux Tribe v. South Dakota*, 796 F.2d 241 (8th Cir. 1986), *cert. denied*, 483 U.S. 1005 (1986). The United States has only had one opportunity since *DeCoteau* (but before the present litigation) to tell this Court specifically about the *Yankton* statute and how

it compared to the *DeCoteau* statute. In that instance, involving a lakebed, the comparison is also telling:

> [T]he United States' right to control Lakes Andes and its bed, to the exclusion of the Yankton Sioux Tribe, is in any event secured by the 1892 Cession Agreement. . . . First, Article I is framed in terms that this Court has repeatedly characterized as "express language of cession." *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, No. 83-2148 (July 2, 1985), Slip op. 15 n.19; *Solem v. Bartlett*, 465 U.S. 463, 469 (1984). In *DeCoteau v. District County Court*, 420 U.S. 425, 445 (1975) (emphasis added), this Court, in considering *a similar and contemporaneous cession* agreement, found that *the same language* was "precisely suited" to the purpose of conveying to the United States, "for a sum certain, *all* of [the Indians'] interest in *all* of their unallotted lands."
>
> Second, the retention of the lakebed by the Tribe would have been inconsistent with the *purposes* of the 1892 Cession Agreement. Those *purposes* consisted not only of opening additional lands for non-Indian settlement, but also of paving the way for the anticipated end of the tribal way of life. . . .

BUS, Co. App. at 165a, 166a (emphasis on all in original).

While it remains to be seen what the United States might tell this Court now, the County would submit that in this excerpt in the 1986 Brief in Opposition, the United States has already said everything worth saying ("a similar and contemporaneous cession"). This *Yankton* lakebed litigation was pending for over a decade. Although reservation disestablishment was not decided, the Yankton cession agreement was central to the arguments for the United States and other parties. As such, it was thoroughly reviewed and discussed in all respects. At that time, Article XVIII of the Yankton agreement, viewed in context, was not noteworthy and did not even merit special attention in the argument of the United States. (Not surprisingly, the position of the

United States on this issue was subsequently modified to one that now supports the recognition of the original Yankton reservation. Article XVIII figures prominently in the new argument.)

8. *Yankton Sioux Tribe v. Southern Missouri Waste District*, 99 F.3d 1439 (8th Cir. 1996). The United States did not participate in this litigation in the district court. In the court of appeals, the United States, as *amicus curiae*, told the court that because the federal government retains jurisdiction over Indian country generally, the continuing integrity of the exterior boundaries of Indian reservations is of "significant import." Br. of the United States at 1, *Yankton Sioux v. Southern Missouri*, 99 F.3d 1439 (8th Cir. 1996) (No. 95-2647). (The United States did not mention the uncontested fact that federal jurisdiction had *not* been exercised in this area for over a century.)

Moreover, the United States argued, for the first time, that it had a strong interest in protecting "the integrity of reservation boundaries" because of its "special relationship with Indian tribes." *Id.* The strength of this interest presumably overpowered any inclination to present, address, explain or defend any of the previous United States' cession arguments that were plainly inconsistent with continued reservation status. The United States mentioned none of this and simply noted: "We do not agree with the arguments raised by the County in its brief. They are irrelevant to this case." *Id.* at 19 n.11.

Only two points in the novel argument now advanced by the United States in support of original reservation boundaries are significant at this point in time. First, the commendable concession that this Court's 1914 Yankton decision in *Perrin v. United States*, 232 U.S. 478 (1914), "assumed" disestablishment. *Id.* at 19 n.10. And secondly, that as late as 1985 the United States (and everyone else) was continuing to make this same assumption:

> [T]he United States stated in a footnote in its brief that, based on decisions of state courts in South

Dakota, the reservation had been diminished by the 1894 treaty.

Id. at 18 n.8.

The panel majority should have been more reluctant in disregarding this venerable precedent.

CONCLUSION

For the foregoing reasons, and those stated in the Petition, the Petition for Writ of Certiorari should be granted.[4]

Respectfully submitted,

MATTHEW F. GAFFEY
Charles Mix County
State's Attorney
P.O. Box 370
Lake Andes, SD 57356
(605) 487-7441

TOM D. TOBIN
Counsel of Record
TOBIN LAW OFFICES, P.C.
422 Main Street
P.O. Box 730
Winner, SD 57580
(605) 842-2500

Dated: May 7, 1997

---

[4] The State and the County met with the Solicitor General of the United States recently to request that the United States support the Petition for a Writ of Certiorari (irrespective of differences regarding the merits). Consistent with the submission of the United States in *Hagen*, the County expects support should be forthcoming if the Court invites the Solicitor General to express the views of the United States. Br. for the United States as *Amicus Curiae* (supporting Pet. for Cert.) at 15, *Hagen* (No. 92-6281). If for any reason the Solicitor General declines to support the Petition, it is respectfully submitted that the Court should consider that view in the full light of the "litigation position" of the United States in cases of this nature. In the past, this Court did exactly that and granted certiorari in spite of the Solicitor General's express recommendation to the contrary, when a conflict like this was presented in 1984 involving the status of another reservation in South Dakota. Br. for the United States as *Amicus Curiae* Supp'ng Resp't (opposing Pet. for Cert.) at 8, *Solem* (No. 82-1253). *Solem*, 465 U.S. at 466 ("Because the Supreme Court of South Dakota has issued a pair of opinions offering a conflicting interpretation of the Act of May 29, 1908, we granted certiorari.").

APPENDIX

APPENDIX TABLE OF CONTENTS

	Page
Memorandum for the United States, *Seymour v. Superintendent*, 368 U.S. 351 (1962)	1a
Brief for the United States as *Amicus Curiae*, *Mattz v. Arnett*, 412 U.S. 481 (1973)	4a
Brief for the United States as *Amicus Curiae*, *DeCoteau v. District County Court*, 420 U.S. 425 (1975)	27a
Brief for the United States as *Amicus Curiae*, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977)	55a
Brief for the United States as *Amicus Curiae* Supporting Respondent, *Solem v. Bartlett*, 465 U.S. 463 (1984)	98a
Brief for the United States as *Amicus Curiae* Supporting Petitioner, *Hagen v. Utah*, 510 U.S. 399 (1994)	128a
Brief for the United States in Opposition, *Yankton Sioux Tribe v. State of South Dakota*, 796 F.2d 241 (8th Cir. 1986), *cert. denied*	157a

APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1960

No. 8 Misc.

PAUL SEYMOUR, PETITIONER

v.

MERLE E. SCHNECKLOTH, SUPERINTENDENT
OF WASHINGTON STATE PENITENTIARY

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

---

MEMORANDUM FOR THE UNITED STATES

The Court has requested the view of the United States as to whether the lands involved in the above-entitled case are Indian lands.

The record in this case shows the land involved as follows:

> On the southwest corner of 6th Avenue and Jackson Street (formerly 10th Street) in East Omak, Okewogan County, Washington; that said premises are more particularly described as Lot 9, Block 118 of the government townsite of Omak and situated in Section 36, Township 34, North Range, 26 E.N.M.

According to the records of the Department of Interior, this land is not held in a trust status for any Indian nor is it held by an Indian subject to restrictions against alienation. Nevertheless, it is the position of the Department of Interor, with which the Department of Justice agrees, that the land is "Indian country" as that term is defined in 18 U.S.C. 1151.

18 U.S.C. 1151 provides in pertinent part that Indian country means "all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent and including rights-of-way running through the reservation." The land here is, in our view, "within the limits" of an Indian reservation.

The Colville Reservation, as originally established by executive order in 1872, was bounded on the north by the international boundary and on the south by the Columbia River. See Royce, *Indian Land Cessions in the United States*, Washington Map 1, No. 536. That part of the original reservation approximating the north half was ceded to the United States and the reservation was diminished to approximately the south half in 1892. See Royce, *op cit.*, Washington Map 2, No. 717. While it is true that the Act of March 22, 1906, 34 Stat. 80, made provision for allotments on the diminished reservation and authorized the sale and disposition of the unallotted lands subject to payment of the proceeds of the sales to the Indians, this did not destroy the existence of the reservation. The Department of Interior continued to recognize the entire diminished or "south half" as the Colville Reservation. The Act of July 24, 1956, 70 Stat. 626, specifically provides in section 1 that "the undisposed-of lands of the Colville Indian Reservation, Washington, dealt with by the Act of March 22, 1906 (34 Stat. 80), are hereby restored to tribal ownership to be held in trust by the United States to the same extent as all other tribal lands on the existing reservation, subject

to any existing valid rights." Section 2 of that Act, authorizing exchanges to effect land consolidation between Indians and non-Indians in Okawogen County, provides that the "acquisition of lands pursuant to this Act shall be limited to lands within the boundary of the reservation." This seems a clear recognition by Congress that lands opened under the Act of 1906 are still within the existing boundaries of the Colville Reservation.

Since it is the boundaries of the reservation, rather than the fee title to the property, which is controlling under 18 U.S.C. 1151, the land in issue seems to us to be in "Indian Country." Hence, under 18 U.S.C. 1153, the crime of burglary would be punishable by the United States, and not the state.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

SEPTEMBER 1960.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

No. 71-1182

RAYMOND MATZ, PETITIONER

v.

G. RAYMOND ARNETT

On Writ of Certiorari to the
California Court of Appeal, First District

BRIEF FOR THE UNITED STATES AS
AMICUS CURIAE

OPINIONS BELOW

The order of the Supreme Court of California denying petitioner's application for review (Pet. App. C) was entered on December 16, 1971. The opinion of the Court of Appeal, First District (Pet. App. A), is reported at 20 Cal. App. 3d 729, 97 Cal. Rptr. 894.

JURISDICTION

On December 16, 1971, the Supreme Court of California denied petitioner's application for review. A petition for a writ of certiorari was filed with this Court on March 14, 1972, and was granted on January 15,

1973. This Court's jurisdiction rests on 28 U.S.C. 1257(3).

EXECUTIVE ORDER AND STATUTES INVOLVED

The Executive Order of October 16, 1891, 1. Kappler, *Laws and Treaties* 815 (1904), reads as follows:

> EXECUTIVE MANSION OCTOBER 16, 1891
>
> It is hereby ordered that the limits of the Hoopa Valley Reservation in the state of California, a reservation duly set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in said State, by Act of Congress approved April 8, 1864, (13 Stats., 39), be and the same are hereby extended so as to include a tract of country one mile in width on each side of the Klamath River, and extending from the present limits of the said Hoopa Valley reservation to the Pacific Ocean; *Provided, however,* That any tract or tracts included within the above described boundaries to which valid rights have attached under the laws of the United States are hereby excluded from the reservation as hereby extended.
>
> BENJ. HARRISON.

The Act of June 17, 1892, 27 Stat. 52, reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.* That all of the lands embraced in what was Klamath River Reservation in the State of California, as set apart and reserved under authority of law by an Executive order dated November sixteenth, eighteen hundred and fifty-five, are hereby declared to be subject to settlement, entry, and purchase under the laws of the United States granting homestead rights and authorizing the sale of mineral, stone, and timber lands: *Provided*, That any Indian now located upon said reservation may, at

any time within one year from the passage of this act, apply to the Secretary of the Interior for an allotment of land for himself and, if the head of a family, for the members of his family, under the provisions of the act of February eighth, eighteen hundred and eighty-seven, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," and, if found entitled thereto, shall have the same allotted as provided in said act or any act amendatory thereof: *Provided,* That lands settled upon, improved, and now occupied by settlers in good faith by qualified persons under the land laws shall be exempt from such allotment unless one or more of said Indians have resided upon said tract in good faith for four months prior to the passage of this act. And the Secretary of the Interior may reserve from settlement, entry, or purchase any tract or tracts of land upon which any village or settlement of Indians is now located, and may set apart the same for the permanent use and occupation of said village or settlement of Indians. And any person entitled to the benefits of the homestead laws of the United States who has in good faith prior to the passage of this act, made actual settlement upon any lands within said reservation not allotted under the foregoing proviso and not reserved for the permanent use and occupation of any village or settlement of Indians, with the intent to enter the same under the homestead law shall have the preferred right, at the expiration of said period of one year to enter and acquire title to the land so settled upon, not exceeding one hundred and sixty acres, upon the payment therefor of one dollar and twenty-five cents an acre, and such settler shall have three months after public notice given that such lands are subject to entry within

which to file in the proper land office his application therefor; and in case of conflicting claims between settlers the land shall be awarded to the settler first in order of time: *Provided,* That any portion of said land more valuable for its mineral deposits than for agricultural purposes, or for its timber, shall be entered only under the law authorizing the entry and sale of timber or mineral lands: *And provided further,* That the heirs of any deceased settler shall succeed to the rights of such settler under this act: *Provided further,* That the proceeds arising from the sale of said lands shall constitute a fund to be used under the direction of the Secretary of the Interior for the maintenance and education of the Indians now residing on said lands and their children.

Approved, June 17, 1892. [Bold type shows language added by Senate amendment of House bill.]

18 U.S.C. 1151 reads as follows:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. 1162 provides in relevant part:

> (a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses

committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	*Indian country affected*
* * * *	
California	All Indian country within the State.
* * * *	

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; * * * or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping or fishing or the control, licensing, or regulation thereof.

The California Fish and Game Code, Section 12300, reads as follows:

> Irrespective of any other provisions of law, the provisions of this code are not applicable to California Indians whose names are inscribed upon the tribal rolls, while on the reservation of such tribe and under those circumstances in this State where the code was not applicable to them immediately prior to the effective date of Public Law 280, Chapter 505, First Session, 1953, 83d Congress of the United States.

QUESTION PRESENTED

Whether petitioner's fishing nets were seized by the State of California within Indian country as defined by 18 U.S.C. 1151 (62 Stat. 757, as amended by 63 Stat. 94).[1]

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's of October 10, 1972, inviting the Solicitor General to express the views of the United States in this case.

STATEMENT

This action was brought by the respondent, director of the state Department of Fish and Game, for the forfeiture of five nylon gill nets owned by the petitioner on the ground that he used the nets in violation of California's fish and game laws. The nets were seized by a state game warden on September 24, 1969. The nets were stored in open containers upon land owned by a lumber company within 200 feet of the Klamath River on land that had once been part of the Klamath River Reservation and that had been made part of the Hoopa Valley Reservation by Executive Order in 1891 (Pet. App. A, p. 1; Pet. App. B, pp. 4-5).

The petitioner intervened to resist the forfeiture alleging that he is an enrolled Indian of the Yurok (Klamath River) Tribe, that the nets were seized within Indian country as defined by 18 U.S.C. 1151, and that the California law prohibiting use of the nets was therefore inapplicable.

---

[1] Having ruled that the land where the nets were seized was not Indian country, the California courts did not reach the issue whether, if the land is Indian country, petitioner is a beneficiary of rights which either are preserved from state regulation by 18 U.S.C. 1162(b), *supra*, or entitle him to the exemption of California Fish and Game Code, Section 12300, *supra*. See Pet. App. A, pp. 1-2.

The trial court held that the land where the nets were seized was not "Indian country" within the scope of 18 U.S.C. 1151 and was not within an Indian reservation within the meaning of California Fish and Game Code, Section 12300, because the Act of June 17, 1892, which had opened the Reservation for public purchase of excess land had, in effect, terminated the twenty miles of the reservation nearest to the Pacific Ocean (Pet. App. B, pp. 1-2). The state Court of Appeal affirmed the decision on the same grounds (Pet. App. A), and the Supreme Court of California denied petitioner's application for review (Pet. App. C). Petitioner then filed a petition for a writ of certiorari in this Court, which granted the petition on January 15, 1973.

SUMMARY OF ARGUMENT

I. The events leading to the Act of June 17, 1892, show that the Act did not terminate the portion of the Hoopa Valley Reservation to which it applied. The seaward twenty miles of the addition to the Hoopa Valley Reservation had been the Klamath River Reservation. Because of legal problems in maintaining multiple separate reservations, the President, by Executive Order in 1891, had made the Klamath River Reservation part of the Hoopa Valley Reservation. The reference in the 1892 act to "what was the Klamath River Reservation" merely designates the portion of the addition to the Hoopa Valley Reservation that had previously been a separate reservation. It does not indicate a congressional abolition of half of the just created Hoopa addition.

The Act of 1892 can properly be understood only in light of the General Allotment Act which Congress had recently passed. In that Act Congress maintained Indian reservations but permitted allotments of land within reservations to individual Indians and sales of surplus land to non-Indians. The General Allotment Act, however, did not require the President to make allotments within any particular reservation. Consequently a number of Acts

requiring allotments and disposal of surplus land within particular reservations were passed. The 1892 Act was such an Act. Nothing in the Act purports to terminate the part of the reservation to which it applies. When Congress has wished to terminate all or part of a reservation it has done so explicitly.

II. The consistent course of administrative and congressional action subsequent to the Act of 1892 supports the proposition that that Act did not abolish the Klamath River portion of the Reservation. The Department of the Interior, shortly after the passage of the Act, was required to determine whether allotments made under the Act were allotments on or off a reservation. In a carefully reasoned and documented opinion the Department in charge of administering the Act ruled that the Act reconfirmed, rather than cast doubt upon, the continued existence of the Reservation. This has been the consistent view of the Department of the Interior, and has also been the premise on which Congress has subsequently acted.

III. The decisions of this Court has consistently held that Acts opening reservations or parts of reservations for allotment and disposal of surplus land for the benefit of the resident Indians do not thereby abolish the reservations. *Seymour* v. *Superintendent*, 368 U.S. 351, is, in our view, controlling here. The Act of 1906 in question in *Seymour*, 34 Stat. 80, was identical in effect to the Act in question here. This Court held that that statute, while requiring allotment and disposal of surplus land in the Colville Reservation, did not thereby terminate the Reservation. Moreover, although one of the primary purposes of the extension of the Hoopa Valley Reservation was to secure the Indians' fishing rights in the Klamath River, nothing in the 1892 Act purported to terminate those rights. An intent to take such rights without compensation merely by implication should not be presumed.

ARGUMENT

I. THE EVENTS LEADING TO THE ACT OF JUNE 17, 1892, 27 STAT. 52, AND THE ACT ITSELF SHOW THAT THE ACT DID NOT TERMINATE THE ADDITION TO THE HOOPA VALLEY RESERVATION CREATED BY EXECUTIVE ORDER ONLY MONTHS BEFORE, ON OCTOBER 16, 1891

A. The History of the Establishment of the Reservation

The Yurok Indians historically have been fishing people who live on the lower Klamath River near the Pacific Ocean, the area in question here. See Kroeber, *Handbook of the Indians of California*, p. 1 (1925).[2] Their very name means "downstream" in the language of the adjacent Karok Tribe. Kroeber, *supra*, at p. 15.

On November 16, 1855, as authorized by the Act of March 3, 1855 (10 Stat. 686, 699), President Pierce set apart as an Indian reservation a strip of territory extending along the Klamath River for a width of one mile on each side for a distance of twenty miles inland from the Pacific Ocean. The area is a deep gorge, consisting of craggy timberland rich in redwood and pine with little arable land except at the river bank. The area was chosen because the Indians had always lived there and had depended largely on fish from the Klamath River for their diet and trade.[3]

In his 1861 Annual Report (quoted in 33 I.D. at 216) the Commissioner of Indian Affairs described the Reservation as follows:

---

[2] There are excerpts from Kroeber at A. 34-44.

[3] See 1858 Annual Report of the Commissioner of Indian Affairs, p. 286, quoted in *Crichton* v. *Shelton*, 33 Decisions of the Department of the Interior (I.D.) 205, 216. See also 33 I.D. at 205-206.

> This reservation is well located, and the improvements are suitable and of considerable value. There is an abundance of excellent timber for fencing and all other purposes, and at the mouth of the Klamath river there is a salmon fishery of great value to the Indians.

In 1861 the Klamath river flooded and destroyed many of the Indian villages. This led the Interior Department to attempt a temporary relocation of the Yurok and other Klamath River Indians to a reservation on the Smith River, but few left and most of those soon returned.[4] The Smith River reservation was thereafter abolished.[5]

In 1864 the Hoopa Valley Reservation, a 12-mile square about 50 miles inland from the mouth of the Klamath River, was created by administrative order authorized by the Act of April 8, 1864 (13 Stat. 39) (later confirmed by Executive Order of June 23, 1876, I Kappler, *supra*, at p. 815). Its creation inadvertently cast doubt on the continued *legality* of the Klamath River reservation (not on its occupation or use by Indians). This was so because the Act of April 8, 1864, *supra*, which authorized the President to create new Indian reservations within California, limited the number of new and old reservations to four, and, arguably, the President had exceeded that number. Indeed, in 1889 the Circuit Court for the Northern District of California ruled that because of the President's failure to list the Klamath River Reservation as one of the four, it was no longer legally a reservation. *United States* v. *Forty-Eight Pounds of Rising Star Tea*, 38 Fed. 400.

It was in response to this decision that, in order to preserve the Klamath River Reservation, President Harrison issued the Executive Order of October 16, 1891 (p. 2, *supra*) extending the Hoopa Valley Reservation to

---

[4] See *Crichton*, *supra*, 3 I.D. at 208.

[5] Act of July 27, 1868, 15 Stat. 198, 221.

the sea in a strip one-mile wide on each side of the Klamath River so as to include the former Klamath River Reservation. In *Donnelly* v. *United States*, 228 U.S. 243, this Court upheld the validity of the 1891 Executive Order extending the Hoopa Reservation to the sea.[6]

B. The Act of June 17, 1892 and the General Allotment Act

In our view, the Act of June 17, 1892, can properly be understood only in light of two considerations: (1) what Congress had done five years earlier in the General Allotment Act (Act of February 8, 1887, 24 Stat. 388) and (2) the changes made in the 1892 Act during the legislative process in order to incorporate Allotment Act provisions in it.

1. By the 1880's and 1890's the Indians in the West had given up vast areas of land, but they still had substantial holdings in the form of reservations, created by treaty, executive order, or statute. During this period there was much pressure on Congress to remove land from these reservations and make it available for settlement and exploitation by non-Indians. But there was also considerable feeling that to do so would violate treaties and generally break faith with the Indians who had been induced to give up larger areas of land and to become peaceful in return for federal protection and the reservations created for them. The General Allotment Act of 1887 was to some extent a congressional compromise of these conflicting pressures and considerations.

The policy of the Act was to continue the reservation system and the trust status of Indian land at least for

---

[6] *Donnelly* concerned a crime committed within the "connecting strip" joining the former Hoopa and Klamath River Reservations. The Court consequently did not specifically consider the effect of the Act of 1892. However, it characterized it as "opening" that part of the reservation to "settlement, entry and purchase," 228 U.S. at 253, not as terminating or abolishing it.

the time being, but to allot individual tracts to Indians (in trust) which they would be encouraged to farm. When all the land had been allotted and the trusts had expired, the reservation could be abolished.[7] In the meantime, since acreage limitations were put on the allotments, there would usually be surplus land within reservations which could be made available to non-Indians. It was hoped that the resulting juxtaposition of the two races would be edifying to the Indians and encourage them to adopt white ways.[8]

While the General Allotment Act thus permitted the President to make allotments of reservations lands and, with tribal consent, to sell surplus lands, it did not require him to do so. Congress, therefore, occasionally enacted special legislation to assure that a particular reservation would be opened for allotment and non-Indian settlement. The Act of June 17, 1892, at issue in this case, is an example of such legislation.[9]

Because of the General Allotment Act and these special Acts opening land within reservations to settlement, it is common today to have extensive non-Indian holdings within reservations. As we show in point III, *infra*, however, allotments to Indians and sales to non-Indians, whether under the General Allotment Act or special Acts, do not in themselves terminate the reservations or even make the lands therein held by non-Indians cease to be Indian country. *Seymour* v. *Superintendent*, 368 U.S. 351, 357-359; *Ellis* v. *Page*, 351 F.2d 250 (C.A. 10); *State* v. *Molash*, 199 N.W. 2d 591 (Sup. Ct. S.D.).

---

[7] The original trust period was to be 25 years, but those periods have often been extended. See p. 21, *infra*.

[8] See, generally, United States Department of the Interior, Federal Indian Law, pp. 115-117, 127-129, 776-777 (1958).

[9] The policy of allotment and sale of surplus lands within reservations was repudiated in the Indian Reorganization Act of 1934, 48 Stat. 984 *et seq.*, as amended, 25 U.S.C. 461 *et seq.*

2. The pressures of non-Indians to obtain some of the land and especially the redwood forests within the Klamath River Reservation were particularly strong. In 1879, at the request of the Department of the Interior, military forces were used to evict trespassers. Thereafter, the Secretary decided in 1883 to make allotments to Indians living on the reservation, but he revoked the decision because of inadequate surveys and nothing further was done at that time to make allotments or authorize white settlement.[10] In October 1891, the President reaffirmed the existence of the reservation by his Executive Order incorporating it into an extension of the Hoopa Valley Reservation (see p. 2, *supra*).

House Bill, H.R. 38, 52d Cong., 1st Sess., which after amendment became the Act of 1892 at issue here, was reported out of committee on February 5, 1892[11] and was passed by the House on March 1, 1892,[12] only months after the President had reaffirmed the existence of the reservation. The apparent purpose of the House Bill[13] was to seek to open the reservation to non-Indian interests without raising too much opposition. Its language did not purport to terminate the Reservation (the Hoopa extension) just created by the President, and it did not purport to "diminish" the Reservation. Nor did it call for the removal of the Indians.

The bill first designates, as the area to which it applied, what was "Klamath River Reservation"—thus only the seaward portion of the just created extension of the Hoopa Valley Reservation. The bill opened the designated

[10] See Annual Report of the Commissioner of Indian Affairs for 1885, quoted in part in *Crichton*, *supra*, 33 I.D. at 214.

[11] H. Rept. No. 151, 52d Cong., 1st Sess.

[12] 23 Cong. Rec. 1598-1599.

[13] At pages 2-3, *supra*, we have set forth the 1892 Act with the House language in normal type and the language added by the Senate in bold type.

portion of the Reservation for settlement under the homestead, mineral and timber laws. However, it recognized that there were both Indian villages and settlements within that part of the reservation and authorized the Secretary of the Interior to set those apart for permanent use by the Indians. The bill provided for confirmation of title for non-Indians who had settled on reservation land not constituting Indian villages or communities, and specified that the funds derived from the sale of the land "shall constitute a fund to be used under the direction of the Secretary of the Interior for the maintenance and education of the Indians now residing on said lands and their children." The House bill thus recognized a continuing Indian community and a continuing federal responsibility for Indians living in this portion of the reservation.

The Senate, however, was not satisfied that the House bill adequately protected Indian interests; it amended the bill and called for a conference with the House. 23 Cong. Rec. 3918-3919. As a result of the Senate amendment, the first two provisos of the Act were added (see p. 3, *supra*, bold type). In these provisos the area in question is referred to as a "reservation" and "any Indian now located upon said reservation" is permitted to "apply to the Secretary of the Interior for an allotment of land for himself and * * * for the members of his family, under the provisions of * * * [the General Allotment Act]." In other words, the Senate, dissatisfied with the House bill, which would have allowed non-Indian settlement without first providing for Indian allotments, brought the Act into line with the General Allotment Act, with the difference that Congress ordered the opening rather than leaving it to the President with the consent of the Indians.[14]

[14] Senator Dawes, the author of the General Allotment Act, sat on the Conference Committee. See 32 Cong. Rec. 3919. Because the House bill was significantly amended in the Senate and in the Conference Committee before it was enacted, respondent errs in

Nothing in the Act, or even in the House bill, purports to abolish the Reservation. The reference in the Act to "what was the Klamath River Reservation" merely identifies the part of the extension of the Hoopa Valley Reservation to which the Act applied (see p. 15, *supra*). The court below erred in relying on this descriptive designation as indicating abolition of the Reservation. When Congress has wished to abolish an Indian reservation, it has used direct and unambiguous language to accomplish that purpose. For example, when Congress abolished the nearby Smith River Reservation it stated: [T]he Smith River reservation is hereby discontinued." 15 Stat. 221. And when several Oklahoma Reservations were abolished, the tribes agreed to " 'cede, convey, transfer, relinquish, and surrender, foreover and absolutely, without any reservation' all their claim in and to the lands embraced within the designated reservation." *Ellis* v. *Page*, 351 F.2d 250, 252 (C.A. 10).

In another example, Congress specified:

> [T]he reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same are hereby abolished. 33 Stat. 218.

See also 68 State. 250 (providing for the abolition of the Menominee Reservation): *State* v. *Molash*, 199 N.W.

---

relying (Br. pp. 5-7) on statements in the House Report accompanying that bill which do not reflect the amendments designed to protect the interests of Indians living on the Reservation. Those amendments are inconsistent with the statements in the House Report (and with isolated similar statements by individuals during the floor debates) that the Klamath River area was no longer being used as a reservation—a statement as to which the Department of the Interior later declared "the committee was apparently mistaken * * *" (*Crichton, supra*, 33 I.D. at 214). Moreover, although the House Report is dated more than 5 months after the Executive Order establishing the extension of the Hoopa Valley Reservation (see p. 15, *supra*), it makes no mention of this highly significant Presidential action affecting the land and people in question.

2d, 591 (Sup. Ct. S.D.); *Leech Lake Band* v. *Herbst*, 334 F. Supp. 1001 (D. Minn.)

The contrast of these statutory provisions with the Act at issue here is highly significant—particularly in light of the 1892 Act's provisions recognizing that Indians individually and in villages and communities would continue to live in the area and would continue to be under federal protection (see p. 4, *supra*).[15]

And there is nothing in the Act suggesting any loss of fishing rights for the Indian residents of the area or diminution of federal jurisdiction over the area.

II. THE CONSISTENT COURSE OF ADMINISTRATIVE AND CONGRESSIONAL ACTION SUBSEQUENT TO THE ACT OF JUNE 17, 1892, SUPPORTS THE PROPOSITION THAT THE ACT DID NOT ABOLISH THE KLAMATH RIVER PORTION OF THE 1891 EXTENSION OF THE HOOPA VALLEY RESERVATION

Interpretation of a law by the government agency responsible to administer it is entitled to great weight.

---

[15] In 1893, pursuant to the 1892 Act and the General Allotment Act, 161 allotments were granted to Indians residing on the Klamath River part of the Hoopa Extension, thus demonstrating a sizeable Indian community at the time the Act was passed. These allotments averaged 60 acres each, totaling 9,762 acres, 40% of the approximately 25,000 acres of the part of the reservation opened for settlement. Finding of Fact No. 83, p. 57, Report of Commissioner in *Jessie Short, et al.* v. *United States*, C.Cls. No. 102-63. At the trial of the present case evidence was submitted showing that petitioner's mother holds such an allotment and that his fishing was in the close vicinity of that allotment (A. 28-31).

In *Jessie Short*, pending in the United States Court of Claims, the issue is whether the joining of the two reservations gave all Indians residing therein rights in the whole or whether each group has rights only within its original portion. Neither the United States nor the other parties to that suit contest the continued existence of the whole as an Indian reservation though the decision of the California court of appeal in this case is, of course, noted.

Griggs v. *Duke Power Co.*, 401 U.S. 424, 433-434; *Udall* v. *Tallman*, 380 U.S. 1, 16. The consistent course of administrative interpretation by the Department of the Interior has been, and remains, that the Klamath River Reservation was not abolished by the 1892 Act and still survives.

In 1904 the Department of the Interior was required to rule on whether an allotment made in the Klamath River Reservation portion of the Hoopa Extension under the Act of June 17, 1892, was an allotment within an Indian reservation or outside a reservation. *Crichton* v. *Shelton*, 33 I.D. 205. The question of the survival of the Reservation after the 1892 Act was squarely presented. In a carefully reasoned and fully documented opinion, the Department ruled that the challenged allotments were allotments on a reservation, and that the 1892 Act, in authorizing such allotments, reconfirmed, rather than cast doubt upon, the continued existence of the Reservation. 33 I.D. at 219-220. This contemporaneous interpretation of the 1892 Act was rendered, not by the Bureau of Indian Affairs, but by the Department of the Interior—the Department charged with administering the Act both as to Indians (through the Bureau of Indian Affairs), and as to non-Indian settlers (through the Land Office).

The opinion is significant not only for its holding, but also for the thorough factual and historical background it set forth at a time when the events were less remote. Of particular importance here is the opinion's carefully documented statement that (33 I.D. at 217):

> * * * the lands within the reservation are peculiarly adapted to the purposes for which it was set apart, reference being had to the location of said lands and the habits and necessities of the Indians [occupying them]. There is little question that the prevailing motive for setting apart the reservation was to secure

> to the Indians the fishing privileges of the Klamath River . * * *

Testimony at a congressional hearing held in 1932 [16] confirms that the Department of the Interior still considered the seaward twenty miles of the Klamath River to be an Indian reservation. O. M. Boggess, Superintendent (for 12 years) of the Department's Hoopa Indian Agency, in a statement taken at Hoopa California, September 24, 1932, testified (A. 14):

> Mr. BOGGESS. This reservation is 12 miles square and then there is an extension 1 mile on each side for an aditional 50 miles down the Klamath River to the east [sic] coast.
>
> Senator FRAZIER. Is it all connected?
>
> Mr. BOGGESS. Yes; and it is all classed by the Indian Office as one reservation.
>
> Senator FRAZIER. What do they call this reservation?
>
> Mr. BOGGESS. They call it the Hoopa, and the mile strips they call the Klamath.

The Department of the Interior today administers the entire 1891 extension to the Hoopa Valley Reservation as an Indian reservation. See note 15, *supra*.[17]

Moreover, after it authorized entry to surplus lands in the 1892 Act, Congress also continued to treat the Klamath River Reservation as an existing reservation. Indians had continued to live on this part of the Hoopa Extension (as they do today), but the trust period on their allotments had expired in 1919. Instead of considering its responsibilities terminated in this area, Con-

---

[16] 72d Congress, *Survey of Conditions of the Indians in the United States*, Part 29, California, U.S. Printing Office 1934. See p. 12-16.

[17] See, also, map of Indian Land Areas published by the Department of the Interior in 1971, which we have lodged with the Clerk of this Court.

gress in the Act of December 24, 1942, 56 Stat. 1081, 25 U.S.C. 348a, extended "The period of trust on lands allotted to Indians of the Klamath River Reservation * * *," reimposing "the trust on certain lands allotted to Indians of the Klamath River Reservation, California." And in the Act of May 19, 1958, 72 Stat. 121, Congress restored to tribal ownership 159.57 acres of "vacant and undisposed-of-ceded lands * * * on the following named Indian reservations * * * : Klamath River, California * * *." Compare *Seymour* v. *Superintendent*, 368 U.S. 351, 356.

III. THIS COURT'S DECISIONS INDICATE THAT THE FOREGOING CONSIDERATIONS ESTABLISH THE CONTINUED EXISTENCE OF THE RESERVATION

1. The Act of June 17, 1892, is only one of many Acts which between 1887 and approximately 1913 opened Indian reservations for allotments to individual Indians and settlement of surplus lands by non-Indians.[18] These Acts are modifications of the General Allotment Act designed to apply to specific reservations. While they vary in detail, they rather uniformly provide for allotments to individual Indians within the reservation, make surplus land available to homesteaders, and provide that the proceeds from the disposition of the surplus lands will be used for the benefit of Indians on the reservation. The question whether such Acts make either land allotted to Indians or land patented to non-Indians no longer

[18] See, *e.g.*, Act of March 2, 1889, 25 Stat. 888 (Sioux Reservations), *United States* v. *Nice*, 241 U.S. 591; Act of March 22, 1906, 34 Stat. 80 (Colville Reservation), *Seymour* v. *Superintendent*, 368 U.S. 351; Act of May 29, 1908, 35 Stat. 460 (Cheyenne River Reservation), *United States ex rel. Condon* v. *Erickson*, 344 F. Supp. 777 (D. S.D.); Act of June 1, 1910, 36 Stat. 455 (Fort Berthold Reservation), *The City of New Town, North Dakota* v. *United States*, 454 F.2d 121 (C.A. 8); Act of February 14, 1913, 37 Stat. 675 (Standing Rock Reservation), *State* v. *Molash*, 199 N.W.2d 591 (Sup. Ct. S.D.).

Indian country has been before the courts many times and has been addressed by Congress in defining Indian country in 18 U.S.C. 1151, pp. 4-5, *supra*. Both before and after the enactment of 18 U.S.C. 1151, this Court has consistently held that neither allotment nor sale of land within a reservation terminates the reservation.

In *United States* v. *Celestine*, 215 U.S. 278, the Court had to decide whether various patents of land made within a reservation precluded federal jurisdiction over a murder that might have occurred on patented land. The Court held (*id.* at 284):

> That the offense was committed within the limits of the Tulalip Indian Reservation is distinctly charged in the indictment and not challenged in the plea in bar. Although the defendant had received a patent for the land within that reservation, and although the murdered woman was the owner of another tract within such limits, also patented, both tracts remained within the reservation until Congress excluded them therefrom.

The general principles stated by the Court was that "* * * when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." *Id.* at 285. The Court held that the patenting of allotments on the reservation to individual Indians did not constitute such separation and did not terminate the reservation.

Several years later in *United States* v. *Nice*, 241 U.S. 591, the Court was called upon to interpret the Act of March 2, 1889, 25 Stat. 888, which, similarly to the Act at issue here, required allotments to be made within various Sioux reservations in accordance with the General Allotment Act and which authorized the Secretary of the Interior, with the consent of the tribe, to sell surplus land after the allotments had been made. The Court held that this Act did not terminate the reservation, since both the

General Allotment Act and the Act in question "disclosed that the tribal relation, while ultimately to be broken up, was not to be dissolved by the making or taking of allotments, and subsequent legislation shows repeated instances in which the tribal relations of Indians having allotments under the Act was recognized during the trust period as still continuing." 241 U.S. at 596-597. See also *Wilbur* v. *United States,* 281 U.S. 206.

This Court's more recent decision in *Seymour* v. *Superintendent,* 368 U.S. 351, is, in our view, controlling here. The 1906 Act in question in *Seymour,* 34 Stat. 80, was identical in effect to the Act in question here. That Act (1) provided for allotments to Indians under the provisions of the General Allotment Act (Sec. 2); (2) required that surplus land be made available for homesteading (Sec. 3); (3) required that surplus land not settled by homestead be sold at auction (*ibid.*); and (4) provided that the proceeds received from homesteading and sale be used for the benefit of the Indians remaining on the reservation (Sec. 6). In holding that the Act did not terminate the reservation there at issue, the Court emphasized the absence from the Act of language abolishing the reservation or "restoring that land to the public domain" (368 U.S. at 355) and the Act's requirement that the proceeds of sales of the land be used for the benefit of the Indians (*id.* at 355-356). The Court also relied on the subsequent interpretation of the Act by the Department of the Interior (*id.* at 357) and the subsequent congressional restoration to the tribe of undisposed of lands within the reservation (*id.* at 356).[19] All of these factors, which were controlling in *Seymour,* are also present, and equally controlling, here.

[19] The Court in *Seymour* also rejected the State's alternative contention that the reservation, if not totally abolished, had at least been diminished to the extent of actual purchases of lands within it by non-Indians. The Court held this contention inconsistent with the definition of Indian country in 18 U.S.C. 1151 as including "'all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent * * *.'" 368 U.S. at 357-358.

2. We note also that no mention is made in the Act of June 17, 1892, of depriving the Indians of the Hoopa Valley Reservation Extension of either their ownership of the river bed or their fishing rights.[20]

In *Donnelly* v. *United States,* 228 U.S. 243, 259, this Court held that the river bed was part of that Reservation and emphasized the importance of fishing to Indian life as follows:

> Does the reservation include the bed of the Klamath River? The descriptive words of the order are "a tract of country one mile in width on each side of the Klamath River and extending," etc. It seems to us clear that if the United States was the owner of the river bed,[21] a reasonable construction of *this language requires that the river be considered as included within the reservation.* Indeed, in view of all the circumstances, it would be absurd to treat the order as intended to include the uplands to the width of one mile on each side of the river, and at the same time exclude the river. *As a mater of history it plainly appears that the Klamath Indians established themselves along the river in order to gain a subsistence by fishing.* The reports of the local Indian agents and superintendents to the Commissioners of Indian Affairs abound in references to fishing as their principal subsistence, and the river is described

[20] After extensive hearings in 1964 the Senate let die in committee two proposals to terminate Indian fishing rights on the West Coast, Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, on S. J. Res. 170 and S. J. Res. 171, 88th Cong., 2d Sess. And Congress in 18 U.S.C. 1162(b) (p. 5, *supra*) in granting criminal and civil jurisdiction over Indian country to certain States specifically excepted federally protected fishing rights.

[21] The Court held that it was. *Id.* at 264.

as running in a narrow canyon through a broken country, the Indians as dwelling in small villages close to its banks. [Emphasis added.]

See also *Metlakatla Indians* v. *Egan*, 369 U.S. 45; *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620.

The obvious intent of specifically including the riverbed and shore in the Hoopa Extension (Executive Order of October 16, 1891) was to protect the right of the Indians to fish. Nothing in the Act of 1892 purported to terminate the Tribes' ownership of the riverbed or their fishing rights. An intent to take such rights without compensation merely by implication should not be presumed. *Menominee Tribe* v. *United States*, 391 U.S. 404. See also *Kennerly* v. *District Court of Montana*, 400 U.S. 423.

CONCLUSION

The judgment of the California Court of Appeal should be reversed and the case should be remanded for determination of the issues not reached by the courts below.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

KENT FRIZZELL,
Assistant Attorney General.

HARRY R. SACHSE,
Assistant to the Solicitor General.

CARL STRASS,
GLEN R. GOODSELL,
Attorneys.

MARCH 1973.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-1148

IN THE MATTER OF THE APPLICATION OF
CHERYL SPIDER DECOTEAU, PETITIONER

v.

THE DISTRICT COURT FOR THE
TENTH JUDICIAL DISTRICT

On Writ of Certiorari to the Supreme Court of South Dakota

No. 73-1500

DON R. ERICKSON, WARDEN, SOUTH DAKOTA
STATE PENITENTIARY, PETITIONER

v.

JOHN LEE FEATHER, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether the Act of March 3, 1891, opening land within the Lake Traverse Indian Reservation to non-Indian settlement, granted the State of South Dakota criminal and domestic relations jurisdiction over members of the Sisseton,Wahpeton Sioux Tribe with respect to acts done on such land patented to non-Indians.[1]

TREATY AND STATUTE INVOLVED

The Treaty of February 19, 1867, 15 Stat. 505, is set forth in the Brief for Petitioner in *DeCoteau* at App. 1-6.

The pertinent provisions of the Act of March 3, 1891, 26 Stat. 989, are set forth in the Brief for Petitioner in *DeCoteau* at App. 7-15.

STATEMENT

This brief supplements the memorandum submitted in response to the Court's order of April 29, 1974, inviting the Solicitor General to express the views of the United States in *DeCoteau* v. *The District County Court,* and expresses the views of the United States in the closely related case of *Erickson* v. *Feather, certiorari* was granted in both cases on June 3, 1974.

1. DeCoteau v. District County Court (No. 73-1148)

In December 1971, the State of South Dakota brought dependency and neglect proceedings in the District Court

[1] It is common ground that, since South Dakota is not a "Public Law 280 State" by original designation or subsequent election (see Act of August 15, 1953, 67 Stat. 588: 18 U.S.C. 1162; 28 U.S.C. 1360), the State lacks civil and criminal jurisdiction over Indians within the boundaries of a subsisting reservation, regardless of whether the acts occurred on Indian trust lands or lands patented to non-Indians. See 18 U.S.C. 1151. Accordingly, the question presented might be more simply stated as: Whether the boundaries of the Lake Traverse Indian Reservation remain as originally established by the Treaty of 1867.

for the Tenth Judicial District of South Dakota against petitioner DeCoteau, an enrolled member of the Sisseton-Whapeton Sioux Tribe, seeking to terminate her parental authority over her minor children, Robert Lee Feather and Herbert John Spider, also enrolled members of the Tribe. The parties stipulated that all of the facts giving rise to the court's order occurred within the boundaries of the Lake Traverse Reservation, as established under the Treaty of February 19, 1867, *supra,* approximately half on allotted Indian land, and the other half on land patented to non-Indians (Decoteau, Pet. App. A. 2a; Pet. App. B, 9a). Both children were placed in foster homes by the county court.

On August 4, 1972, Mrs. DeCoteau moved in the county court for dismissal of the proceedings and return of her children to her on the ground that all the incidents giving rise to the proceedings involved Indians and occurred on the Reservation and that the court therefore lacked jurisdiction. The county court denied the motion.

Mrs. DeCoteau then petitioned in the South Dakota Circuit Court for the Fifth Judicial Circuit for a writ of habeas corpus. That court denied the writ (DeCoteau, Pet. App. B). While it found that Mrs. DeCoteau and the two children are enrolled members of the Sisseton-Wahpeton Sioux Tribe (DeCoteau, Pet. App. B, 8a), it ruled that the county court had jurisdiction to entertain the dependency and neglect proceedings because some of the alleged incidents occurred on non-Indian owned land within the original boundaries of the Reservation, and, in the court's view, "the non-Indian patented land * * * is not within the Indian Country" (DeCoteau, Pet. App. B, 10a).

The Supreme Court of the State of South Dakota affirmed (DeCoteau, Pet. App. A). It held that the effect of the agreement between the United States and the Tribe dated December 12, 1889, and the Act of March 3,

1891, 26 Stat. 989, 1036, ratifying that agreement, was to separate from the Reservation all lands not allotted to Indians, and, because some of the incidents occurred on such land, the State courts had jurisdiction over the family relationships at issue.

2. Erickson v. Feather, et al. (No. 73-1500)

The ten respondents in this case are all enrolled members of the Sisseton-Wahpeton Indian Tribe. They were all tried and convicted in the courts of South Dakota for alleged crimes committed within the Treaty boundaries of the Lake Traverse Reservation, but not upon trust land. At the time this suit was instituted they were incarcerated in the South Dakota State Penitentiary (Erickson, Pet. App. A, 3a). They petitioned in the United States district court in South Dakota for writs of habeas corpus on the ground that the State of South Dakota did not have jurisdiction to try, convict, and sentence them because their alleged criminal acts took place within the boundaries of the Lake Traverse Reservation (Erickson, Pet. 2). The district court, on stipulation that "the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land * * *," denied the writs (Erickson, Pet. App. B, 10a-19a).

The Court of Appeals for the Eighth Circuit reversed (Erickson, Pet. App. A, 7a-9a). After reviewing the decisions of this Court, and its prior decisions on the effect of opening reservations to non-Indian settlement, the court stated (*id.* at 6a):

> The case before us is not unlike *Seymour* [v. *Superintendent,* 368 U.S. 351] *Mattz* [v. *Arnett,* 412 U.S. 481] and *Condon* [*United States ex rel. Condon* v. *Erickson,* 478 F.2d 684 (C.A. 8)]. The overall climate of legislative activity concerning Indian reservations during the period from 1887 through 1910 received its primary impetus from the

> General Allotment Act. See *Cohen, supra* at 78-80, (§§ 11-13). The 1891 Act, by its express terms, refers to the General Allotment Act of 1887. Just as in the beforementioned three cases, the reservation here was not sold to the government outright but merely opened for settlement under the homestead laws and the 1887 general allotment plan. Allotment and homesteading do not suggest congressional purpose to terminate the reservation. *Seymour, supra.*

The Court found no evidence in the 1891 Act's legislative history of a congressional intent to do other than open the Reservation for non-Indian settlement (Erickson, Pet. App. A, 8a), and noted that the State Supreme Court had recently denied state jurisdiction in a similar situation in *State* v. *Molash,* 199 N.W. 2d 591. The court of appeals concluded that the boundaries of the Lake Traverse Reservation remain as established by treaty and the State of South Dakota had no jurisdiction to try the respondents (Erickson, Pet. App. A, 8a-9a).

3. The Reservation and the Tribe

The Sisseton and Wahpeton Sioux were a portion of the Sioux Nation who, in the Sioux outbreaks of 1862, did not rebel against the United States. Some "freely perilled their lives during that outbreak to rescue the residents of the Sioux reservation, and to obtain possession of white women and children made captives by the hostile bands." Others fled, "fearing the indiscriminate vengeance of the whites" (Treaty of February 19, 1867; DeCoteau, Pet. Br. App. 1).

In 1867 the United States made a treaty with the Sisseton-Wahpeton Tribes in which the Tribes "cede[d] to the United States the right to construct wagon-roads, railroads * * * and other such public improvements * * * across the lands claimed by said bands (including their

reservation as hereinafter designated) * * * " (*id.* at 2; Art. 2). In consideration for the cessions made and services rendered by the Tribes, the United States established for these Tribes "as a permanent reservation" a triangular tract of land that became known as the Lake Traverse Reservation (*id.* at 3; Art. 3).[2] The Treaty further provided (*id.* at 6; Art. 10):

> The chiefs and head-men located upon either of the reservations[3] set apart for said bands are authorized to adopt such rules, regulations, or laws for the security of life and property, the advancement of civilization, and the agricultural prosperity of the members of said bands upon the respective reservations, and shall have authority, under the direction of the agent, and without expense to the Government, to organize a force sufficient to carry out all such rules, regulations, or laws, and all rules and regulations for the government of said Indians, as may be prescribed by the Interior Department: *Provided*, That all rules, regulations, or laws adopted or amended by the chiefs and head-men on either reservation shall receive the sanction of the agent.

On December 12, 1889 the Sisseton-Wahpeton Sioux entered into an agreement with the United States providing that, in accordance with the Act of February 8, 1887 (the General Allotment Act, 24 Stat. 388), the Tribes do (DeCoteau, Pet. Br. App. 8):

---

[2] In connection with our brief *amicus curiae* in *Antoine* v. *The State of Washington*, No. 73-717, this Term, we lodged with the Clerk copies of the U.S. Department of the Interior, Bureau of Indian Affairs Map, "Indian Lands and Related Facilities as of 1971." That map shows the Lake Traverse Reservation at issue here. We are supplying copies of the map to counsel herein. We have also appended to this brief a diagram sowing the location of trust and tribal lands within the Reservation. This diagram is taken from a more detailed but bulky map prepared by the Bureau of Indian Affairs which we are lodging with the Clerk.

[3] Article 4 of the Treaty also established the Devil's Lake Reservation in North Dakota.

> * * * hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservaiton set apart to said bands of Indians as aforesaid remaining after the allotments and additional allotments provided for in article four of this agreement shall have been made.

The agreement also provides that, in addition to certain settlements of past claims and indemnities, the Indians shall receive $2.50 for each acre of land conveyed, to be deposited in the Treasury and used "for the education and civilization of the said bands of Indians * * * as provided in section five [of the General Allotment Act of 1887] * * *") *id.* at 9).[4]

The ratifying Act of March 3, 1891, after reciting the Agreement in full, provides, among other things, that the land ceded by the Indians shall be—

> subject only to entry and settlement under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State wherein located * * *. [*id.* at 15.]

In accordance with the Act of 1891 a large amount of land within the Reservation was patented to non-Indians. A large amount also remains Indian trust land. The State Circuit Court in *DeCoteau* found as a fact (DeCoteau, Pet. App. B, 9a, finding IX):

> That lots or tracts of non-Indian patented or deeded land and lots or tracts of unpatented Indian trust land are interspersed in a crazy-quilt pattern

---

[4] The Agreement provided that the money was to earn interest at 3% and be available for appropriation by Congress. The 1891 Act raised the interest rate to 5% and authorized the President, without further congressional action, to use any part of the funds for the "education and civilization" of the Tribe (*id.* at 14).

over the entire area within the boundaries of the Lake Traverse Indian Reservation as established by the treaty of February 19, 1867.

The Sisseton-Wahpeton Sioux Tribe has remeained a major Indian Tribe. Its present enrolled membership is 6,010, of whom 3,200 live on or near the Lake Traverse Reservation. The Tribe has a Constitution and by-laws approved by the Secretary of the Interior. In addition to having an active tribal government, it operates, with federal assistance, its own police force (presently 14 persons) and maintains a tribal court with two judges and various other personnel.[5]

It is the position of the United States, in accord with the decision of the Eighth Circuit in *Erickson*, that the Act of March 3, 1891, did not disestablish the Lake Traverse Indian Reservation and that the State of South Dakota is without jurisdiction over the domestic affairs or alleged criminal acts of Indians arising within the boundaries of the Reservation as established by the Treaty of February 19, 1867.

SUMMARY OF ARGUMENT

The essential question presented by these cases is whether the Act of March 3, 1891, by which unallotted land within the Lake Traverse Reservation was opened for settlement by non-Indians, removed that land from the Reservation. In approaching the question it is important to bear in mind that an Indian reservation does not connote total Indian or federal ownership of the land within it. It refers to a geographical area within which the legislative authority of the Tribe functions and the area within which federal rather than state criminal jurisdiction applies in matters affecting Indians.

The 1891 Act did not specifically change the boundaries of the Reservation or return land to the public

[5] Information supplied by the Sisseton-Wahpeton Agency of the Bureau of Indian Affairs.

domain, and its repeated references to the General Allotment Act show that Congress intended no more than to "open" the Reservation for non-Indian settlement. This Court's decisions in *Seymour* v. *Superintendent*, 368 U.S. 351, and *Mattz* v. *Arnet*, 412 U.S. 481, show that this limited purpose is consistent only within preservation of the Reservation as a jurisdictional unit. The special provisions of the Act as to the 16th and 36th sections also show that Congress did not regard the opening of the Reservation as altering its boundaries.

Subsequent administrative and legislative actions confirm that the 1891 Act did not disestablish the boundaries of the Reservation. The President, in proclaiming the availability of lands for settlement after passage of the Act, described them as "land embraced in said reservation" and "lands within the Lake Traverse Reservation opened to settlement" (*infra*, p. 22). And the Department of the Interior has held the boundaries of the Reservation to be unaffected by the 1891 Act. Recently Congress has authorized the Secretary of the Interior to purchase lands "within the boundaries of the Lake Traverse Reservation" for the use of the Tribe and has restored to the Tribe certain federal lands within the Reservation. These acts strongly affirm the continued existence of the Reservation as a unit of federal and Indian jurisdiction.

Moreover, given the scattering of trust lands throughout the Reservation, the State's position would be destructive of law and order on the Reservation. Since the State here (being a non-Public Law 280 State) can assert no jurisdiction over Indians on trust lands, federal and trival jurisdiction over Indians everywhere within the Reservation's treaty boundaries is required for effective law enforcement.

Similarly, the Tribes' civil jurisdiction over the Reservation Indians, a basic part of tribal self-government, should not depend on the title to the lot within the Reservation where a particular act takes place. There is no

reason to believe that Congress intended so to impede the Tribe's right to govern its own people. Accordingly, the judgment of the Eighth Circuit in *Erickson* should be affirmed, and the judgment of the Supreme Court of South Dakota in *DeCoteau* should be reversed.

ARGUMENT

I

THE ACT OF MARCH 3, 1891, DID NOT ALTER THE BOUNDARIES OF THE RESERVATION AS ESTABLISHED IN THE TREATY OF FEBRUARY 19, 1867

Article 3 of the Treaty of February 19, 1867 (DeCoteau, Pet. Br. App. 3), granted the Sisseton and Wahpeton Sioux Indians a permanent Reservation with definite boundaries. Article 10 of that treaty (*id* at 6) granted the Tribes within the Reservation the right to make their own laws and be governed by them, subject to the supervision of the United States. The basic question in this case is whether the Act of March 3, 1891, which clearly permitted non-Indian settlement within the Reservation, also altered the boundaries of the Reservation. In considering that issue we must remember that an Indian reservation does not connote total Indian or federal ownership of the land within it. It refers to a geographical area within which the legislative authority of a tribe functions. *Worcester* v. *Georgia*, 6 Pet. 515; *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164. It also describes the area within which federal criminal jurisdiction in matters affecting Indian applies, 18 U.S.C. 1151, and the area within which services of the Bureau of Indian Affairs are primarily directed, *Morton* v. *Ruiz*, 415 U.S. 199. Accordingly, the fact that portions of the land within the Reservation are owned by non-Indians is immaterial. The controlling question is whether Congress deliberately terminated or changed the boundaries of the Reservation by the Act of 1891.

1. The General Scheme of the 1891 Act Suggests No Change in the Reservation's Boundaries

The 1891 Act begins by ratifying and quoting in full the 1889 Agreement made between the Tribe and the United States. The Agreement, in its preamble, twice states that it is made under the authority of the Act of February 8, 1887, the General Allotment Act, and quotes from that Act the language which authorizes the President, after allotments have been made, to negotiate with Indian tribes for the sale of their unallotted lands (*DeCoteau*, Pet. App. C, 13a). The Agreement then specifically provides for the sale of the unallotted land of this Tribe *"within the limits of the reservation"* (*id.* at 14a; emphasis added), and directs that the payment shall be deposited in the Treasury to be appropriated by Congress for the "education and civilzation" of the Indians (*ibid.*). The Act of 1891 added to the agreement a further reference to the General Allotment Act (*id.* at 19a, sec. 29) and the proviso that the lands ceded shall:

> be subject only to entry and settlement under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State wherein located. [*Id.* at 20a.] [6]

---

[6] The background of the negotiation of the 1889 Agreement and the enactment of the 1891 Act are exhaustively set out in the brief of respondent. In our view, essentially two points are established: first, the non-Indian inhabitants of South Dakota intensely desired the opening of the Lake Traverse Reservation for settlement by non-Indians (see DeCoteau, Resp. Br., 16); second, the Tribe, which had endured four years of drought, was badly in need of money. See E. Ex. Doc. No. 66, 51st Cong., 1st Sess., p. 19. Neither of these facts, however, in any way implies that the boundaries of the Reservation had to be or were reduced. Indeed, the only money immediately paid to the Tribe was not part of the consideration for the lands "ceded" but about $500,000 conceded to be due for scout services and a cancelled annuity. For the

Several things are immediately apparent. The negotiation with the Indians, the allotments to them, and the cession made by them are expressly made under the authority of the General Allotment Act. The boundaries of the Reservation are not expressly altered and no separately described portion of the Reservation is vacated, returned to the public domain, or set aside for settlement. The government is not free to use the opened land for any purpose, but only for homesteading, townsites and school land. The tribal relationship is expressly continued and monies from the sale of the land are not distributed but are kept in trust to be appropriated by Congress or applied by order of the President for the "education and civilization" of the "bands of Indians or members thereof" (*id.* at 19a). Thus, on the face of the statute, it does not appear that Congress intended to change the boundaries of the Lake Traverse Reservation.

2. The References to the General Allotment Act Show the Reservation Was Maintained

Both the 1889 Agreement and 1891 Act were adopted pursuant to the General Allotment Act of 1887. The philosophy of the latter Act was succinctly stated in *Mattz* v. *Arnett*, 412 U.S. 481, 496:

> [The General Allotment Act] permitted the President to make allotments of reservation lands to resident Indians and, with tribal consent, to sell surplus lands. Its policy was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing.

It was not the purpose of the General Allotment Act to divide reservations into a scattering of land under federal jurisdiction and a scattering under state jurisdiction.

---

future, the Indians expected to have expended on their behalf the interest on the amount nominally deposited in the Treasury in "payment" for the land, approximately $80,000 annually (when the interest rate was raised to 5%).

Seymour v. *Superintendent*, 368 U.S. 351, 357-358. Rather, as this Court stated in *Mattz, supra*, 412 U.S. at 497, quoting from *Seymour, supra*:

> "The Act did no more [in this respect] than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards."

Nor was it the intent of the General Allotment Act to disturb tribal relations prior to the time that the trust status of allotments should be abolished. In *United States* v. *Nice*, 241 U.S. 591, 596-597, the Court stated:

> [The General Allotment Act] disclosed that the tribal relation, while ultimately to be broken up, was not to be dissolved by the making or taking of allotments, and subsequent legislation shows repeated instances in which the tribal relation of Indians having allotments under the act was recognized during the trust period as still continuing.

In sum, while the General Allotment Act of 1887 provided for some settlement of non-Indians within reservations, the congressional intent was to continue the reservation system and to maintain established relations with the Tribes and federal trust responsibility over the reservations until these protections were no longer necessary. The 1889 Agreement and 1891 Act were adopted in conformity with this policy and should not be held to have tacitly abolished or diminished the Reservation here in question.

3. The Absence of Language in the 1891 Act Expressly Altering the Boundaries of the Reservation or Returning Land to the Public Domain Shows That the Reservation Boundaries Were Not Altered

In *Mattz* v. *Arnett, supra*, this Court stated (412 U.S. at 504-505; footnote omitted):

> Congress [in 1892] was fully aware of the means by which termination could be effected. * * * The Court stated in *United States* v. *Celestine*, 215 U.S., at 285, that "when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." A congressional determination to terminate must be expressed on the fact of the Act or be clear from the surrounding circumstances and legislative history. See *Seymour* v. *Superintendent*, 368 U.S. 351 (1962); *United States* v. *Nice*, 241 U.S. 591 (1916).

In a footnote, the Court gave the following examples of termination language [*Mattz, supra*, 412 U.S. at 504, n. 22]:

1. 15 Stat. 221 (1868) ("the Smith River reservation is hereby discontinued").
2. 27 Stat. 63 (1892) (* * * the North Half of the Coleville Indian Reservation] "the same being a portion of the Colville Indian Reservation * * * be, and is hereby vacated and restored to the public domain").
3. 33 Stat. 218 (1904) ("the reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same hereby abolished").

There is no such language in the 1891 Act at issue here. The Reservation is not discontinued. A discrete portion of it is not "vacated and restored to the public domain." The reservation lines are not abolished.

Moreover, to read into the language opening unallotted lands for settlement an intent to remove them from the Reservation would inevitably create a reservation with crazy quilt boundaries, a result that both Congress (see 18 U.S.C. 1151) and this Court have reasonably sought to avoid.

4. The Use of the Word "Cede" and the Payment Arrangement of the Act Did Not Change the Reservation Boundaries

a. The State argues that the provisions "ceding" the unallotted portion of the Reservation to the United States tacitly removes that land from the Reservation.

There are several reasons why this is not so. First the "cession" is not an outright return of the land to the public domain but a transfer expressly for the limited purpose of opening the land for homesteading in accordance with the General Allotment Act. Thus, though the Indians in the "cession" expressed their willingness that the government dispose of unallotted land, the government remained under a trust responsibility to dispose of it in a certain way, assumed to be in the Indians' interest as well as that of the government.

That a "cession" of unallotted land within a reservation does not of itself disestablish the reservation is supported by this Court's decision in *Ash Sheep Co.* v. *United States*, 252 U.S. 159. The question was whether the defendant had grazed its sheep on public land, which was entirely legal, or on "land belonging to any Indian or Indian tribe" in violation of R.S. 2117. The lands involved were (252 U.S. at 164):

> within the part of the Reservation as to which the Indians, in terms "ceded, granted, and relinquished" to the United States all of their "right, title and interest."

Nevertheless, the Court held that the lands remained in Indian ownership until actually sold to homesteaders be-

cause the lands were ceded to the United States only for subsequent sale (except for the 16th and 36th sections) and on conditions set forth in the Act. While, in our case, jurisdiction rather than ownership is at issue, *Ash Sheep Co.* at least indicates that the use of the word "cede" does not always imply a termination of the Indian-federal relationship as to the land "ceded".

b. The State, however, argues (see DeCoteau, Resp. Br. 59-65) that because the Tribe was paid a "sum-certain" for the unallotted land, with the government recouping its money as the lands were sold, rather than being paid as the lands were sold to homesteaders, the conveyance to the government should be held to have removed the lands from the Reservation. We see no reason so to conclude.

The payment, realistically, was no more immediately available to the Tribe than if it had been paid only as each tract was sold. The monies stipulated as payment for the lands ceded were to be deposited in the United States Treasury, and the expectation was that only the interest on this trust fund would be expended, and then only as found necessary for the benefit of the Tribe by the President or Congress. As Congressman Call explained:

> * * * The amount is reimbursed, so that it is but a nominal appropriation. The entire amount come back into the Treasury. It is nothing but a loan of the public credit of the United States to the accomplishment of these purposes [of the General Allotment Act] and in no respect touches the taxation upon the people of this country.
>
> Mr. President, there has been a great deal of objection found to this bill which has no just foundation. All the legislation to the bill is but the application of the existing law on the subject. [22 Cong. Rec. 3881, reprinted in DeCoteau, Resp. Br. 65].

Consequently, payment in this manner is not a reliable indication of an intent by Congress to change the boundaries of a reservation. Where the references to allotment and opening under the General Allotment Act are as specific as they are here and where, as here, there is no language even arguably disestablishing a discrete part of the Reservation, the payment scheme does not indicate disestablishment anymore than would a scheme of payment as individual lots are sold to homesteaders. In either situation, the conveyance of the unallotted lands is handled by the government for the benefit of the Tribe in accordance with the General Allotment Act without thereby terminating the Reservation. Compare *Seymour* v. *Superintendent, supra*, 368 U.S. at 354-359.

5. The Provision of the 1891 Act Referring to the "Laws of the State Wherein Located" Did Not Disestablish All or Part of the Reservation

The Act of 1891 provides that the land ceded shall "be subject only to entry and settlement under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State wherein located * * *" (Decoteau, Pet. Br. App. 15). The Supreme Court of South Dakota, in *DeCoteau*, interpreted the final phase of this passage as expressly subjecting activities on all lands sold to state civil and criminal jurisdiction (DeCoteau, Pet. App. A, 5a-7a). The Eighth Circuit in *Erickson* found the language ambiguous—both as to its general meaning and as to whether it applied only to the school sections (which the court considered more plausible) or to all land sold. It concluded that "[W]e do not read this clause as a clear indication of congressional intention to terminate the Lake Traverse Reservation" (Erickson, Pet. App. A, 6a-7a). In our view, the "laws of the state" language is simply not addressed to the question of whose law shall govern acts committed on the land in question; the purpose is, rather, to make clear that, while the un-

allotted land shall be open only to settlement under the federal homestead and townsite laws, an exception is made for the 16th and 36th sections which are to be used only for common school purposes and may be used or sold as permitted by state law for that purpose.

The language was necessary because the South Dakota Enabling Act did not reserve the 16th and 36th sections in Indian reservations for school purposes, and special language was needed to accomplish that purpose. See the Statement of Senator Gamble at 35 Cong. Rec. 3187 and the Statement of Congressman Burke at 38 Cong. Rec. 1423, both reproduced at DeCoteau, Resp. Br. 136-138. Indeed, if the "ceded" land had been regarded by Congress as no longer forming part of the Reservation, no such special language would have been needed to establish the 16th and 36th sections as school land.[7]

In sum, while the Act of March 3, 1891 paved the way for homesteading by non-Indians within the Lake Traverse Reservation, it did not change the boundaries of the Reservation or abolish it. Thus questions of criminal and civil jurisdiction within this Reservation are determined as within any other Reservation.

II

SUBSEQUENT ADMINISTRATIVE AND LEGISLATIVE ACTIONS CONFIRM THAT THE 1891 ACT DID NOT DISESTABLISH THE 1867 TREATY BOUNDARIES

a. The most important administrative interpretation of the 1891 Act is the contemporaneous proclamation of President Harrison opening the Reservation for settlement

[7] See Section 1 of the Act of March 2, 1895, 28 Stat. 899-900, 43 U.S.C. 856, which, 4 years later, provided general authorization for state selection of school lands "within the boundaries of any Indian reservation in such state" from "surplus lands * * * purchased by the United States."

(Procl. of April 11, 1892, 27 Stat. 1017, DeCoteau, Pet. Br. App. 16-20). In that Proclamation, made after enactment of the 1891 Act and after payment to the Tribes for the land "ceded," the President consistently referred to the Reservation in the present tense and the lands opened for settlement as "lands embraced in said reservation" (DeCoteau, Pet. Br. App. 18). The Proclamation further referred the reader to "the accompanying schedule, entitled "Schedule of lands *within the Lake Traverse Reservation opened to settlement* by proclamation of the President * * * " (*id.* at 19; emphasis added). This proclamation is important not only because it is a contemporaneous construction of the effect of the 1891 Act, but also because it was the basis on which non-Indian settlers purchased land, giving them fair warning that they were purchasing land within an Indian reservation.

Subsequent executive orders extending the trust period on allotments on April 16, 1914, and April 19, 1924, (Nos. 1916 and 3994, respectively) each refer to the 'Sisseton and Wahpeton Bands of Sioux Indians of the Lake Traverse Reservation, North and South Dakota." And in decisions and literature of the Department of the Interior after 1891 there are numerous references to land "in" or "within" the Lake Traverse Reservation. *Circular, Sisseton and Wahpeton Lands,* 14 L.D. 302; *Madella O. Wilson,* 17 L.D. 153; *Edward Parant,* 20 L.D. 53. Nothing could be clearer than the report of the Sisseton-Wahpeton Indian Agent in 1900 describing the Reservation:

> The reservation is in the northeastern part of South Dakota, occupying parts of Roberts, Day, Grant, Marshall and Codington counties and extending into Richland and Sargent counties of North Dakota. It is about 120 miles long and at the State line 42 miles wide, coming to a point near Watertown, S. Dak. * * *

> There are 1,970 [allotted] pieces of land situated from one end of the reservation to the other * * *.
>
> [Annual Report, Commissioner of Indian Affairs, United States Indian Affairs Office, 385 (1900)].

See also the reference to the Annual Reports of the Commissioner of Indian Affairs in DeCoteau, Pet. Br. 42, n. 30.

Of equal importance, the exercise of trust responsibility by the United States for this Tribe, and the Tribal relationship of its members, remained intact. A decision of the Eighth Circuit in 1901, ten years after allotment and disposal of surplus land, makes this continuing relationship clear. *Farrell* v. *United States,* 110 Fed. 942. The case concerned the application of the laws against sale of liquor to Indians to a sale to one La Framboise, a person of mixed Sioux and Caucasian ancestry. While the boundaries of the Reservation were not at issue, La Framboise's membership in the Sisseton-Wahpeton Tribe was. The court noted that:

> La Framboise had received his allotment and patent, and the lands within the reservation of the Sisseton and Wahpeton bands of Sioux Indians, to which he belonged, that had not been allotted, had been opened to settlement * * *. [*Id.* at 947.]

Nevertheless, it was found that there was continuing regulation by the Tribe of its membership and family relations and constant supervision over the Tribe by the resident federal agent:

> [The issuing of allotments] did not radically change the title to the lands reserved for [these Indians], or their need of care and education. The government held the title to their reservation in trust for them collectively before, it held the title to their allotments in trust for them individually after, the issue of the patents. There was every reason why congress should retain and exercise its power to superintend

> the trade with them, and none to induce it to renounce it. By the treaty of 1867 the United States agreed to appoint and maintain an agent for these Indians at Lake Traverse, and by its legislation and the rules of the interior department it made it the duty of this agent to use every endeavor to suppress the traffic in intoxicating liquors with them, to educate them, and to induce them to cultivate the soil. There has been no express abrogation of this agreement in any subsequent treaty or act of congress, and the government has continued to comply with it since the allotments as it did before. Agreements are not released or abrogated and statutes are not repealed by implication unless the subsequent agreements or laws are necessarily repugnant to those which preceded them. [*Id.* at 951.]

This evidence of the continued exercise of federal trust responsibility after the opening of the Reservation supports our conclusion that the Reservation was opened, but not dissolved. See also *United States* v. *Rickert,* 188 U.S. 432.

We have been unable to discover contemporaneous opinions of the Department of the Interior directed precisely to the jurisdictional effect of the 1891 Act. There are, however, two recent decisions, predating either of the appellate decisions under review, and rendered at a time when *DeMarrias* v. *State,* 319 F. 2d 845 (C.A. 8), overruled by the *Erickson* decision, was still intact. Both decisions, made by the Field Solicitor of the Department of the Interior in Aberdeen, South Dakota (the office which deals with this Tribe on a regular basis), sustained the continued federal and tribal authority and the commenusurate lack of state jurisdiction over Indians within the Treaty boundaries of the Lake Traverse Reservation (Opinions of June 9, 1972 and August 16, 1972, DeCoteau, Pet. Br. App. 21-33). Interpretation of a law by the government agency responsible to administer it is,

of course, entitled to great weight. *Udall* v. *Tallman*, 380 U.S. 1, 16. This is particularly true when the statute may affect the status of an Indian reservation and the trust responsibilities of the United States. *Seymour* v. *Superintendent, supra*, 368 U.S. at 357; *Mattz* v. *Arnett, supra*, 412 U.S. at 505.[8]

b. Congress, since the opening of the Reservation, has continued to appropriate funds for the Sisseton-Wahpeton

---

[8] South Dakota points out (DeCoteau, Rep. Br. 113-116) that the depiction of the Reservation on government maps varied considerably over the years since 1891. From 1892 to 1908 the Reservation was not shown on the maps. From 1909 to 1917 the Reservation was shown as an "open" reservation, but the 1918 map shows it was a "former" reservation. Modern maps show the Reservation simply as a "reservation." We think these differences are unimportant. The early map-makers wanted to show that the lands were no longer reserved for exclusive Indian occupancy, but were open for settlement. As this Court and Congress began to refine the jurisdictional meaning of such openings the map makers followed suit. Indeed the meaning of the word "reservation" itself has changed over the years. In early years it seemed to have been used to mean literally land reserved for exclusive Indian use. Later, as a result of the various "opening" Acts, it came to have the broader jurisdictional meaning that it has today. The first decision of this Court to clarify the meanings of "reservation" and "Indian country" after the General Allotment Act was *United States* v. *Celestine*, 215 U.S. 278, 285-286. This process of clarification continued with enactment of 18 U.S.C. 1151 and this Court's subsequent decision in *Seymour* v. *Superintendent, supra*. Thus, as with early maps, early casual references to the Reservation as the "former reservation" (see DeCoteau, Br. 9) are of little significance; they indicate only that the Reservation had been opened for non-Indian settlement, which is not disputed. South Dakota also points out a reference to the "former Sisseton Indian Reservation" in *United States* v. *Rickert, supra*, 188 U.S. at 432 (see DeCoteau, Resp. Br. 173). That phrase, however, is not the Court's but part of a question from the pleadings below as recited in the question certified to the Court. Reservation bundaries were not at issue and the use of the phrase must be considered in light of its limited meaning at the time.

Reservation or Agency[9] and has never referred to the Reservation as a "former reservation" as it did with the reservations recognized by this Court as continuing to exist in *Seymour* v. *Superintendent, supra*, 368 U.S. at 356, n. 12, and *Mattz* v. *Arnett, supra*, 412 U.S. at 496, n. 17. This consistent appropriation process is a significant exercise of trust responsibility. Recently, moreover, Congress has unmistakenly reaffirmed its view that the opening of the surplus lands to non-Indian settlement did not terminate or diminish the Reservation (Public Law 93-489 and Public Law 93-491, signed by the President October 26, 1974). Indeed, in Public Law 93-489 Congress restored to "the United States in trust for the Sisseton-Wahpeton Sioux Tribe" certain federally owned land "of the Lake Traverse Indian Reservation in North and South Dakota." Since the land had not been trust land, this is a clear indication of the congressional understanding that the Reservation was never abolished and always included non-trust land. Similarly, Public Law 93-491 authorizes the Secretary of the Interior to acquire lands:

> *within the boundaries of the Lake Traverse Reservation* * * * for the purpose of consolidating landholdings, eliminating fractional heirship interests in Indian trust lands, providing land for any tribal program for the improvement of the economy of the tribe and its members through the development of industry, recreational facilities, housing projects, and the general rehabilitation and enhancement of the total resource potential *of the reservation*. [Emphasis added.]

---

[9] See, for typical early appropriation language, 39 Stat. 988 and 42 Stat. 576. In recent years general appropriations have not been by particular reservation or agency. An extensive accounting of trust funds of the Tribe expended by the United States is available in General Services Administration Report, *The Lower Sioux Indian Community in Minnesota, et al.*, Docket No. 363 (June 1967) before the Indian Claims Commission.

It further authorizes the Tribe to sell tribal property and, from the proceeds, purchase *"other land on the reservation."* Again, we have a recognition of the Reservation's existence beyond trust lands and its continued service as the home and political jurisdiction of the Sisseton-Wahpeton Tribe. While these recent Acts are not determinative of an earlier congressional intent, they are consistent only with the continuity of the Reservation's original boundaries and should be given weight. See *Seymour* v. *Superintendent, supra,* 368 U.S. at 356.

III

THE TRIBE'S INHERENT RIGHT OF SELF-GOVERMENT, CONFIRMED IN THE TREATY OF FEBRUARY 19, 1867, AND THE PRACTICALITIES OF PERFORMING THE CONTINUING TRUST RESPONSIBILITIES OF THE UNITED STATES TOWARD THE TRIBE SUPPORT THE INTERPRETATION OF THE ACT OF 1891 AS NOT DIMINISHING THE RESERVATION

We have discussed the jurisdiction of the State within the borders of the Lake Traverse Reservation primarily in terms of the precise wording of the statute opening the Reservation for non-Indian settlement. But the alleged ambiguity of the Act of 1891 and of similar Acts opening reservations also calls for a broader approach.

We note, first, that the Sisseton-Wahpeton Tribe remains an important and populous Indian tribe exercising its federally guaranteed powers of self-government under federal guardianship. A large amount of land, scattered about within the boundaries of the Reservation, remains trust land. The State of South Dakota did not choose to assume responsibility for civil and criminal law and law enforcement within Indian country in the state when it could have done so under Public Law 280, *supra*. Compare *Williams* v. *Lee,* 358 U.S. 217, 222-223; *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164, 177-178. Nor is the decision that the State asks of this Court one that could give the State jurisdiction over acts occurring on trust land. Instead, the result sought by the state would greatly increase the difficulty of achieving adequate law and order on the reservation by requiring plat-book jurisdiction—state jurisdiction over Indians on this lot, federal or tribal jurisdiction on the next. Obviously, such an absurd result, in a reservation such as this, where a large Indian population lives, ought to be avoided, if possible.

Also, and equally important, it is, and has been, the policy of the United States that, unless specifically terminated by Congress, Indian tribes are self-governing political communities. In *McClanahan* v. *Arizona State Tax Commission, supra,* 411 U.S. at 168, this Court stated:

> * * * "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice* v. *Olson,* 324 U.S. 786, 789 (1945). This policy was first articulated by this Court 141 years ago when Mr. Chief Justice Marshall held that Indian nations were "distinct political communities, having territorial boundaries, within which their authority is exclusive * * *."

See also *Williams* v. *Lee, supra,* 358 U.S. at 220:

> Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right or reservation Indians to make their own laws and be ruled by them.

This right to self-government was explicitly guaranteed the Sisseton-Wahpeton Tribe in its 1867 Treaty with the United States and has never been taken away by Congress. Article 10 of that Treaty states (DeCouteau, Pet. Br. App. 6):

> The chiefs and head-men located upon either of the reservations set apart for said brands are authorized to adopt such rules, regulations, or laws for the security of life and property, the advancement of civilization, and the agricultural prosperity of the members of said bands upon the respective reservations, and shall have authority, under the direction of the agent, and without expense to the Government, to organize a force sufficient to carry out all such rules, regulations, or laws, and all rules and regulations for the government of said Indians * * *.

Tribal control over domestic relations, at issue in *DeCoteau*, is at the heart of this right of Tribal self-government. See, *e.g.*, *United States* v. *Quiver*, 241 U.S. 602, 603-604. The question of a child's welfare cannot be decided without reference to his family structure. This involves both a sympathetic knowledge of the individuals involved, and a knowledge of the background culture. No matter how well-intentioned, state authorities are not likely to have insight into these important areas. Moreover, if such authorities are to have jurisdiction over tribal children in dependency and neglect cases, there is a substantial chance that such children may be placed in non-Indian homes outside the Reservation and be deprived of their cultural identity.[10] The Sisseton-Wahpeton Tribe opposed such practices in a tribal resolution on July 6, 1972, which states:

[10] This concern, in the light of present experience, was strongly expressed by the North American Indian Women's Association in a recent report. North American Indian Women's Association, Inc., *Project Report for Development of a Prototype Program for Indian Children with Special Needs*, BIA Contract No. K51C14200761, December 15, 1973. The first recommendation made by the study was that "[W]hen at all possible, Indian Children should be placed with Indian foster parents." *Id.* at 62.

SISSETON-WAHPETON SIOUX

WHEREAS, The Sisseton-Wahpeton Sioux Tribe is interested in the well-being of all the enrolled members of the tribe and

WHEREAS, Minor children of Sisseton-Wahpeton descent have been placed in non-Indian foster and adoptive homes all over the United States,

WHEREAS, The Tribal council is in the process of researching the sovereign status of the tribal entity in respect to its jurisdiction as stated in the constitution of the Sisseton-Wahpeton Sioux Tribe, and,

WHEREAS, It is the intent of the Sisseton-Wahpeton Sioux Tribe to establish its own method of social and economic development and well-being of the enrolled members, and,

WHEREAS, It is the strong feeling of the tribal council "to make every stand possible to keep these children on the reservation" (minutes of June 6th council meeting) and "the tribal council would like these children to be placed in an Indian licensed home until an Indian home can be found for them to be adopted."

THEREFORE, BE IT RESOLVED, that Mr. Bert Hirsch, legal counsel from the Association of American Indian Affairs, will stand on these grounds in his argument in Robert County Court on July 7, 1972 and future cases of this nature.

The Sisseton-Wahpeton Tribe is a responsible body, concerned about its young people. It should have authority over dependency and neglect and similar proceedings concerning its own people anywhere within the Reservation.[11] If this authority were fragmented so as to apply only to acts committed on trust land within the

[11] The Tribe has assumed such authority under its tribal code.

Reservation, it would be practically meaningless as an exercise of effective self-government. And neither the Tribe, in domestic relations matters and with respect to the criminal offenses left to its control, nor the United States, in its control over major crime, should have to search the tract books in order to determine whether it or the State has jurisdiction. *Seymour* v. *Superintendent, supra,* 368 U.S. at 358.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of the State of South Dakota should be reversed and the judgment of the United States Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

WALLACE H. JOHNSON,
Assistant Attorney General.

LOUIS F. CLAIBORNE,
HARRY R. SACHSE,
Assistants to the Solicitor General.

EDMUND B. CLARK,
EDWARD J. SHAWAKER,
Attorneys.

NOVEMBER 1974.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 75-562

ROSEBUD SIOUX TRIBE, PETITIONER

v.

HONORABLE RICHARD KNEIP, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-61) is reported at 521 F.2d 87. The opinion of the district court (Pet. App. 63-113) is reported at 375 F.Supp. 1065.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1975 (Pet. App. 61). A petition for a writ of certiorari was filed on October 11, 1975, and was granted on May 24, 1976. The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether three Acts of Congress, which authorized the sale of land within portions of the Rosebud Indian Reservation to non-Indians and directed that the proceeds of each sale as received should be deposited in trust for the benefit of the Tribe, diminished the exterior boundaries of the Reservation as they existed in 1889.

STATUTES INVOLVED

The Acts of April 23, 1904, 33 Stat. 254; March 2, 1907, 34 Stat. 1230; and May 30, 1910, 36 Stat. 448, are set forth in Appendix C to the petition.

STATEMENT

In June 1972, the Rosebud Sioux Tribe of Indians filed suit in the United States District Court for the District of South Dakota, seeking a declaratory judgment that the exterior boundaries of the Rosebud Reservation, as defined in the Act of March 2, 1889, 25 Stat. 888, had not been altered by three Acts of Congress (Act of April 23, 1904, 33 Stat. 254; Act of March 8, 1907, 34 Stat. 1230; Act of May 30, 1910, 36 Stat. 448) opening certain unallotted surplus land to non-Indian settlement.

In the Act of March 2, 1889, Congress "restored to the public domain" (25 Stat. 896) one-half of the Great Sioux Reservation established in 1868, but preserved for the Sioux Tribes six Reservations in present-day North and South Dakota (*id.* at 888-890). Among these was the Rosebud Reservation, located in the south central portion of South Dakota, and composed of the Counties of Todd, Tripp and Mellette, and parts of Gregory and Lyman counties.[1]

---

[1] A map of the Reservation, showing the 1889 boundaries and the boundaries as found by the court of appeals, is reproduced at Pet. App. 113.

In 1901, the Rosebud Tribe agreed (Pet. App. 15, n. 21) to "cede * * * and convey to the United States" for a specified sum of $1,040,000 the unallotted land within the Gregory County portion of its Reservation for non-Indian settlement. Congress rejected this agreement in 1902 and 1903. The problem "was, simply put, money" (Pet. App. 16). Congress then "amended and modified" the agreement (Pet. App. 117) and enacted it as the Act of April 23, 1904 (Pet. App. 117-120). The primary amendments were that (1) the Indians were not guaranteed any consideration for the land except with respect to the 16th and 36th sections (school section), but were to be paid only as the lands were actually sold to settlers;[2] (2) the United States did not guarantee to find purchasers but agreed only to "act as trustee for said Indians to dispose of said lands" (Section 6, Pet. App. 120); and (3) limitations were placed on the distribution of the proceeds to the Indians (compare Art. III, Pet. 118, with Art. III, Pet. App. 115-116).

The Rosebud Reservation was further opened by the 1907 Act, which, as passed, provided (Pet. App. 121) "that the Secretary of the Interior * * * is hereby, authorized and directed, * * * to sell or dispose of all that portion of the Rosebud Indian Reservation * * * [within Tripp County] except such portions thereof as have been, or may hereafter be, allotted to Indians" (and except school sections that were to be paid for by the United States, and granted to the State).[3] The 1907 Act further provided (Section 5, Pet. App. 122-123) that the funds

---

[2] Section 2 of the Act (Pet. App. 119) set forth a schedule of the prices per acre for the land, which varied according to the time at which the land was sold.

[3] Each Act contains substantially identical school land provisions to the effect that Sections 16 and 36 of the lands in each township are not to be disposed of, but are reserved for donation to the State for use as common schools. These lands were to be paid for by the federal government. See Pet. App. 120, 121, 123, 127.

received should be deposited in an interest-bearing account in the Treasury of the United States "to the credit of the Indians belonging and having tribal rights on the Rosebud Reservation," that the interest shall be paid annually to the Indians, that all funds up to one million dollars should be distributed after ten years on a per capita basis to the Indians, and that the balance should be expended or distributed for the Indians' benefit at the discretion of the Secretary of the Interior. The 1907 Act concluded, as did the 1904 Act (Section 6, Pet. App. 120), with a section declaring (Section 8, Pet. App. 123):

> * * * nothing in this act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this act that the *United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received, as herein provided* * * *. [Emphasis added.]

The 1910 Act (Pet. App. 124-127), like the 1907 Act (Pet. App. 121), began with an authorization to the Secretary to "sell and dispose" of surplus lands within a described portion (Mellette County) of the Reservation App. 124).[4] The Act further provided (*ibid.*)

> [t]hat any Indians to whom allotments have been made on the tract to be *ceded* may, in case they elect to do so before said lands are offered for sale, relinquish same and select allotments in lieu thereof

[4] The 1907 Act uses the phrases "sell *or* dispose" (emphasis added).

> on the diminished reservation * * *. [Emphasis added.]

The 1910 Act further required (Section 4, Pet. App. 125) that a commission be established, composed of "[o]ne resident citizen of the State of South Dakota, one representative of the Interior Department, and one person holding tribal relations with said tribe of Indians," to determine the price setters would be charged for the land. The proceeds of any eventual sales were to be deposited in the Treasury to the credit of the "Indians belonging and having tribal rights on the said reservation," which "shall be at all times subject to appropriation by Congress for their education, support and civilization" (Section 7, Pet. App. 126). The 1910 Act (Section 11, Pet. App. 127), like the earlier Acts (Section 6, Pet. App. 120; Section 8, *id.* at 123), explictly stated that the United States was not obligated to purchase the surplus land, except Sections 16 and 36 for school purposes, and would act only as trustee for the Indians in disposing of the surplus land.

In a lengthy opinion the district court held that each of the 1904, 1907 and 1910 Acts extinguished the portion of the Reservation to which it applied (Pet. App. 63-113; see *id.* at 113). The court found no language in the Acts expressly terminating the Reservation in the counties involved and no "express discussion of state versus federal jurisdiction over the lands in question" (*id.* at 85); however, the court held that, in light of the "surrounding legislative history and the circumstances" (*id.* at 109) from 1901 to 1910, Congress intended to extinguish the portions of the Reservation at issue.

The United States Court of Appeals for the Eighth Circuit affirmed (Pet. App. 1-61), after this Court had decided *DeCoteau* v. *District County Court*, 420 U.S. 425. The court rejected arguments of the Tribe, and the United States as *amicus curiae*, that the language of the Acts interpreted in light of prior decisions of this Court

did not abolish the disputed portions of the Reservation, and that neither the legislative nor the administrative history established that the State had undisputed jurisdiction to the exclusion of the Tribe and the United States. The court thought that prior decisions, including this Court's decisions in *Seymour* v. *Superintendent*, 368 U.S. 351, and *Mattz* v. *Arnett*, 412 U.S. 481, and its own decisions in *City of New Town, North Dakota* v. *United States*, 454 F. 2d 121, and *United States ex rel. Condon* v. *Erickson*, 478 F. 2d 684, were "of limited utility" in deciding this case (Pet. App. 5) and concluded that "the overriding judicial inquiry remains unchanged, namely, the congressional intent" (*ibid.*). Stating that this Court's decision in *DeCoteau, supra*, permitted it to utilize "all materials reasonably pertinent to the legislation * * * as well as those bearing upon the historical context of its passage, such as the social forces then at work in the area * * *" (Pet. App. 8), the court found a "continuity" of circumstances from 1901 to 1910 that demonstrated Congress' intention to extinguish Indian jurisdiction over the areas in question (*id.* at 26-28, 34, 38, 39-40, 44, 46, 48).

SUMMARY OF ARGUMENT

It is the position of the United States that the Acts of 1904, 1907, and 1910, while opening portions of the Rosebud Reservation to non-Indian settlers, did not contract the exterior boundaries of the Reservation. This position is based upon our assessment of the Acts themselves, the contemporary social and legislative history, subsequent treatment of the lands by the Department of the Interior, and doctrines developed by this Court in similar cases. While the courts below gave some attention to each of these factors, we believe that the courts overemphasized inconclusive legislative history. A more balanced analysis, we submit, requires a finding that Congress did not intend by these Acts to terminate most of the Reservation but expected that termination would occur, if at all, when the trust period on allotments expired.

This Court's decisions require compelling evidence to prove that reservation boundaries have been cut back without the consent of the affected Indian tribe and without guaranteed payment for the opened lands. Any different construction would place Indians in the position of surrendering jurisdiction over substantial portions of their reservation before any benefits had been assured or received. Thus, the Court found in *Seymour* v. *Superintendent*, 368 U.S. 351, and *Mattz* v. *Arnett*, 412 U.S. 481, that unilateral Acts of Congress, providing that the United States would not purchase Indian lands but would merely act as trustee for their sale, did not commit the opened lands to state jurisdiction. The Acts opening the Rosebud Reservation were drafted in similar fashion and are to the same effect.

The Acts of 1904, 1907, and 1910, do not demonstrate an intention to return lands to the public domain, and the clear language of other Acts expressly restoring lands to the public domain is notably absent. In contrast to public lands, which are subject to disposition under general laws, the lands of the Rosebud Reservation were to be sold only in accordance with the terms of the trust established by Congress; all proceeeds were explictly dedicated to the benefit of the Tribe. In fact, Congress included a provision granting school lands to the State in each Act, despite this Court's holding in 1902 that such provisions were unnecessary when lands were restored to the public domain. *Minnesota* v. *Hitchcock*, 185 U.S. 373.

Subsequent administrative actions confirm that the Acts did not disestablish the 1889 boundaries of the Reservation. Under the Indian Reorganization Act of 1934, 48 Stat. 984, as amended, 25 U.S.C. 461, *et seq.*, the Department of the Interior restored to Indian ownership lands in the opened portion of the Reservation, an action that could not have included lands "upon the public domain outside the geographic boundaries of any Indian

reservation * * *" (48 Stat. 986). Moreover, numerous communications and reports show that the Deparement, before and after the Indian Reorganization Act, recognized territory in the opened counties as within the Rosebud Reservation. Recent appropriations are consistent with that viewpoint.

The uncertain legislative history does not demonstrate a contrary intention. Despite the emphasis placed on the legislative history by the court of appeals, the reports and debates show that Congress at no time concerned itself with the question of jurisdiction over the opened lands. While the court of appeals stressed references made in unrelated contexts, we submit that the inferences to be drawn from such references are at best ambiguous. They do not merit the weight that they received in the court of appeals.

The Acts of 1904, 1907, and 1910, therefore, do not demonstrate congressional intent to impede the Tribe's right to govern its own people.

ARGUMENT

I. THE DECISIONS OF THIS COURT HOLD THAT ACTS OF CONGRESS ESTABLISHING TRUSTS FOR THE SALE OF INDIAN LANDS DO NOT REDUCE RESERVATION BOUNDARIES

This Court, in deciding Indian cases, does not write upon a fresh slate. The Court has long recognized that "[t]he relation of the Indian tribes living within the borders of the United States * * * [is] an anomalous one and of a complex character." *United States* v. *Kagama*, 18 U.S. 375, 381. "Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States." *Id.* at 383-384 (emphasis in original). With respect to legislation, therefore, "[d]oubtful expressions are to be resolved in favor of the weak and defenseless

people who are the wards of the nation, dependent upon its protection and good faith." *Carpenter* v. *Shaw*, 280 U.S. 363, 367.

During the past fifteen years this Court has been asked three times to decide whether Congress intended to cut back reservation boundaries or to open up reservation lands for settlement with the existing boundaries unchanged. *Seymour* v. *Superintendent*, 368 U.S. 351; *Mattz* v. *Arnett*, 412 U.S. 481; *DeCoteau* v. *District County Court*, 420 U.S. 425. The principles developed by those decisions are directly applicable to the questions raised in this case.

In *Seymour*, this Court considered the effect of the Act of March 22, 1906, 34 Stat. 80, on the Colville Indian Reservation in the State of Washington. In 1892, the United States expressly vacated and restored a portion of the Reservation "to the public domain," 27 Stat. 62, 63. In the 1906, Act, however, no such language was included; the Secretary was merely directed "to sell or dispose" of unallotted lands within the Reservation (34 Stat. 80) and to place the proceeds as received from settlers into the Treasury for the benefit of the Indians (34 Stat. 81). The Act further provided that the United States would act as a trustee in disposing of these lands for the Indians' benefit and not as a purchaser (34 Stat. 82). Because *Seymour* involved a criminal matter, this Court assessed the meaning of the 1906 Act against the backdrop of the definition of "Indian Country" found in 18 U.S.C. 1151.[5]

This Court concluded that "the purpose of the 1906 Act was neither to destroy the existence of the diminished Colville Indian Reservation nor to lessen federal responsi-

[5] Indian country is defined, in part, as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights of way running through the reservation * * *."

bility for and jurisdiction over the Indians having tribal rights on that reservation." 368 U.S. at 356. The Colville Act "did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards" (*ibid.*). The Court noted that any other conclusion would result in checkerboard jurisdiction over Indians, a consequence that Congress sought to avoid by enacting 18 U.S.C. 1151 (*id.* at 358).[6]

In *Mattz* this Court was required to decide whether the Klamath River Indian Reservation in California was terminated by an 1892 Act of Congress or remained Indian country as defined in 18 U.S.C. 1151 (412 U.S. at 483). After assessing legislative history and subsequent administration of the land by the Interior Department, the Court concluded, as it had in *Seymour*, that the mere opening of the Reservation to settlers did not mean that the Reservation was discontinued. Recognizing that "the House was generally hostile to continued reservation status of the land," the Court nonetheless found that Congress never terminated it (*id.* at 499)[7] but merely provided for

[6] This Court took particular note of the subsequent treatment of this area by Congress and by the Interior Department and gave particular attention to the Department's decision, 54 I.D. 559, that land within the Colville Reservation previously opened to settlement could be restored to Reservation status under the Indian Reorganization Act of 1934 (368 U.S. at 357, n. 14). This Court recognized a period of "congressional confusion" when the area was referred to as the "former Colville Reservation" (*id.* at 356, n. 12), but did not find such references indicative of a Congressional intent to terminate jurisdiction over the Reservation.

[7] The State urged that a reference in the 1892 Act to "what was [the] Klamath River Reservation," indicated a Congressional intention to terminate. This Court found the reference to the Reservation "in the past tense * * * merely * * * a natural, convenient and shorthand way of identifying the land subject to allotment * * *" (*id.* at 498). Cf. *Seymour, supra*, 368 U.S. at 356, n. 12.

sale of the surplus lands with the "proceeds of sales to be held in trust for the 'maintenance and education' * * * of the Indians" (*id.* at 504). Because a decision to terminate a reservation "must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history" (*id.* at 505), this arrangement did not deprive the Indians of their important reservation rights.[8]

Placing the 1892 Act into the historic context of the General Allotment Act of 1887, 24 Stat. 388, the Court further observed that the Allotment Act "permitted the President to make allotments of reservation lands to resident Indians and, with tribal consent, to sell surplus lands. Its policy was to *continue the reservation system* and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. *When all the lands had been allotted and the trust expired, the reservation could be abolished*" (412 U.S. at 496; emphasis added). See also *United States* v. *Nice*, 241 U.S. 591, 599. However, enactment of the Indian Reorganization Act in 1934, 48 Stat. 984, as amended, 25 U.S.C. 461 *et seq.*, ended the policy of allotment, and all trust periods were indefinitely extended (412 U.S. at 496, n. 18). Later, as the Court noted, portions of the land in the Klamath Reservation previously opened to settle-

[8] After this Court's decision in *Seymour*, the Eighth Circuit considered whether the Act of May 29, 1908, 35 Stat. 460, opening the Cheyenne River Reservation in South Dakota, diminished its boundaries. Relying on *Seymour*, it held it did not, *United States ex rel. Condon* v. *Erickson*, 478 F.2d 684 (C.A. 8), and this Court in *Mattz* twice noted that decision with approval, remarking that it presented "issues not unlike those before us" (412 U.S. at 497, n. 19 and 505, n. 23). The Eighth Circuit had reached a similar conclusion in *City of New Town, North Dakota* v. *United States*, 454 F.2d 121, involving the effect of the Act of June 1, 1910, 36 Stat. 455, opening the Fort Berthold Reservation.

ment were withdrawn and restored to tribal ownership (*id.* at 496, n. 17 and 505).[9]

In *DeCoteau*, the Court determined the effect of the Act of March 3, 1891, 26 Stat. 989, 1035, on the Lake Traverse Reservation. The 1891 Act had ratified an agreement in which the Tribe expressly ceded to the United States all its "right, title and interest" in the land for a lump sum. The Court contrasted this transaction with the Acts involved in *Seymour* and *Mattz* (420 U.S. at 447-449, stating that it "adhere[d] without qualification to both the holdings and the reasoning of those decisions"; the Court, however, found that "gross differences between the facts * * *" (*id.* at 447) justified a finding that the Reservation had been terminated.

The differences identified by the Court are important to the present case. The 1891 Act was a negotiated agreement with the Tribe, whereas the Acts involved in *Seymour* and *Mattz* were "unilateral" Acts of Congress not agreed to be the Tribes (*id.* at 448). The 1891 Act was a straightforward cession for a sum certain in amount, and not the arrangement found in *Mattz* and *Seymour* where proceeds from uncertain future sales were placed in trust for the benefit of the Tribe (*id.* at 448-449). The Department of the Interior did not, as it had in *Mattz* and *Seymour*, consistently regard the Reservation as continuing (*id.* at 448). These distinctions led to the conclusion that the Lake Traverse Reservation was extinguished and the land restored to the public domain.

The fact that the Indians' land holdings would be diminished as the land was sold, therefore, does not mean that the Rosebud Reservation itself was abolished in the areas where the land subject to sale was located. In *DeCoteau* (but not in *Seymour* or *Mattz*) the United States

[9] The Klamath River Reservation was also identified by the Interior Department (54 I.D. 559), as containing land, opened by the 1892 Act, which could be restored to reservation status.

itself purchased the land in the Reservation pursuant to an agreement with the Indians; this, the Court held, restored the land to the public domain and extinguished the Reservation. 420 U.S. at 446-447. But under the Rosebud Acts, the federal government did not buy the Indians' land. The government acted merely as a trustee for the Tribe in selling its land to non-Indians; the land passed from the Indians to private individuals. It was not first made part of the public domain, and Congress appropriated no funds to pay for these lands, except for school sections. Rather, any funds distributed to or deposited on behalf of the Indians were to be derived from amounts paid by the non-Indian purchasers. If there were no buyers interested in the land the government was to sell for the Indians, the Indians would have received no money; yet according to the reasoning of the court below, the Tribe nevertheless would have been deprived of three-fourths of its Reservation. Such an intention should not be attributed to Congress without the clearest kind of evidence.

Every court faced with similar questions, except the courts below, has found that such Acts of Congress did not extinguish portions of the Reservations but instead opened the Reservations to allow integration of Indians and settlers and to provide needed lands for the western migration.[10] This construction is consistent not only with proper concern for Indian sovereignty but also with the long-standing reluctance to place Indian wards within the reach of state jurisdiction. "The policy of leaving Indians free from state jurisdiction and control is deeply

[10] *Russ* v. *Wilkens*, 410 F. Supp. 579 (N.D. Cal.); *Leech Lake Band of Chippewa Indians* v. *Herbst*, 334 F. Supp. 1001 (D. Minn.); *City of New Town, North Dakota* v. *United States*, 454 F.2d 121 (C.A. 8); *United States ex rel. Condon* v. *Erickson*, 478 F.2d 684 (C.A. 8); *Putnam* v. *United States*, 248 F.2d 292 (C.A. 8); *Confederated Salish and Kootenai Tribes* v. *Namen*, 380 F. Supp. 452 (D. Mont.), affirmed, 534 F.2d 1376 (C.A. 9), pending on petition for certiorari, No. 76-185.

rooted in the Nation's history." *Rice* v. *Olson*, 324 U.S. 786, 789.

Although the court of appeals found these principles "of limited utility" (Pet. App. 5), we believe they may not be so lightly dismissed.[11] While we do not read the cases to say that Congress could never remove lands from a reservation by a unilateral decision to act as trustee for their sale, that construction should be greatly disfavored. This is particularly true when, as here, Congress demonstrated quite clearly that it did not intend to place the Indian lands within the public domain.

II. THE ACTS OF 1904, 1907 AND 1910 DID NOT RESTORE INDIAN LANDS TO THE PUBLIC DOMAIN

The United States does not dispute that Congress during the early 1900's expected that Indian reservations at some point would be abolished. Congress was faced with pressures to open additional land located within existing Indian reservations and Congress itself desired that Indians gradually develop a less tribal way of life. The integration of Indians while white settlers was viewed as an important step in that development. The question in this case, therefore, is not whether Congress intended the Rosebud Reservation to continue unchanged indefinitely but whether termination was to occur immediately upon passage of the Acts or at some later time, when the trust period on allotted Indian lands had expired.

---

[11] The court of appeals apparently misunderstood (Pet. App. 24-25) the significance of the fact that Congress did not secure the approval of the Rosebud Indians as required by the Treaty of 1868 (15 Stat. 635, 639). While Congress had the power to dispose of lands without such consent, *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, its decision to do so must be regarded as unilateral. In fact, the government's negotiator, Inspector James McGlaughlin, repeatedly stressed to the Indian that their lands could be sold without their consent and that they should redirect their efforts to securing a reasonable price. *E.g.*, A. 476, 481, 490, 776, 803-804.

1. The language of the Acts themselves does not disclose an intent to return land to the public domain. The 1904 Act provides for the Indians to "cede, surrender, grant and convey to the United States all their claim, right, title and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted [within Gregory County]" (Pet. App. 115), but that terminology was simply carried over from the unratified agreement for sale at a sum certain. The 1904 Act nowhere provides that the Reservation was abolished or that the lands were to be restored to the public domain. The Acts of 1907 and 1910 provide that the Secretary of the Interior shall "sell or dispose" (in the 1907 Act) or "sell and dispose" (in the 1910 Act) "of all that portion of the Rosebud Indian Reservation subsequently described (Pet. App. 121, 124). Again no mention is made that the Reservation is *pro tanto* terminated or that the lands were to become public lands. This reticence is in marked contrast to the express language used by Congress in other statutes. See 15 Stat. 221 (1868) ("the Smith River reservation is hereby discontinued"); 27 Stat. 63 (1892) ("the same being a portion of the Colville Indian Reservation * * * be, and is hereby vacated and restored to the public domain"); 33 Stat. 218 (1904) ("the reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same are hereby abolished"). See also *Mattz* v. *Arnett*, *supra*, 412 U.S. at 504, n. 22.[12]

---

[12] The language of the 1904 Act is similar to the statutory language discussed in *DeCoteau*, *supra*, and found sufficient to terminate the Reservation. But Congress had *ratified* a sale for a sum-certain in that case, and the words of cession in that context merely reflected the common understanding of the Indians and the government. The words in this case were originally part of a similar agreement, which Congress refused to ratify. Although Congress retained the form of the agreement in passing the 1904 Act, the language disappeared in the Act of 1907 and 1910, both of which were passed without tribal consent.

The mere fact that the government had power to sell the Indians' lands does not mean that they are public lands. "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." *Newhall* v. *Sanger*, 92 U.S. 761, 763. The United States commonly owns public lands free of beneficial rights and may dispose of them for its own benefit. Its power over the Rosebud Reservation lands, however, was significantly different; under the Acts of 1904, 1907, and 1910, the United States could sell the lands only under specified conditions and was required to administer the proceeds for the benefit of the Rosebud Indians. Unlike agreements providing for sale for a sum-certain, the three Acts in question specifically stated that the United States did not guarantee to buy, or even to find purchasers for, the affected lands. In fact, part of the lands was later released from the trust in accordance with the Indian Reorganization Act of 1934 (pp. 28-33, *infra;* App. A, *infra*, p. 1A).

The provision for schol lands in each of the three Acts indicates that Congress was aware of the nature of this trust. In May 1902, this Court, in *Minnesota* v. *Hitchcock*, 185 U.S. 373, had considered the troublesome question whether a cession-in-trust to the government for resale gave Minnesota the right to Sections 16 and 36 of the ceded lands for school purposes.[13] (The Enabling Act admitting Minnesota to the Union, like the Enabling Act of South Dakota, provided that the State was entitled to Sections 16 and 36 from all "public lands" within the State for schools.) This Court concluded that, while Minnesota would be entitled to Sections 16 and 36 of public lands even though no express exception in the instrument of conveyance was made (185 U.S. at 392-393), the land in question had never been restored to the public domain because the cession was in trust and the proceeds from uncertain future sales were to be deposited in the Treasury for the Indians' benefit (185 U.S. at 395). Thus Congress, if it wanted the State to receive Sections 16 and 36 while they remained within the opened Indian reservation, had to include an express provision to that effect. Such provisions were contained in all three Rosebud Acts.[14]

[13] Congress was well aware of the importance of *Minnesota* v. *Hitchcock*. After the Department of the Interior moved to dismiss the State's original action in this Court, on the ground that the Chippewa Indians were indispensable parties, Congress passed an Act expressly permitting the Interior Department to appear instead of the tribe in such cases. Act of March 2, 1901, 31 Stat. 950. The Committee Report on the bill (H.R. 14191) stated that "it is of the utmost consequence * * * that there be the most speedy determination of a vexed question that has dragged through forty years" (H.R. Rep. No. 2948, 56th Cong., 2d Sess. 1 (1901)).

The legislative history of these provisions, though sparse, is instructive. In 1902, bills were introduced to ratify the Agreement negotiated with the Tribe in the previous year. The bill reported to the Senate, in addition to supporting approval of the Agreement, proposed an additional provision not originally negotiated: the inclusion of a requirement reserving Sections 16 and 36 in each township in Gregory County "for the use of the common schools" and granting those sections to the State of South Dakota. S. Rep. No. 662, 57th Cong., 1st Sess. 1-2 (1902). The bill was passed in the Senate, but the House Committee on Indian Affairs rejected not only the provisions permitting free-homesteads but also the school lands provision, stating (H.R. Rep. No. 2099, 57th Cong., 1st Sess. 1 (1902)):

> The opinion of the committee is that this section is *not necessary*, as under *existing law* sections 16

[14] A school lands provision was also contained in the Act of March 3, 1891, 26 Stat. 989, 1035, extinguishing the Lake Traverse Reservation. At that time, of course, this Court had not held that a State would be entitled to school sections out of public lands by the force of its Enabling Act alone, and Congress therefore included an express grant even in Acts providing for purchase of lands for a sum certain.

and 36 would be granted to the State upon the extinguishment of the Indian title. [Emphasis added.]

The bill never reached the House floor for a vote (Pet. App. 16, n. 23).[15] When the Agreement for a sum certain was abandoned, however, subsequent bills included an express grant for school lands.

The question arose again in connection with the Act of 1910. Although the school lands provision was included in that Act without substantial debate, a similar provision in a bill to open lands in the Fort Berthold Reservation, North Dakota, was more fully discussed, The Fort Berthold bill, described as "practically in the same form" as the 1910 Rosebud Act (45 Cong. Rec. 5794 (1910)), provided for sales according to the

[15] The 1901 Agreement was an outright cession of Gregory County for a sum certain, which the Tribe conceded below would have extinguished the reservation status of the land and restored it to the public domain (Pet. App. 16). See *DeCoteau* v. *District Court, supra*, 420 U.S. at 447-449. The House Indian Affairs Committee understood that, under such circumstances, it was *not* necessary expressly to reserve Sections 16 and 36 for school purposes because the South Dakota Enabling Act of 1989 provided that those sections would automatically revert to the State when Indian title was extinguished. See 25 Stat. 676, 679, Section 10. The Senate Committee Report, supporting inclusion of the provision, was issued in March 1902, *before* this Court's decision in *Minnesota* v. *Hitchcock, supra*. The House Report was issued on May 17, 1902, after the *Hitchcock* decision. Congress "must be deemed to have known" that the exact issue it was dealing with was resolved by this Court in *Hitchcock*. *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99, 113. It was the House Report that accurately reflected existing law.

The court of appeals mistakenly relied (Pet. App. 29) on statements made by Senator Gamble in 1902 in favor of a school lands provision without noting that others regarded the provision as unnecessary. The court then juxtaposed those statements with statements made in 1904 (Pet. App. 30) after the sum certain method of payment had been discarded. The latter statements in fact simply emphasize the need to include school lands provisions when the uncertain-sum-in-trust method of payment is used.

uncertain-sum-in-trust method, except for Sections 16 and 36 which were to be purchased by the United States. After discussion of the school lands provision, Senator Jones of Washington stated (45 Cong. Rec. 6741 (1910)):

> I think I am thoroughly familiar with the terms of these various bills, and I am satisfied that these lands are *not restored to the public domain at all.* Their disposition is provided for in a special way. *The title of the Indians is recognized, and the lands are sold for the Indians.* They are to have the benefit.
>
> I am not going to object to the bill, and I am not going ot object to the provisions in it, but I did want to put in the RECORD my judgment that we are under *no obligation to purchase section 16 and 36, because we are not restoring these surplus lands to the public domain.* [Emphasis added.]

Senator Jones clearly recognized that the 1910 Fort Berthold Act, which was "practically in the same form" as the 1910 Rosebud Act, did not restore any lands to the public domain, and that Congress chose voluntarily to include a grant of school lands to provide schools in the opened territory.[16] The Eighth Circuit has held that the 1910 Fort Berthold Act did not diminish the exterior boundary of that Reservation. *City of New Town, North Dakota* v. *United States*, 454 F. 2d 121. It is highly unlikely that Congress would have intended a different result in substantially identical legislation passed within the same month.

2. There is also no reason to believe that these lands, not restored to the public domain by Acts of Congress, were nevertheless restored by issuance of the Presidential proclamations opening the lands for settlement. At that point, the trust was still in full effect and the Indians had

[16] Since the opened areas where to be populated largely by white settlers, this action seems consistent with the purpose of the school lands provisions in the States' Enabling Acts.

yet to receive any benefits under the particular Acts. Lands unsold or forfeited were to be restored to the Indians (presumably through the trust) and would not have been available for sale under the general laws. Thus they bear little resemblance to public lands.

This conclusion is fortified by *Ash Sheep Co.* v. *United States*, 252 U.S. 159. In 1899, the United States had negotiated an agreement with the Crow Tribe, by which the Tribe agreed to "cede, grant and relinquish" to the United States, for a lump sum, a portion of its reservation in Montana, 33 Stat. 352-356. In 1904, however, the Congress unilaterally "amended and modified" the unratified 1899 Agreement to include an uncertain-sum-in-trust provision, 33 Stat. 361 (Section 6), and a trusteeship provision, 33 Stat. 361 (Section 8), while retaining the "cede, grant, and relinquish" language of the 1899 Agreement. The land was opened by Presidential Proclamation in 1906, 34 Stat. (Part III) 3200, and "[m]uch thereof ha[d] been disposed of * * *." *United States* v. *Ash Sheep Co.*, unpublished opinion, Brief of the United States as Amicus Curiae in Support of Petition for Hearing and Rehearing en Banc, p. 66 (filed in the court of appeals).

In 1913, the Ash Sheep Company sought to graze sheep on unallotted lands opened for settlement without compliance with Interior Department regulations, claiming that the Act of 1904 had diminished the Reservation and converted the land affected into "public land." This Court disagreed, stating (252 U.S. at 165-166):

> It is obvious that the relation thus established by the act between the Government and the tribe of Indians was essentially that of trustee and beneficiary and that the agreement contained many features appropriate to a trust agreement to sell lands and devote the proceeds to the interests of the *cestui que trust*. *Minnesota* v. *Hitchcock*, 185 U.S. 373, 394, 398. * * *

> Taking all of the provisions of the agreement together we cannot doubt that while the Indians by the agreement released their possessory right to the Government, the owner of the fee, so that, as their trustee, it could make perfect title to purchasers, nevertheless, until sales should be made any benefits which might be derived from the use of the lands would belong to the beneficiaries and not to the trustee, *and that they did not become "Public lands"* in the sense of being subject to sale, or other disposition, under the general land laws. *Union Pacific R.R. Co.* v. *Harris*, 215 U.S. 386, 388. They were subject to sale by the Government, to be sure, but in the manner and for the purposes provided for in the special agreement with the Indians, which was embodied in the Act of April 27, 1904, 33 Stat. 352. * * *. [Emphasis added.]

Thus, the Presidential Proclamation of 1906 clearly had not converted the Indian lands into public lands outside the Reservation.

Furthermore, a bill (S. 4632) to give settlers additional time to make payments on lands within various North and South Dakota Reservations (including the Rosebud) was introduced and considered in the Sixty Third Congress in 1914. 51 Cong. Rec. 8790 (1914). During the House debate of May 18, 1914, the consequences of non-payment by the settlers was discussed (51 Cong. Rec. 8791 (1914)):

> Mr. FOSTER: I want to say to the gentleman from South Dakota, on the statement he makes that these lands will probably go back to the Government, and that these people are really in distress—
>
> Mr. MANN: The Government does not own these lands?
>
> Mr. BURKE of South Dakota: *The Government does not own them.* The Government is undertaking to dispose of these lands for the benefit of the Indians.

Mr. FOSTER: Certainly. I understand.

Mr. BURKE of South Dakota: *And instead of giving money to the Indians, under the agreement of 1889*, so far as these reservations in South Dakota are concerned, *the money goes into the Treasury*, and we appropriate it for the support and civilization of the Indians. [Emphasis added.]

The point was also emphasized later in the debate (*ibid.*):

Mr. FOSTER: * * * if at the end of the time they do not desire to pay for them, the land goes back to the Government.

Mr. MANN: *The land goes back to the Indians.* [Emphasis added.]

3. We believe that Congress expected by the Acts in question "to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted and the trust expired, the reservation could be abolished." *Mattz* v. *Arnett, supra*, 412 U.S. at 496. While it might have been possible to diminish the reservation *pro tanto* as each plot of land was actually sold, that system seems both illogical and impractical. Under such circumstances Indians could not be sure from day-to-day what lands remained within the Reservation (and thus on what lands they became subject to state jurisdiction, see U.S. Department of Interior, *Federal Indian Law* 510-511 (1958)), and jurisdiction could only be exercised in checkerboard fashion according to local plat books. That cumbersome system should not be readily implied. *Seymour* v. *Superintendent, supra*, 368 U.S. at 358. Furthermore, the risk of forfeitures was always present given South Dakota's climate; the difficulties would only be increased as land, previously sold and removed from the Reservation, reverted to the trust upon nonpayment. Finally, the Indians living on the opened portion might be denied benefits available to Indians living on a Reservation.

By contrast, preserving the Reservation until the trust allotments expired would present fewer problems. The acquisition of land would not be impeded, for the settlers would own their land in the same manner and would be generally subject to state civil and criminal jurisdiction. *United States* v. *McBratnew*, 104 U.S. 621; *New York ex rel. Ray* v. *Martin*, 326 U.S. 496. The taxable base for the State and counties would be expanded, relieving the burdens of a locality previously inhabited largely by non-taxable Indians. At the same time, the Indians living on allotments would continue to receive needed federal benefits. While the State, of course, would not have jurisdiction over Indians on the Reservation, extension of State control over Indians has not generally been favored, *Rice v. Olson, supra.* This viewpoint is also consistent with treatment of the Reservation by the Department of the Interior, as we next discuss.

III. THE DEPARTMENT OF THE INTERIOR HAS ADMINISTERED THE ROSEBUD RESERVATION IN ACCORDANCE WITH THE BOUNDARIES ESTABLISHED IN 1889

Although the State of South Dakota has asserted dominion over the opened portions of the Rosebud Reservation, the territory within the original boundaries of 1889 has been recognized and administered as a Reservation by the Department of the Interior.

1. The process of alienating "surplus" Indian lands pursuant to the allotment policy ended with the passage of the Indian Reorganization Act of 1934 (48 Stat. 984). *Mattz* v. *Arnett, supra*, 412 U.S. at 496, n. 18. Under Section 3 of that Act, the Secretary of the Interior was authorized "to restore to tribal ownership the remaining surplus lands of any Indian Reservation heretofore opened * * *," 48 Stat. 984, and under Section 7, he was authorized to proclaim "new Indian reservations * * * or to add such lands to existing reservations."

48 Stat. 985. Congress made clear, however, that "[n]othing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads *upon the public domain outside the geographic boundaries* of any Indian reservation now existing or established hereafter" (48 Stat. 986; Section 8) (emphasis added).

The legislative history of the Act establishes that its provisions were directed particularly to "opened" portions of reservations. John Collier, Commissioner of Indian Affairs, whose agency was largely responsible for drafting the original bills, testified: [17]

> There have been presented to the House Indian Committee numerous land maps showing the condition of Indian-owned lands on allotted reservations. The Indian-owned lands are parcels belonging (a) to allottees and (b) to the heirs of deceased allottees. Both these classes of Indian-owned land are checker-boarded with white-owned land already lost to the Indians, and on many reservations the Indian-owned parcels are mere islands within a sea of white-owned property.

Before the House Committee Commissioner Collier testifed[18]:

> * * Alienation under allotment takes place in a spotty way *throughout the entire area within the reservation*. Indian land is not lost in solid blocks. It passed into white hands in scattered parcels which increased year by year until the remaining Indian lands are checker-boarded by white lands. *In many areas they have shrunk to mere dots on the map surrounded by large areas of white land.*

[17] Hearings on S. 2755 before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess. 18 (1934).

[18] Hearings on H.R. 7902 before the House Committee on Indian Affairs, 73d Cong., 2d Sess. 30-31 (1934) (emphasis added).

After passage of the Indian Reorganization Act of 1934 the unexpired trust period on all land allotted to Indians within reservations was indefinitely extended. The Secretary of the Interior was required to identify those Acts that "opened" portions of Indian Reservations but did not convert those lands into "public domain" (54 I.D. 559). The Secretary noted that many reservation lands had been ceded for a sum certain and concluded that "[t]he lands thereby separated from a reservation were no longer looked upon as being a part of that reservation" (54 I.D. at 560.) However, the Secretary determined that a second type of disposition did not extinguish the Indian title and convert the land into public domain (*ibid.*):

> * * * [A]bout 1890 * * * there was adopted the plan of opening to entry, sale, etc., the lands of reservations that were not needed for allotment, the Government taking over the lands only as trustee for the Indians. Under this plan the Indians were to be credited with the proceeds only as the lands were sold, the United States not to be bound to purchase any portion of the lands so opened. Undisposed of lands of this class remain the property of the Indians until disposed of as provided by law (*Ash Sheep Company* v. *United States*, 252 U.S. 159). Such lands are usually referred to as surplus lands of Indian reservations opened to public entry, and undoubtedly comprise the class of lands from which restorations to tribal ownership are to be made under the said Section 3, if in the public interest.[19]

[19] Respondents' discussion of a 1938 opinion by the Acting Solicitor (56 I.D. 330), concerning the Colorado Ute Reservation. Reply Brief for Respondents' in Opposition, pp. 26-27, takes an opposite viewpoint, replying on language that "[t]he phrase 'of any Indian reservation' must be used in section 3 to describe the character and location of the lands at the time they were opened to disposal under the public land laws," 56 I.D. at 333. No mention is made, however, of the language in Section 8 that "[n]othing

The Secretary then proceeded to identify "a list of Indians to receive the proceeds of sale only as the reservations where the lands have been opened, the tracts are disposed of" (54 I.D. at 561).[20] In addition to the three Rosebud Acts of 1904, 1907 and 1910 (*id.* at 562), the Secretary listed some twenty-six other reservations.[21] While those reservations have been the source of continual litigation, not one court has ever held that the

---

contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside the geographic boundaries of any Indian reservation now existing or established hereafter." That qualification, read in conjunction with Section 3, indicates that the only lands governed by the Indian Reorganization Act were lands located within an Indian reservation that were opened but not restored to the public domain. Such lands, as the Court held in *Seymour* and *Mattz*, were not removed from Indian and federal jurisdiction.

Moreover, the lands at issue in the Colorado Ute case did not contain any Indian allotments. Three bands of Utes occupied this Reservation prior to 1880; each was permitted to select allotments within the Reservation before it was opened by the 1880 Act, but because little arable land was available, the Uncompahgre and White River Utes were "voluntarily" removed to Utah. The Southern Utes were the only band to remain, and they selected allotments in the southern portion of the Reservation where the arable lands were located, *Ute Indians* v. *United States*, 45 Ct. Cl. 440, 449, leaving the northern portion unallotted. The discussion by the Acting Solicitor, therefore, must be read in the context of these unusual facts. See also *Confederated Bands of Ute Indians* v. *United States*, 100 Ct. Cl. 413, 423, 424-430.

[20] Approximately one month later, a supplemental order was issued which included additional reservations. It stated that (*id.* at 564) "as to those townsites any part of which remains unsold within such areas, it is hereby recommended that said order * * * be construed to apply to the extent of temporarily withholding from other disposition any unsold lots or portions of any such townsites * * *."

Thus, even townships, which by the 1930's would be populated by numerous non-Indians, were encompassed by this Interior Department order.

[21] See cases cited, note 10, *supra*.

Indian title to the land affected was extinguished by the applicable Act of Congress and the land converted to public domain. In fact, when the question presented was whether the reservation boundaries continued to exist undiminished in size, each court decided that they had.

On December 3, 1937, the Assistant Commissioner of Indian Affairs recommended to the Secretary of the Interior that, pursuant to Section 3 and Section 7 of the Indian Reorganization Act, certain undisposed surplus lands "of the Rosebud Reservation, South Dakota" should be restored to tribal ownership.[22] (App. A, *infra*). These lands included vacant lands totaling some 4,649.25 acres, and also "remaining vacant and undisposed * * * lots within the townsites of Wamblee, Witten and Wewela, in the opened portion of the said Rosebud Reservation,

---

[22] The Secretary had previously approved the Constitution and Bylaws of the Rosebud Sioux Tribe (App. B, *infra*), pursuant to Section 16 (48 Stat. 987) of the Indian Reorganization Act. That section provides that "[a]ny Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws * * *." Article 1 of the Constitution defined the Tribe's jurisdiction as "the territory within the original confines of the Rosebud Reservation boundaries as established by the act of March 2, 1889, and to such other lands as may hereafter be added thereto under any law of the United States, except as otherwise provided by law." The Rosebud Sioux Tribe has had a law and order system since 1877, suported by Congressional appropriations. 19 Stat. 254, 257 (Art. 9). Its police force was organized in 1879, *Report of Commissioner of Indian Affairs*, 1879, p. 40, and the extensive nature of its law and order system was recognized by this Court in *Ex parte Crow Dog*, 109 U.S. 556. See also *Report of Commissioner of Indian Affairs*, 1881, p. 54. Congress authorized the establishment of Tribal Courts in 1888, 25 Stat. 233, and the Rosebud law and order system continued to function thereafter. *Report of Commissioner of Indian Affairs*, 1897, p. 277 and *Report of Commissioner of Indian Affairs*, 1890, p. 381. After the approval of the Tribal Constitution in 1935, the Tribal Government was reorganized, and the Tribe has continued to exercise jurisdiction throughout the 1889 Reservation over Tribal members. See App. C, *infra*.

which townsites were established by the Department, pursuant to authority contained in the Act of March 2, 1907, *supra*." *Id.* at 2A. The lands encompassed by this recommendation were in Tripp County, opened by the 1907 Act. On January 12, 1938, the Secretary issued an "Order of Restoration," restoring these lands to the Tribe (App. D, *infra*).[23]

2. Other actions confirm this view of the Rosebud Reservation as administered by the Department of the Interior. Department officials have repeatedly treated lands within Mellette, Tripp, Gregory and Lyman Counties, located within the 1889 Reservation boundaries, as reservation lands. This treatment belies the viewpoint of the court of appeals that Todd County alone has constituted the Rosebud Reservation since 1910.

For examples, in 1909, the Department, not having sold portions of the surplus lands made available by the 1904 Act to homesteaders, offered the remainder for sale at public auction. In a letter dated February 8, 1909, to the Commissioner of the General Land Office, the Secretary stated (37 I.D. 442-443):

> It is directed that *all that part of the Rosebud Indian reservation in Gregory County*, South Dakota, opened to settlement and entry by the act of April 23, 1904 (33 Stat. 254), which had not been entered prior to August 8, 1908, will be offered for sale * * *. [Emphasis added.]

The Department used similar language in 1913, directing sale of the lands opened by the 1907 Act:

[23] On August 20, 1964, the Congress placed in trust status certain federal lands "on the Rosebud-Sioux Reservation," which included tract E. ½ of Section 35, T. 42 N., R. 33 W. 6th P.M. in Mellette County. 78 Stat. 560.

Restoration orders, comparable to the 1938 Rosebud Order, were issued for the Colville Reservation, pursuant to a Congressional directive, 70 Stat. 626 (1956), *Seymour* v. *Superintendent*, *supra*, 368 U.S. at 356, and the Klamath River Reservation, *Mattz* v. *Arnett*, 412 U.S. at 496, n. 17 and 505.

> Sir: It is directed that all that *part of the Rosebud Indian Reservation in Tripp County*, South Dakota, opened to settlement and entry by the act of March 2, 1907 (34 Stat. 1230), which had not been disposed of on April 1, 1913, will be offered for sale at public auction * * * [42 I.D. 292].

Communications between Department officials are to the same effect. In April 1913, the Acting Commissioner of Indian Affairs, C. F. Hauke, submitted to the Superintendent of the Rosebud School a request for a report on the possible consequences of reorganizing the administrative structure of the Reservation. C.A. App. IV, Doc. 41.[24] Replying to the request, the Superintendent discussed, among other things, the status of Indian allotments in the various districts (or counties) opened for settlement. He stated (App. IV, Doc. 42, p. 4):

> *These two Districts* [Little White River and Black Pipe (both in Mellette County)] are the most troublesome of any of the Districts *on the Reservation*. The Bad Lands are located largely in these Districts which makes it difficult to go from place to place on account of the bad roads. The Cut Meat District [Todd County] has about 1,332 allotments with 299,120 acres, and a few over 1,000 Indians to look after. While it seems to be a large District, still there is but very little leasing of our Indian lands or allotments, *it being in the closed portion of our Reservation*, and the allotments are most compact with small farms in the District. The Agency has some over 1,200 Indians to look after, and is one of the largest Districts, but the farmer is assisted materially by being located in the Agency. [Emphasis added.][25]

[24] As used in this brief," "C.A. App." refers to the appendix filed in the court of appeals.

[25] This correspondence shows that the distinction between "closed" and "opened" portions of the Reservation is that non-Indians were formally permitted by Congress to enter the Reser-

That same year, the Supervisor of Industries and Agriculture for the Rosebud Reservation submitted a report to the Indian Office in Washington, D.C., regarding his inspection of portions of the Reservation. He stated (C.A. App. IV, Doc. 44, pp. 1-2):

> The reservation is divided into farmers' districts, and I believe an honest effort is being made to induce the Indians to farm; * * * In the *Ponca District* [Gregory and Tripp counties] *at the east end of the reservation* there is a Teacher in Charge residing at the Milk's Camp Day School. His duties are exactly the same as those of the additional farmers.
>
> Practically all of the day school teachers have been raising good gardens for a considerable time. * * * Except in the *Ponca District* [Gregory and Tripp counties] *at the east end of the reservation,* which is a farming district, I do not consider the Rosebud country a farming country. [Emphasis added.]

Moreover, the Report of May 13, 1914, from the Supervisor at Rosebud to the Honorable Cato Sells, Commissioner of Indian Affairs (App. IV, Doc. 51, p. 3), states:

> The [Rosebud] *reservation* is divided into seven farmer districts, each presided over by a farmer paid at a rate of $900 per annum, except the *Ponca district* [Gregory and Tripp counties] in the *extreme eastern end of the reservation,* which is presided over by a teacher-in-charge at $1000 per annum. [Emphasis added.]

Thus, the contemporaneous view of the Department officials was that the reservation boundaries were not changed by the Acts of 1904, 1907 and 1910.

---

vation in one portion (*i.e.*, "opened") while not others (*i.e.*, "closed"). Both parts, however, were administered as the Rosebud Reservation.

More recently, in 1939, the Division of Forestry and Grazing of the Rosebud Reservation forwarded to the Commissioner of Indian Affairs a "map of the Rosebud Indian Reservation showing different types of roads" and identifying important landmarks regarding the location of the roads (*e.g.*, schools, fire look-out stations) (App. E, *infra*). The letter identifies roads and trails constructed by either the County or the Indian Service in Mellette, Tripp, Lyman and Gregory Counties; the location of new schools in Black Pipe (Mellette); the location of fire look-out tower sites in Cedar Butte (Mellette); and the construction of government and private telephone lines in Mellette and Tripp Counties. These facilities all were considered part of the Reservation.

In 1942, the Interior Department's Fish and Wildlife Service undertook a wildlife survey on the Reservation in order to assist the Tribe in managing their resources (App. F, *infra*). The Report on the survey was completed in August 1942 and transmitted to the Commissioner of Indian Affairs in September. The Report contains this description of the Rosebud Reservation (*id.* at 39A-40A):

> The *entire reservation* is included in Tripp, Gregory, Mellette, and Todd Counties, and covers a gross area of 3,555,833 acres. Alienated white lands total 2,468,888 acres of this area. Most of the field work was conducted on the *so called* "Dimished Reservation" in Todd County. This area, including alienated land, totals approximately 894,080 acres. Much of this is checkerboarded although there are some large solid blocks of Indian land. The largest percentage of the diminished reservation is Indian owned. Approximately 7,000 Indians are enrolled in the tribe. [Emphasis added.]

The Bureau of Indian Affairs continued, prior to this law suit, to administer all five counties as part of the Rosebud Reservation. From 1969 through 1974 requests

for Congressional appropriations were based on population statistics which included all Indians living within the exterior boundaries of the 1889 Reservation, and clearly distinguished those from a lesser number living off, but near the Reservation.[26] Various social services were provided to Indians living in all these counties, including child welfare and burial assistance; a BIA outpatient clinic is located in Mellette and Tripp Counties; and housing was provided by BIA or Tribal funding since 1963. Moreover, the Department of Housing and Urban Development, which makes grants only where a tribe has authority to act as a "governmental entity" or "public body" (42 U.S.C. 1460(h)), has been providing financial assistance to the Tribe (Memorandum of the United States as Amicus Curiae supporting petition for certiorari, p. 11). See also Opinion of the Field Solicitor on the exterior boundaries of the Rosebud Reservation in 1972 (C.A. App. IV, Doc. 56).

The agency responsible for administering the Rosebud Reservation, therefore, has greatly regarded the original reservation boundaries as unchanged by the Acts of 1904, 1907, 1910. That understanding is entitled to more weight than it was accorded by the court of appeals, *Mattz* v. *Arnett, supra,* 412 U.S. at 505, and, we believe, is more instructive than the ambiguous legislative history discussed in the following section.

IV. THE LEGISLATIVE HISTORY SHOWS THAT CONGRESS DID NOT CONSIDER QUESTIONS OF JURISDICTION AND IS THEREFORE OF MARGINAL BENEFIT IN THIS CASE

The court of appeals gave primary, if not conclusive, weight to the legislative history of the three Acts (Pet.

[26] See App. A, Brief of the United States as *Amicus Curiae* in the court of appeals below.

App. 9-60).[27] While legislative history may be useful in these inquiries, *DeCoteau, supra,* 420 U.S. at 444-445, we do not believe the history in this case merits the emphasis it enjoyed below. For Congress, in passing these three Acts, at no time addressed the question of jurisdiction. Page after page of the legislative history shows that Congress was concerned with *land* not *jurisdiction.* Thus, that history is at best a slender reed on which to support extinction of most of the Rosebud Reservation.

During the early 1900's there was no reason for Congress to be greatly concerned about jurisdiction. The principal reason for opening the Rosebud Reservation, as the court of appeals recognized (Pet. App. 9, 34, 44), was the desire of settlers for land. This desire was compatible with the interests of States having great reservations within their boundaries, who sought a broader tax base through increased land ownership by non-Indians (*e.g.*, A. 276). Both objectives could be accomplished either by purchase for a lump sum or by purchase through the uncertain-sum-in-trust method. At the same time, the Indians would be exposed to new, presumably more civilized, ideas that would hasten their assimilation into our culture. As that assimilation occurred, and the trust period on allotted lands gradually expired, the Reservations could be abolished. *Mattz, supra,* 412 U.S. at 496.

The debates reflect Congress' lack of attention to jurisdictional matters. Throughout the consideration of these three Acts, Congress discussed the desirability of the lands, the method of payment, the price to be paid by settlers, the need for school lands provisions, and many other matters, but not once addressed the issue of crimi-

[27] A law journal article, written in part by present counsel for South Dakota, had previously reviewed the legislative history in some detail and urged the result reached below. Comment, *New Town, et al.: The Future of an Illusion,* 18 S.D. L. Rev. 85 (1973).

nal and civil jurisdiction within the opened Reservation.[28] Although the court of appeals relied on scattered remarks that suggest abolition of the Reservation, these remarks are necessarily taken from discussions on different subjects and are often contradicted by other references of a similar nature. While exhaustive citation is not necessary, a brief review of materials not cited by the courts of appeals should demonstrate the uncertainty surrounding the legislative history in this case.

1. The view of the legislative history taken by the court of appeals proceeds from the assumption that the Acts of 1904, 1907, and 1910 were extensions of the unratified 1901 Agreement (Pet. App. 22, 23, 25, 38, 40, 48). Although we agree that the 1901 Agreement and the three Acts had a common purpose of providing Indian lands to white settlers, the differences between them merit further attention.

In 1901, the Rosebud Sioux Tribe agreed by a three-fourths majority of the adult male population to "cede, surrender, grant, and convey to the United States all their claim, right, title, and interest" in all that part of the Reservation located in Gregory County, South Dakota, remaining unallotted, in return for a lump sum pay-

[28] Jurisdiction is mentioned, albeit tangentially, in the debate on the liquor provision in the 1910 Act. That provision made all land in Mellette County subject to the liquor laws applicable in "Indian Country." Although the courts below suggested that the provision would be unnecessary if the Reservation were continued (Pet. App. 56-58, 102-103), that suggestion is erroneous. As the debates show, 45 Cong. Rec. 5460-5464 (1910), members of Congress were fully aware of this Court's decision in *In re Heff*, 197 U.S. 488, holding that Indian allottees were subject to *state* liquor laws. While opponents of the provision believed that state jurisdiction was sufficient, supporters noted that dependency on state liquor laws presented a grave risk to Indian well-being (45 Cong. Rec. 5460-5464 (1910)). Thus federal control was expressly continued for twenty-five years, the trust period on Indian allotments, at which time abolition of the Reservation could be considered.

ment of $1,040,000 (Pet. App. 14 and 15, n. 21). This agreement, which was negotiated by the Interior Department's Inspector, James McLaughlin, was to be effective "when accepted and ratified by the Congress of the United States" (id. at 15).[29] That ratification of course never occurred.

Three years later, after several previous bills had failed to pass, a new bill was introduced which unilaterally "amended and modified" the 1901 Agreement. The primary amendments were that (1) the Indians were not guaranteed a lump sum consideration, except for Sections 16 and 36 (school sections), but were to be paid as lands were actually sold (Section 6, Pet. App. 120); (2) the United States did not guarantee to find purchasers but agreed only to "act as trustee for said Indians to dispose of said lands" (Section 6, Pet. App. 120); and (3) limitations were placed on the distribution of the proceeds to the Indians (compare Art. III, Pet. App. 118 with Art. III, Pet. App. 115-116). In addition, the 1904 bill eliminated any reference to tribal consent by three-quarters of the male adults, and included a provision granting Sections 16 and 36 to the State for common school purposes (Section 4, Pet. App. 120). It was enacted on April 23, 1904, 33 Stat. 254.[30]

Although the court of appeals stated that "[t]he 1904 Act, incorporating the entire text of the 1901 Agreement (save for the lump-sum provision) passed under the circumstances [previously discussed], was obviously an outgrowth of and a continuation of the objectives of the 1901

[29] Approval of three fourths of all the adult male Indians, before an agreement was considered valid, was required by the Treaty of 1868, 15 Stat. 635, 639 (Art. XII) (Pet. App. 14, n. 20).

[30] Despite these numerous and material changes the court of appeals somehow concluded that the 1904 Act "amended the 1901 Agreement solely with respect to the method of payment" (Pet. App. 23).

Agreement" (Pet. App. 25), that conclusion, while technically correct, is misleading. The 1901 Agreement itself does not evidence a specific intention to cut down reservation boundaries; at most, that intention could be presumed from the bilateral nature of the agreement and by the provisions for outright purchase of the lands for an indicated sum. *DeCoteau, supra.* That presumption is unavailing, however, once the nature of the agreement and the method of payment are changed. The objective of securing new lands for non-Indian settlers surely was continued, but that is not material to the question of jurisdiction over the settled lands.

2. The court of appeals also proceeded on the assumption that the terms "reservation" and "diminished reservation" had one settled, precise meaning throughout the legislative history. Thus, the court relied heavily on various references to the "reservation" and the "diminished reservation" (Pet. App. 12, 13, 14, 26-28, 39, 40-41, 44, 45, 51-52, 54, 57, 58, 59) to show that the exterior boundaries of the Rosebud Reservation had been cut back. Consideration of similar references in the legislative history, however, indicates that the terms were often used in shorthand fashion without the precision that the court of appeals supposed.

For example, the term "diminished reservation," as used in the 1910 Act, appears to include not only Todd County (the closed portion) but also Mellette County (the portion to be opened). The May 30, 1910 Rosebud Act provides in part, 36 Stat. 449 (Section 1):

> [A]ny Indians to whom *allotments* have been made *on the tract to be ceded* [Mellette County] may, in case they elect to do so *before* said lands are offered for sale, relinquish same and select allotments in lieu thereof on the *diminished reservation* * * *. [Emphasis added.]

Section 2 of the Act, however, directs the Secretary to dispose of the unallotted lands in Mellette County after a presidential proclamation, provided (*ibid*):

> That prior to said proclamation the *allotments within the portion* of the said Rosebud Reservation *to be disposed of* [Mellette County] as prescribed herein shall have been completed * * *. [Emphasis added.]

Since the Indians could select new allotments in Mellette County prior to the presidential proclamation, as well as in Todd County, "diminished reservation" seems to refer not merely to the closed portion of the Reservation but to the " 'area of the reservation * * * diminished in size by reason of the settlement of the unalloted lands by non-Indians.' " *Putnam v. United States,* 248 F. 2d 292, 295 (C.A. 8). In *United States ex rel. Condon* v. *Erickson,* 478 F. 2d 684, 687 (C.A. 8), the court of appeals recognized that a similar use of the term could mean that "the reservation * * * retained its original exterior boundaries even though the portion held by Indians was diminished by virtue of the sale of lands within the boundaries to outsiders. The court then continued: "Indeed, this would be consistent with 18 U.S.C. § 1151 defining Indian Country as lands within the limits of a reservation *notwithstanding the issuance of any patent*" (*ibid.*; emphasis in original).[31]

---

[31] In a November 12, 1910, letter regarding the 1910 Act, the Assistant Commissioner of Indian Affairs stated (C.A. App. IV. Doc. 40B):

"The diminished reservation,—that is, the lands remaining *after* the allotments [to Indians] and sale of lands [to homesteaders] referred to, *will consist of about 40 townships,* which may be used to provide allotments until such time as there are no unallotted lands therein." [Emphasis added.]

In 1910 Mellette County consisted of 837,125 acres (36 full townships) and a number of irregularly sized townships. Thousands of these acres had already been allotted to Indians *prior* to the opening, and could not "be used to provide allotments * * *"

At other times, "diminished reservation" seems to mean only the closed portion of the Reservation. The Report prepared by the Fish and Wildlife Service in 1942 (App. F, *infra*, at 39A), for example, states that "[t]he entire [Rosebud] reservation is included in Tripp, Gregory, Mellette, and Todd Counties," and notes that "[m]ost of the field work was conducted on the so called 'Diminished Reservation' in Todd County." This is the same portion of the Reservation that the Superintendent of Rosebud School described as "the closed portion of our Reservation * * *" (*supra*, p. 35).

Construction of the term "reservation" also leads in various directions. While some references to the Rosebud "reservation" appear compatible with the court of appeals' analysis, other references do not. Thus, within a year after the 1904 Act was passed, the homesteaders in Gregory County petitioned Congress for an extension of time to establish their residence upon lands opened to settlement. The Senate and House Committee Reports both refer to the lands in question as "*lands within the confines of that part of the Rosebud Indian Reservation* thrown open to entry * * *" (emphasis added). H.R. Rep. No. 4198, 58th Cong., 3d Sess. (1905); S. Rep. No. 2760, 58th Cong., 3d Sess. (1905) And, after describing the need for the legislation in light of bad

after the opening. To find "about 40 townships" available for allotment, therefore, it would be necessary go beyond Mellette County.

In 1911, a few months after Mellette County was opened to settlement, there existed in Todd County less than 220,000 acres that could "be used to provide allotments * * *" to Indians, S. Rep. No. 1166, 62d Cong., 3d Sess. 4 (1913), the remainder having long since been allotted or reserved for agency and school purposes. The remaining 700,000 acres referred to by the Assistant Commissioner appears to have been an estimate from existing Department records of the land remaining throughout the entire 1889 Reservation for the purpose of allotment, "diminished" by the lands already alloted to Indians or occupied by homesteaders.

climatic conditions causing delays in payments by homesteaders, the Senate Committee Report states (*id.* at 2):

> A further fact which influences the committee in making a favorable report is that these settlers are under conditions different to those affecting the ordinary homestead settler. Entrymen on the reservations in question have to pay $4 an acre in the case of the Rosebud Reservation * * *.

This legislation became law on February 7, 1905, 33 Stat. 700.

On March 3, 1909, Congress enacted an appropriation for the Indian Department for the fiscal year ending June 30, 1910. 35 Stat. 781. Under Section II of the Act, Congress made appropriations for reservations within various states, including South Dakota. 35 Stat. 808. Additionally, Congress authorized the Secretary to permit the establishment of catholic missions "on the Rosebud Reservation." 35 Stat. 809. The missions were to be located as follows (*ibid.*):

> *On the Rosebud Reservation*, at or near Saint Francis Mission * * *; also, at or near Red Leaf Camp * * *; also, at or near Oak Creek * * *; also, at or near Antelope Creek * * *; also, at or near Little White River * * *; *also, at or near Ponca Creek*. [Emphasis added.]

Ponca Creek is located in Gregory County, opened by the Act of 1904.

In 1911 Congress had before it a bill for relief of settlers in the area opened by the Act of 1907. Representative Stephens, who called up the bill, described it as a "bill (H.R. 13044) extending the time of payment to certain homesteaders in the Rosebud and other Indian reservations in South and North Dakota * * *" (47 Cong. Rec. 3840 (1911)) and then stated (*id.* at 3841):

> Mr. Speaker, we have gone at some length into the question of the great drought-striken country of the West in the bill which has already passed the House and we have shown the House beyond all question that a severe drought has extended all over the West, including South Dakota. *The Rosebud Reservation, where these lands are situated,* is now, in the main, in the hands of settlers * * *. [Emphasis added.]

The bill became law on April 17, 1911, 37 Stat. 21.

In 1918, Mr. Gandy, a representative from South Dakota, introduced a bill (H.R. 12082) ("authorizing the sale of certain lands in South Dakota for cemetery purposes." 56 Cong. Rec. 6469 (1918). The bill was referred to the Committee on Indian Affairs, which reported (H.R. Rep. No. 742, 65th Cong., 2d Sess. 1 (1918)):

> This is a bill to authorize the sale of 10 acres of tribal land *on Rosebud Indian Reservation in Mellette County S. Dak., and belonging to the Rosebud Tribe of Indians,* to the White River Cemetery Co. * * * It is provided that the Secretary of the Interior shall sell the land * * * and that the money received shall be deposited in the Treasury of the United States to the credit of the Rosebud Tribe of Indians. [Emphasis added.]

In the following year, during debate on a bill to pay for fire damages on the Todd County portion of the Rosebud Reservation, 58 Cong. Rec. 4933 (1919), Mr. Gandy observed that "[t]he Rosebud Reservation embraces about 7,000 square miles." However, Todd County, which the Eighth Circuit found to be the *only* portion of the original Rosebud Reservation remaining in 1919, is less than 1,500 square miles (approximately 800,000 acres). The 1889 Rosebud Reservation, undiminished in size, is in excess of 5,000 square miles (3,228,160 acres).

In December 1910, the Town of White River, located in Mellette County, South Dakota, sought approval from the Federal Power Commission for construction of an electric power line across Indian lands. The FPC notified the Town that if "tribal Indian lands are to be crossed * * * prior approval of the proper reservation authorities" was required (App. G, *infra,* p. 41A). The FPC then notified the Secretary of the Interior that the "Town of White River, South Dakota, has filed with the Commission an application for license * * * affecting lands of the United States within the Rosebud Indian Reservation" (App. G, *infra,* p. 42A). Thus, both the Town of White River and the FPC acknowledged that power line construction in Mellette County would affect lands within the Reservation and was subject to approval of "reservation authorities."

In June, 1941, the United States filed a Declaration of Taking in the United States District Court for the District of South Dakota, in order to acquire land "for the use of the United States of America, * * * in connection *with the Two Kettle Project on the Rosebud Indian Reservation in South Dakota* * * *" (App. II, *infra,* pp. 44A, 50A) (emphasis added.) The lands acquired were described the District Court as (*id.* at 50A)

> * * * containing 610.10 acres of land, more or less, *in Mellette County,* South Dakota, designated as Tract No. 189 of the Two Kettle Project *on the Rosebud Indian Reservation* [Emphasis added.]

The District Court entered its Findings of Fact and Conclusions of Law, as well as its final judgment, on December 12, 1941 (*id.* at 44A).

In 1945 Senator Bushfield, a Senator from South Dakota, introduced a bill (S. 1564) directing the Secretary of the Interior to issue a fee patent to Shadrick Ponca, a Rosebud Sioux Indian. The relevant Committee Report stated (S. Rep. No. 1442, 79th Cong., 2d Sess. 1 (1946)):

> Shadrick Ponca, is the sole heir of his deceased mother, Millie or Wing Ponca, who bequeathed to him her allotted lands *on the Rosebud Indian Reservation, S. Dak., described in this bill, which lands are situated in Gregory County, S. Dak.*, a distance of more than 50 miles from applicant's home in the village of Okreek, in Todd County, S. Dak., where applicant, Shadrick Ponca, lives in his own home * * *.[32]

Two years later, Senator Bushfield asked the Commissioner of Indian Affairs for a report on the application of Charlotte Gordon Odden for a patent in fee covering her allotment in Tripp County, South Dakota. The Commissioner stated in his letter of August 21, 1947 (App. I, *infra*):

> Receipt is acknowledged of your letter of August 11 about Mrs. Charlotte Gordon Odden's application for a patent in fee covering her 160-acre allotment, No. 4248, *on the Rosebud Reservation, described as* the SW ¼ sec. 11, T. 96N., R. 74W., 5th P.M., *Tripp County, South Dakota.* [Emphasis added.]

The inconsistency in these references is not surprising in view of the fact, discussed previously, that Congress did not squarely face the question of jurisdiction over the opened lands; other more controversial matters claimed its attention. It is inappropriate, therefore, to select certain statements from the mass of ambiguous materials and draw inferences from these, as the courts below did.[33]

---

[32] The bill was passed by the Senate on June 14, 1946, 92 Cong. Rec. 6920, introduced into the House, 92 Cong. Rec. Rec. 7120, and referred to the House Committee on Indian Affairs. 92 Cong. Rec. 7399-7400. There was no further action during the 79th Congress, and although the South Dakota Senator introduced it again in the 80th Congress, 93 Cong. Rec. 3219 (1947), it did not become law.

[33] We also think the court of appeals misapprehended the significance of the fact that non-Indians and Indians live within the

Read in its entirety, the legislative history does not show a clear intent to cut back the Reservation boundaries.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Eighth Circuit should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER R. TAFT,
Assistant Attorney General.

H. BARTOW FARR,
Assistant to the Solicitor General.

EDMUND B. CLARK,
NEIL T. PROTO,
Attorneys.

SEPTEMBER 1976.

Reservation and utilize State and Federal facilities or benefits. Neither fact is inconsistent with the continued existence of the Rosebud Reservation. Only 19% of the Flathead Tribe live within the Flathead Reservation in Montana. *Confederated Salish and Kootenai Tribes* v. *Namen*, 380 F. Supp. 452, 457, n. 5 (D. Mont.), and considerable expenditures by both the State and Federal governments within the area provide benefits to all residents. *Confederated Salish and Kootenai Tribes* v. *Moe*, 392 F. Supp. 1297, 1313-1314 (D. Mont.). Similarly, the entire City of Tacoma, Washington, is within an Indian Reservation (Brief of the United States as Amicus Curiae in Support of Petition for Rehearing and Rehearing en Banc, p. 95 (filed in court of appeal); see also *United States* v. *Washington*, 496 F.2d 620 (C.A. 9), certiorari denied, 419 U.S. 1032), and this Court recognized the presence of non-Indians within the Colville Reservation. *Seymour* v. *Superintendent, supra*, 368 U.S. at 358-359. This pattern represents nothing more than the logical consequence of Acts "opening" Indian reservations to white settlement around the turn of the century.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

No. 82-1253

HERMAN S. SOLEM, WARDEN, and MARK V. MEIERHENRY,
ATTORNEY GENERAL OF SOUTH DAKOTA, PETITIONERS

v.

JOHN BARTLETT

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

The special relationship of the United States to the Indian Tribes is too familiar to require restatement. It precedes the Constitution, was confirmed by it, and is evidenced in a long course of treaties and Executive Orders. The attendant national powers and duties are particularized in a multitude of Acts of Congress. Of immediate relevance here is the status of a remnant of the Great Sioux Reservation—itself established by treaty in 1868 and later reduced and broken up into segments by congressional legislation in 1889—as it may have been

further diminished by an Act of 1908. The result will affect, inter alia, the continuing federal responsibility for law enforcement within the disputed area under 18 U.S.C. 1152 and 1153.

In light of this continuing federal interest, the Court invited the Solicitor General to file a brief expressing the views of the United States at the jurisdictional stage. Now that the case is to be heard on the merits, we deem it appropriate to make a further submission.

STATEMENT

1. Respondent John Bartlett, an enrolled member of the Cheyenne River Sioux Tribe, pleaded guilty in 1979 in a South Dakota state court to a charge of attempted rape. The crime took place on an alienated parcel of land in Eagle Butte, South Dakota, which lies within the portion of the original Cheyenne River Indian Reservation that was opened to settlement by the Act of May 29, 1908, ch. 218, 35 Stat. 460 *et seq.* Pet. App. A2-A3.[1] After Bartlett's request for post-conviction relief was denied by the South Dakota court in which he had entered his plea (Pet. App. A2 n.1), he filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. (Supp. V) 2254, in the United States District Court for the District of South Dakota. There, he contended that the crime was committed in "Indian country", as defined in 18 U.S.C. (Supp. V) 1151, and that, accordingly, exclusive jurisdiction to prosecute

[1] The Reservation was once part of the Great Sioux Reservation, established by the Treaty of Apr. 29, 1868, 15 Stat. 635 *et seq.*, from which the Black Hills area was taken in 1877. Act of Feb. 28, 1877, ch. 72, 19 Stat. 254 *et seq.* The Cheyenne River Reservation emerged as a separate unit in 1889, when another substantial portion of the large Reservation was ceded and the remainder was carved up into six distinct Reservations. Act of Mar. 2, 1889, ch. 405, 25 Stat. 888 *et seq.* See *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 589 (1977). As defined in 1889, the Cheyenne Sioux Reservation comprised about 2.8 million acres. The area opened in 1908 embraces some 1.6 million acres.

him rested with the Sioux Tribe or the federal government. The State of South Dakota, on the other hand, argued that the 1908 Act terminated the reservation status of the portion opened to sale to non-Indians and divested the Tribe and the United States of jurisdiction over alienated lands in that area. Pet. App. A2-A3.[2]

2. The district court applied the rulings of the Court of Appeals for the Eighth Circuit in *United States ex rel. Condon* v. *Erickson*, 478 F.2d 684 (1973), and *United States* v. *Dupris*, 612 F.2d 319 (1979), vacated and remanded, 446 U.S. 980 (1980), to the effect that the Cheyenne River Indian Reservation was not disestablished or diminished by the 1908 Act. Therefore, despite contrary decisions by the South Dakota Supreme Court,[3] the district court held that the State was precluded from exercising its criminal jurisdiction over Bartlett since the opened portion remained "Indian country" within the meaning of 18 U.S.C. (Supp. V) 1151. The court granted the writ of habeas corpus, but stayed the effect of its decision pending the outcome of any appeal. Pet. App. A1-A8, A96-A97.

3. The court of appeals, sitting en banc, affirmed (Pet. App. A9-A11), Judges McMillian and Arnold dissenting (Pet. App. A11-A12).[4] The court declined to overrule

[2] It was correctly assumed by both parties that, having chosen not to invoke the option offered by Public Law 280 (Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 *et seq.*, as amended in 1968, now 18 U.S.C. 1162, 25 U.S.C. 1321-1326, 28 U.S.C. 1360), South Dakota could exercise no criminal jurisdiction over a tribal member within "Indian country," which includes alienated parcels embraced by federally recognized Indian Reservations. See *Williams* v. *United States*, 327 U.S. 711, 714 (1946); *Seymour* v. *Superintendent*, 368 U.S. 351 (1962); *United States* v. *John*, 437 U.S. 634 (1978).

[3] *South Dakota* v. *Janis*, 317 N.W.2d 133 (1982); *Stankey* v. *Waddell*, 256 N.W.2d 117 (S.D. 1977).

[4] The United States, the Cheyenne River Sioux Tribe, and the Standing Sioux Tribe participated as amici curiae in support of Bartlett. The Counties of Dewey, Corson and Ziebach, South Dakota, and Sioux County, North Dakota, participated as amici curiae in support of the State.

United States v. *Dupris*, and found that *Dupris*, *United States* v. *Long Elk*, 565 F.2d 1032 (8th Cir. 1977), and *United States ex rel. Condon* v. *Erickson*, were consistent with this Court's decision in *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975), and *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977). Pet. A10-A11.

INTRODUCTION AND SUMMARY OF ARGUMENT

The only issue before the Court is the continuing status as "Indian country" of a portion of one Indian Reservation in South Dakota. That question has been squarely decided against the claim of "diminishment" or "disestablishment" in at least three holdings of the Court of Appeals for the Eighth Circuit, *United States ex rel. Condon* v. *Erickson*, 478 F.2d 684 (1973); *United States* v. *Dupris*, 612 F.2d 319 (1979), and the present case. See also, *United States* v. *Fay*, 668 F.2d 375 (1981), affirming in part a criminal conviction under 18 U.S.C. 1153 in respect of offenses committed at Eagle Butte without discussion of the jurisdictional issue. The first of these decisions has been cited and quoted with approval in *Mattz* v. *Arnett*, 412 U.S. 481, 497 n.19, 505 (1973), a precedent since reaffirmed by this Court. See *DeCoteau* v. *District County Court*, 420 U.S. 425, 444, 447-449 (1975); *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 586-587 (1977). What is more, on two occasions, the Eighth Circuit has expressly revisited its seminal *Condon* decision in light of this Court's more recent *DeCoteau* and *Rosebud* rulings and the contrary holdings of the South Dakota Supreme Court and has determined to adhere to its conclusion. *E.g.*, *United States* v. *Long Elk*, 565 F.2d 1032, 1034-1040 & n.10 (1977); *United States* v. *Dupris*, 612 F.2d at 321-323. And, now, after reconsidering the matter en banc, that court has firmly settled the question.

In this situation, there would normally be no occasion for further review. In *Seymour* v. *Superintendent*, 368 U.S. 351 (1962), *Mattz*, *DeCoteau* and *Rosebud*, this Court announced the governing guidelines. These have remained unchanged. As the Court was at pains to declare in *DeCoteau* (420 U.S. at 447), "[w]e adhere without qualification to both holdings [*Seymour* and *Mattz*] and the reasoning of those decisions." No one can doubt that the court below has been meticulous in its attempt faithfully to apply those standards in each situation. It was, we stress, the Eighth Circuit that first found diminishment in the case of the Rosebud Reservation. *Rosebud Sioux Tribe* v. *Kneip*, 521 F.2d 87 (1975), aff'd, 430 U.S. 584 (1977). The court of appeals was then credited with a "careful and comprehensive opinion." 430 U.S. at 585. After giving the matter equally full consideration on three occasions, it cannot be faulted for reaching a different result, on different facts, in the case of the Cheyenne River Reservation.

We cannot suppose this Court is now inclined to reconsider its own decisions and to revisit every lower court ruling implementing them—especially those previously cited with approval.[5] Acquiescing in that invitation—apparently tendered by petitioners—would impose an awesome burden and entail very unsettling consequences for all concerned, Indians and non-Indians alike. Rather, we assume the Court has determined to review the present case because of the conflicting decisions of the South Dakota Supreme Court. *Stankey* v. *Waddell*, 256 N.W.2d 117 (1977); *South Dakota* v. *Janis*, 317 N.W.2d 133 (1982). Thus far, that court has declined to accept the ruling of the federal appellate court as settling this issue of federal law. Apparently, the South Dakota Supreme Court was most recently emboldened (in *Janis*) by this

[5] In *Mattz*, this Court listed the 1908 Act involved here as an example of an "opening" statute that did not work disestablishment and approvingly cited the Eighth Circuit's *Condon* decision, followed in this case. 412 U.S. at 497 n.19, 505 n.23.

Court's action (446 U.S. 980 (1970)) vacating the Eighth Circuit's *Dupris* decision as probably moot.[6] See 317 N.W.2d at 137-138. At all events, now that the Court has granted review, it is to be hoped that a clear message will emerge, discouraging other state courts from prolonging disruptive controversies over the status of Indian Reservations. We urge the Court to re-affirm the controlling standards and to conclude that they were correctly applied by the court of appeals.

A.

We begin by re-examining the Court's past decisions in an attempt to distill the general principles that govern issues of Reservation "termination," "disestablishment," or "diminishment." The critical question remains whether the statute invoked worked an immediate and irrevocable cession, or merely opened up a part of the Reservation to purchase by settlers, with the expectation that, in due course, the entire opened area would be acquired and then separated from the remaining Indian territory. Our submission is that where such an opening scheme substantially failed and a significant portion of the opened lands remained unsold when Congress changed policy and halted sales, the area retains Reservation status.

B.

Applying these guidelines to the present case, we conclude that the Cheyenne River Reservation has not been disestablished or diminished. The Act of 1908 involves no outright cession, nor even any agreement by the Tribe. It is, rather, a typical "opening" statute, indistinguishable from the legislation considered in *Seymour* and *Mattz*. And, unlike the result in *Rosebud*, most of the

[6] On remand, the case was ultimately mooted by the court of appeals' direction to the district court to grant the government's motion to dismiss the information against Dupris. 664 F.2d 169 (1981).

opened lands were never sold and were ultimately "restored" to full Reservation status. In other respects, also, the opened area of the Cheyenne River Reservation has remained Indian. In these circumstances, it seems consistent with both the historic intent of Congress and more recent legislative policy to preserve the original boundaries of the Reservation.

ARGUMENT

A. The Governing Principles

1. In considering questions relating to the "termination," "disestablishment" or "diminishment" [7] of Indian Reservations, we must remember that they almost inevitably arise out of congressional legislation enacted near the turn of the last Century, a time when the Political Branches were wholly committed to a policy designed, in due course, to liquidate the Reservation system and accomplish the assimilation of the Indian. The first step, exemplified by the Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388 *et seq.*, was to encourage—and shortly to compel—the Indian to abandon his roaming habits, his communal life, his "tribalism," and to become a self-sufficient farmer, tied to a homestead.[8] To that end, property ownership was to be individualized,

[7] Like Petitioners, we speak of "diminishment" as synonymous with "disestablishment" and "termination," but as applied to a discrete portion, rather than the whole of the Reservation. So used, all three terms imply that the affected area has entirely and permanently lost its Reservation status. In the case of "diminishment," the affected portion is jurisdictionally removed from the subsisting Reservation, whose boundaries are redrawn to exclude that area. It does not, of course, follow that the same meaning should be attributed to the word "diminished" whenever it occurs in Legislative or Executive Branch documents.

[8] There were, to be sure, much earlier experiments with allotment, mainly with the same objectives as the later legislation. But few such plans were fully carried out. See F. Cohen, *Handbook of Federal Indian Law* 98-102, 129-130 (1982 ed.).

and the not unimportant side benefit of allotting the Reservation land among the members would be to open up the substantial "surplus" to white settlers. Although the precise mechanisms varied, the ultimate objectives were always the same: "educating" and "civilizing" the Indian, relieving the federal Treasury of burdensome annual subsidy payments, and releasing "unneeded" tribal land for exploitation by others. In every case, moreover, the expectation was that, sooner or later, perhaps within a generation, the Tribe and its Reservation would cease to exist. See generally, F. Cohen, *Handbook of Federal Indian Law* 206-217 (1942); J. Kinney, *A Continent Lost—A Civilization Won* (1937); D. Otis, *History of the Allotment Policy*, reprinted in Hearings on H.R. *7902 Before the House Comm. on Indian Affairs*, 73d Cong., 2d Sess., Pt. 9, at 428 *et seq.* (1934). See also, *Montana* v. *United States*, 450 U.S. 544, 559-560 n.9 (1981).

This perception might lead us to view as disingenuous all attempts at pursuing the exact intent of Congress in the period of 1890 to 1910 when it allotted and opened up particular Reservations. Disregarding fine points, one might be tempted to rush to the conclusion that the Congressional purpose was plain enough in each instance: termination or "disestablishment" of the Reservation, merely preserving for a limited time in protected status individual Indian homesteads. The upshot of this indiscriminate approach would be to end the Reservation status of every Reservation that has ever been allotted—some four-fifths of the total.[9] While individual allotments held

[9] According to one compilation, of the 229 Indian Reservations existing in 1936 (which comprised approximately 136 million acres in 1887), only 48 (totalling about 22 million acres) escaped allotment and opening up. With the notable exception of the Navajo Reservation (encompassing some 16 million acres in 1936), most of the unallotted Reservations were relatively small. See J. Kinney, *A Continent Lost—A Civilization Won*, App. at 350 (table), 351-356 (table) (1937).

in trust or subject to restrictions would continue to be "Indian country" (see 18 U.S.C. (Supp V) 1151(b)), the territorial integrity of most Reservations would be destroyed, tribal governments would lose much of their reason for being, and all the problems associated with "checkerboard" jurisdiction would emerge.

To acquiesce in these results would break many solemn treaty promises made to the Indian, and, at this late date, the unsettling effect would be extreme. But the dispositive consideration is that reading an intent immediately to disestablish into every turn of the century statute providing for the allotment and opening up of Indian Reservations would attribute to Congress and the Executive a more callous disregard of Indian welfare than the record justifies. Latter-day popular history exaggerates when it portrays the Government of the United States as wholly captive to the "familiar forces" of the times, ready to take the Indian's land by any means and without concern for his fate. As this Court stressed in *Mattz* v. *Arnett*, 412 U.S. 481, 496 (1973), although elimination of separate Reservations was the *ultimate* goal, the actual consequence of allotment was often to "continue the reservation system" for a limited time. See, also, *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463, 478-479 (1976).

So, also, to hold that all Reservations opened up in this period were then permanently disestablished would trivialize the effect of the Indian Reorganization Act of 1934, 25 U.S.C. (& Supp. V) 461 *et seq.* (IRA), and more recent legislation, which radically changed our approach to Indian affairs. See, *e.g.*, *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 151-158 (1973); *Mattz*, 412 U.S. at 496 & nn.17 and 18; *Moe*, 425 U.S. at 472-478; *Bryan* v. *Itasca County*, 426 U.S. 373, 388-389 n.14 (1976). Except as it is unavoidable, we ought not conclude that the remedy came too late for most Indians and most Reservations. This Court "cannot remake history." *DeCoteau* v. *District County Court*, 420 U.S. 425, 449

(1975); *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 615 (1977). But, where implementation was not completed, the Court need not carry forward into the 1980s a policy so firmly repudiated by Congress since the 1930s. See *Moe*, 425 U.S. at 478-479.

This is not "revisionism." As early as 1884 this Court entertained "no doubt" that, until the lands opened to settlers were sold, the Indians remained the equitable owners and that such areas could not be deemed "public lands." *United States* v. *Brindle*, 110 U.S. 688, 693 (1884). A few years later, the reserved status of similar lands was held to defeat a state's claim to included school sections. *Minnesota* v. *Hitchcock*, 185 U.S. 373, 394-402 (1902).[10] See, also, *United States* v. *Thomas*, 151 U.S. 577 (1894); *Wisconsin* v. *Hitchcock*, 201 U.S. 202 (1906). By 1909, the Court had established a presumption against termination or diminishment of Reservations and the elimination of the protective federal umbrella. *United States* v. *Celestine*, 215 U.S. 278, 285-287, 290-291; *United States* v. *Sutton*, 215 U.S. 291, 294-295. See, also, *Spalding* v. *Chandler*, 160 U.S. 394, 403-405 (1896). And, in the next three decades, there followed a host of decisions reflecting the same solicitude to maintain the special status of Indian land. *E.g.*, *Hollowell* v. *United States*, 221 U.S. 317 (1911); *Choate* v. *Trapp*, 224 U.S. 664 (1912); *Ex parte Webb*, 225 U.S. 663 (1912); *Donnelly* v. *United States*, 228 U.S. 243 (1913); *United States* v. *Mille Lac Band of Chippewas*, 229 U.S. 498, 509 (1913); *United States* v. *Sandoval*, 231 U.S. 28 (1913) (disapproving *United States* v. *Joseph*, 94 U.S. 614 (1877)); *United States* v. *Pelican*, 232 U.S. 442 (1914); *United States* v. *Nice*, 241 U.S. 591 (1916) (overruling *In re Heff*, 197 U.S. 488 (1905)); *United*

[10] Unlike some later opening legislation, the 1889 Act involved in *Minnesota* did not contain a special "school provision," stipulating outright purchase by the United States of Sections 16 and 36 and conveyance to the State. See n.14, *infra*.

States v. *Soldana*, 246 U.S. 530 (1918); *Ash Sheep Co.* v. *United States*, 252 U.S. 159 (1920); *United States* v. *Candelaria*, 271 U.S. 432 (1926); *United States* v. *Ramsey*, 271 U.S. 467 (1926); *United States* v. *Chavez*, 290 U.S. 357 (1933); *United States* v. *McGowan*, 302 U.S. 535 (1938).

These early precedents make clear that the Court was adhering to a consistent approach when, more recently, it expressly affirmed the principle that allotment and opening up of tribal lands does not presumptively end the Reservation or reduce its boundaries. *Seymour* v. *Superintendent*, 368 U.S. 351 (1962); *Mattz* v. *Arnett*, *supra*; *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. at 478-479. That remains the rule today, as the Court summed it up in *DeCoteau*, 420 U.S. at 444:

> This Court does not lightly conclude that an Indian reservation has been terminated. "[W]hen Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." *United States* v. *Celestine*, 215 U.S. 278, 285. The congressional intent must be clear, to overcome "the general rule that '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.'" *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 174, quoting *Carpenter v. Shaw*, 280 U.S. 363, 367. Accordingly, the Court requires that the "congressional determination to terminate * * * be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz* v. *Arnett*, 412 U.S., at 505. See also *Seymour* v. *Superintendent*, 368 U.S. 351, and *United States* v. *Nice*, 241 U.S. 591. In particular, we have stressed that reservation status may survive the mere opening of a reservation to settlement, even when the moneys paid for the land

> by the settlers are placed in trust by the Government. *Mattz* v. *Arnett*, *supra*, and *Seymour* v. *Superintendent*, supra.

See, also, *Rosebud*, 430 U.S. at 586-587 ("The mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation status."); cf. *United States* v. *John*, 437 U.S. 634 (1978).

To be sure, as *DeCoteau* and *Rosebud* illustrate, there are instances in which a Reservation must be found to have been irrevocably terminated or diminished. See pp. 14-17, *infra*. But the teaching of this Court over three-quarters of a century remains that such a finding requires very clear evidence of congressional intent to effect a present—and not merely an eventual—dissolution or dismemberment of the Reservation. In assessing that intent, we must of course be attentive to the contemporary understanding. But, again, it is essential to distinguish future expectations from immediate consequences.[11]

2. How then do we distinguish betwen action effectively ending the Reservation status of the whole or a part of recognized Indian lands and a mere opening up of such lands? As we have said, legislation enacted be-

[11] In this context, it is important to remember that the only parties to any cession were the Tribe and the United States. Future settlers, albeit intended beneficiaries, can claim only what the Congress secured, not some larger immunity they may have supposed would attach to their acquisition of surplus Indian land. At all events, the "legitimate expectations" of white settlers can be accommodated without destroying the Reservation status of opened areas. See *Montana* v. *United States*, 450 U.S. at 559-561 & n.9. But, whatever the equities may be in favor of individual holders of "fee" parcels who are challenging Reesrvation ordinances, no comparable claim can be asserted by the state and its counties. They plainly were not parties, directly or indirectly, to any agreement or legislation touching the status of the Reservation. The interest the states and counties now assert—seldom clearly articulated—cannot help us in determining the original understanding.

tween 1890 and 1910 was written, often carelessly, in the expectation that the entire Reservation system would be dismantled within a relatively short span. And it is equally clear that "Reservation status" for alienated lands was not yet a familiar concept.[12] Accordingly, we should not be surprised, in most cases, to find no express legislative discussion of Reservation status or Reservation boundaries as affected by opening up of tribal lands for sale to settlers. In the climate of the times, the only meaningful question is whether the legislation meant to accomplish a *present, unequivocal* and *irrevocable* transfer of Reservation lands from the Tribe to the United States.

a. In the treaty days, before 1871, such cessions were, of course, quite frequent. Even though part or even the whole of the "price" was often to be paid in installments (whether in money or in kind, or both) over several

[12] At the time, the usual focus was as to whether former tribal lands remained "Indian country" for purposes of exercising federal criminal jurisdiction and prosecuting violations of federal liquor law that were restricted to "Indian country." The prevailing view was that fully alienated tracts, including unrestricted allotments of tribal members, ceased to be "Indian country." *E.g., Bates* v. *Clark*, 95 U.S. 204 (1877); *Dick* v. *United States*, 208 U.S. 340 (1908); *Clairmont* v. *United States*, 225 U.S. 551 (1912). It was only in 1932 (Act of June 28, 1932, ch. 284, 47 Stat. 336 *et seq.*) that ceded rights-of-way across Reservations were included, and in 1948 (see 18 U.S.C. 1151(a)) that all lands within a Reservation, including those patented in fee, were declared "Indian country." The question of *tribal* jurisdiction over non-Indians on alienated parcels within the Reservation was not then a live issue, except in the case of the Civilized Tribes of the Indian Territory. There, however, tribal taxing authority over activities in alienated town sites was sustained. *Buster* v. *Wright*, 135 F. 947 (8th Cir. 1905), appeal dismissed, 203 U.S. 599 (1906). See, also, *Morris* v. *Hitchcock*, 194 U.S. 384, 392 (1904), citing with approval an Attorney General's opinion upholding tribal taxation of hay exports from the Reservation even if the non-Indian taxpayer were "the absolute owner of the land on which the hay was raised." This history is recounted in *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 139-144 (1982).

years, the typical treaty cession leaves no doubt that the transfer was complete upon ratification. *E.g., United States* v. *Omaha Tribe of Indians*, 253 U.S. 275 (1920).[13] Like "cessions," expressly so termed, were subsequently accomplished by formal "agreement," incorporated in Acts of Congress. That was the form of the transaction by which the Black Hills were severed from the Great Sioux Reservation in 1877, and much other land in 1889. See Act of Feb. 28, 1877, ch. 72, 19 Stat 254 *et seq.*; Act of Mar. 2, 1889, ch. 405, 25 Stat. 888 *et seq.* Similar cession agreements effected the disestablishment of the North Half of the Colville Reservation and the termination of the Lake Traverse Reservation. See *Seymour*, 368 U.S. at 355; *DeCoteau*, 420 U.S. at 455; *id.* at 455-460 (App. A to opinion). And there are many other instances. See, *e.g., Mattz*, 412 U.S. at 504 n.22; *DeCoteau*, 420 U.S. at 439-440 n.22. See, also, the Act of June 6, 1900, ch. 813, 31 Stat. 672 *et seq.*, upheld in *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903).

Sometimes, to be sure, the purported "agreement" had not been approved by the requisite number of tribal members stipulated in an earlier treaty, or consent had been induced by questionable methods. *E.g.*, the case of the Black Hills, discussed in *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 381-382 & n.13 (1980). But, in light of *Lone Wolf*, that is irrelevant to our inquiry. The critical fact in all these cases is that Congress exacted a *present and total surrender of all tribal interest* in the ceded land in return for an *unconditional commitment* by the United States to an agreed payment, even if inade-

[13] Even then, there were exceptions. Some treaties provided for payment of "ceded" lands, at least in part, by turning over to the Tribe the proceeds of sale received from settlers. In such cases, the Court characterized the cession as incomplete until the tracts were sold, holding that the Indians remained the equitable owners and that the ceded area should not be deemed "public lands." *E.g., United States* v. *Brindle, supra.*

quate or delayed. Although, usually, the Government immediately opened the area to settlers, the Indians, having irrevocably and completely divested themselves of title for a fixed price, had no interest in those subsequent events.

b. On the other hand, during the decade preceding and especially that following 1900, there were more numerous arrangements under which the United States, with or without the formal concurrence of the Tribe, opened up tribal lands to sale without any firm obligation to do more than credit or pay over the proceeds to the Tribe when realized.[14] In effect, the Government was a mere sales agent. No doubt, the primary motive for resorting to this type of scheme was to avoid committing the United States to any independent financial obligation.[15]

[14] There was, commonly, a special exception for "school sections" within the opened area, which were purchased outright by the United States and conveyed to the state. See, *e.g.*, Act of Apr. 27, 1904, ch. 1624, 33 Stat. 352 *et seq.*, quoted in the following note. But, as *Ash Sheep* makes clear, such a provision has no effect on the continuing Indian status of the remaining lands opened up. See pp. 17-19, *infra*. The Court reiterated this view as recently as *DeCoteau*, 420 U.S. at 445-446 n.33: a "school provision" of this kind "implies nothing about the presence or absence of state civil or criminal jurisdiction over the remainder of the ceded lands." A sufficient example is the Crow Allotment Act of June 4, 1920, ch. 224, § 16, 41 Stat. 756, which provided for the purchase by the United States and grant to the State of Montana of Sections 16 and 36 within the Crow Reservation. No one has ever contended that this legislation affected the status or boundaries of the Reservation. See *Montana* v. *United States*, 450 U.S. at 548. Since Montana was admitted by the same Enabling Act as South Dakota, we must assume the Court was misled in *Rosebud* in suggesting that implementation of an Enabling Act school section grant within Indian country implies disestablishment of the affected portion of the Reservation. See 430 U.S. at 599-601. In our view, *DeCoteau* correctly concluded that a school section provision is wholly neutral on the issue of disestablishment.

[15] An express statement of this concern is reflected in Section 8 of the Crow Agreement, incorporated in the Act of Apr. 27, 1904, ch. 1624, 33 Stat. 361, quoted in *Ash Sheep*, 252 U.S. at 165-166:

And it was presumably anticipated that, in due time, all tracts would be sold and that the upshot would be the same as in the case of a straightforward cession. But, until that day, the transfer was incomplete.

Unsurprisingly, the clear line between outright cession and mere opening up of tribal lands was not always observed. As *Rosebud* illustrates, Congress sometimes combined features of both schemes in a given case. Thus, the 1904 Act affecting a portion of the Rosebud Sioux Reservation grew out of a straightforward cession agreement with the Tribe, but the payment provisions were transmuted by the Congress so as to resemble a typical opening up arrangement. See 430 U.S. at 590-598. In part because the immediate cession language was retained in the first statute (*id.* at 591, 596-597) and because the later Acts of 1907 and 1910 were seen as derivative legislation, carrying forward the same "baseline" objective (430 U.S. at 605-615), the Court concluded that an intent immediately to diminish the Reservation must be found. But we do not read *Rosebud* as erasing the traditional distinction.[16] The rule of *Seymour* and *Mattz* has not

> That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of said lands and to expend any pay over the proceeds received from the sale thereof only as received, as herein provided.

This was a standard provision in opening up legislation, including the 1908 Act now before the Court. See Pet. Br. App. A14-A15.

[16] Notwithstanding what was written in *Rosebud*, 430 U.S. at 613-614 & n.47, we fail to appreciate the significance for Reservation status of a provision prohibiting the introduction of liquor into an "opened" area for twenty-five years—at least when, as there and here, it encompasses "land allotted, those retained or reserved," as

been repudiated and presumably continues to govern in any like situation.

3. The immediate consequences of opening up legislation not involving an unconditional present cession are clear enough. Putting aside allotments selected in the opened area and any school sections purchased outright for the state, the Tribe retained its beneficial title to the land until sold, as well as the right to any profits derived from their use. Only Indian occupancy rights were suspended—so that the land could be offered, more invitingly, with "vacant possession." In sum, as this Court repeatedly held in a series of cases including *Brindle, Mille Lac Band of Chippewas, Minnesota* v. *Hitchcock* and *Ash Sheep*, while unsold, such opened lands remained Indian

---

well as "surplus land sold, set aside for town-site purposes, granted to the State * * * or otherwise disposed of." See Act of May 30, 1910, ch. 260, § 10, 36 Stat. 451 (Rosebud Act); Act of Feb. 17, 1910, ch. 40, 36 Stat. 196 *et seq.*, amending Section 8 of the 1908 Act before the Court (Pet. Br. App. A18-A20). Under the Act of July 23, 1892, ch. 234, 27 Stat. 260 *et seq.*, as amended by the Act of Jan. 30, 1897, ch. 109, 29 Stat. 506 *et seq.*, the prohibition already applied to all restricted allotments whether or not within a Reservation, but, at least by clear implication, did not cover unrestricted allotments or alienated parcels even inside a Reservation. See *United States* v. *Sutton*, 215 U.S. at 293. See also, n.12, *supra*. Indeed, that is the general rule today with respect to "non-Indian communities" within Reservations. 18 U.S.C. 1154(c); see *United States* v. *Mazurie*, 419 U.S. 544 (1975). It follows that the provisions in the 1910 statutes quoted above were redundant with respect to allotments (until the restrictions were removed), but important as they affected alienated lands, even if the Reservation boundaries remained unchanged.

Again, the point is illustrated by the Crow Allotment Act of 1920, which, in Section 9 (41 Stat. 754), extended the liquor prohibition to fee tracts within the Reservation (including unrestricted allotments held by Indians, lands alienated to others, and state school sections)—an action which no one has suggested disestablished or changed the boundaries of the Crow Reservation. So, also, a like statute covering the Colville Reservation did not affect the result in *Seymour*. See Act of Aug. 31, 1916, ch. 424, 39 Stat. 673 *et seq.*, noticed by the Court, 368 U.S. at 356 n.12.

for most purposes. The last decision states the situation aptly (252 U.S. at 165-166):

> It is obvious that the relation thus established by the act between the Government and the tribe of Indians was essentially that of trustee and beneficiary and that the agreement contained many features appropriate to a trust agreement to sell lands and devote the proceeds to the interests of the *cestui que trust*. *Minnesota* v. *Hitchcock*, 185 U.S. 373, 394, 398 * * *.
>
> Taking all of the provisions of the agreement together we cannot doubt that while the Indians by the agreement released their possessory right to the Government, the owner of the fee, so that, as their trustee, it could make perfect title to purchasers, nevertheless, until sales should be made any benefits which might be derived from the use of the lands would belong to the beneficiaries and not to the trustee, and that they did not become "Public lands" in the sense of being subject to sale, or other disposition, under the general land laws. *Union Pacific R.R. Co.* v. *Harris*, 215 U.S. 386, 388. They were subject to sale by the Government, to be sure, but in the manner and for the purposes provided for in the special agreement with the Indians, which was embodied in the Act of April 27, 1904, 33 Stat. 352, and as to this point the case is ruled by the *Hitchcock* and *Chippewa Cases, supra*. Thus, we conclude, that the lands described in the bill were "Indian lands" * * *.[17]

---

[17] Usually, the lands "opened" under this type of legislation were not simply made available to all comers under the provisions of the general public land laws; rather, their disposition was governed by special conditions, typically involving classification and appraisal, installment payments, and, if no purchasers appeared after seven years, sale at public auction. A common provision expressly stipulated that "no person shall be permitted to settle upon, occupy, or

It is plain that the continuing tribal interest in the lands opened under these arrangements was not merely a right of reversion in the event the lands were never sold and the Government continued to decline to purchase them itself. There was not a completed sale, subject only to a condition subsequent. Nor was the Government "taking" the land without payment, exposing itself to an obligation, in due course, to make "just compensation" out of Treasury funds if settlers failed to provide the price. Compare *United States* v. *Sioux Nation of Indians, supra.* Indeed, the Congress expressly excluded that possibility. See n.15, *supra.* The transfer was, rather, an incomplete transaction, held in abeyance until payment should be received from homesteaders. For the time being, the Indians' possessory rights were suspended, but that is all. And, at some point, if the scheme failed for lack of purchasers, the Tribe's right to resume occupancy presumably must be conceded—even without the benefit of "restoration orders" under the Indian Reorganization Act of 1934.[18] In the interim, the Indians' title had survived

enter any of said lands except as prescribed in [the President's] proclamation." *E.g.*, Sections 2-5 of the 1908 Act (35 Stat. 461-463) involved here, Pet. Br. App. A4-A12. And, of course, the proceeds of sale did not go to the Treasury as unrestricted moneys, but were required to be credited to the Tribe, with interest. *E.g.*, Section 6 of the same Act (35 Stat. 463), Pet. Br. App. A12. Obviously, this was a far cry from simply "restoring" the area unconditionally to the "public domain."

We note that the statutes involved in *Ash Sheep* and *Minnesota* v. *Hitchcock* incorporated agreements with the Tribe which purported to "cede" the lands that were to be opened to sale. But the Court looked to the substance of the transaction, not the terminology, and concluded that the "cession" was conditional, in effect suspended until and unless sales to settlers were realized. *A fortiori*, that must be the result where no agreement and no words of cession are present.

[18] Section 3 of the IRA, 25 U.S.C. 463, authorized the Secretary of the Interior "to restore to tribal ownership the remaining surplus lands of any Indian reservation [heretofore] opened." Since legal title was to reman with the United States and the Tribe had never

and there was no basis for altering the Reservation boundaries.[19]

The early cases, it is true, dealt only with *unsold* "surplus" lands. But, given that these retained their Reservation status—even if partially suspended—it would be incongruous to conclude that new boundaries should be drawn, in a crazy-quilt pattern, to exclude alienated parcels after Congress determined that they, also, should be deemed "Indian country." 18 U.S.C. (Supp. V) 1151(a). At all events, that is what this Court squarely decided in *Seymour* and re-affirmed in *Mattz.*

4. There is a final caveat. In cases where the opened area of a Reservation was entirely—or almost entirely—sold off to non-Indian settlers before the process was halted by the change of policy enacted in 1934, it may well be right to treat the Reservation as diminished today. This is not merely a bow to current reality. Nor is

lost beneficial title, the practical effect of restoration orders under this provision was to return *use and occupancy rights* to the Tribe. As the Senate Report accurately recited, Section 3 of the IRA was intended to restore unsold "surplus" tracts "to tribal use." S. Rep. 1080, 73d Cong., 2d Sess. 2 (1934). Stated differently, restoration orders ended the suspended status of such areas. As we have said, that result must have occurred sooner or later if the surplus lands remained unsold for a very extended period. But the IRA and the restoration orders issued under it serve the useful function of mooting the question whether, in a given case, lapse of time had already effectively ended the "opening" of tribal lands. Plainly, such restoration orders are not evidence that the Reservation status of the affected lands had been irretrievably lost. *See Rosebud*, 430 U.S. at 604 n.27.

[19] It is worth noting that Interior Department Regulations promulgated in 1912 "contemplated that remaining surplus lands, the proceeds of the disposal of which were for the benefit of the Indians, would be cooperatively administered by the Indian Office and the General Land Office, the Indian Office retaining jurisdiction of the use of the lands before they were sold and the General Land Office administering the final disposition of the lands." See 56 Interior Dec. 330, 339 (1938).

it an impermissible attempt to construe turn of the century legislation in accordance with unpredictable future events. On the contrary, we reasonably may suppose that the sponsors of "opening up" legislation would have intended to end the Reservation status of the affected area *if and when* their expectations were fully realized, but not otherwise.[20] Then, as now, it must have seemed artificial to continue to treat as part of an Indian Reservation a discrete area, typically of large dimensions, once both land ownership and population had ceased to be Indian. Per contra, where no present cession was involved and disappointingly few settlers had taken up Congress's invitation, there was, and is, no justification for jurisdictionally separating from the Reservation "core" an adjacent tract that remains significantly Indian in every respect.

All else aside, this explains the result in *Rosebud*. As the Court there stressed, of the more than 2 million acres opened up by the Acts of 1904, 1907 and 1910, only some 4,600 remained unsold in 1938. 430 U.S. at 588 n.3. And, today, more than 90% of the opened area is non-Indian, both in population and land use. Id. at 605. In these circumstances, it was obviously difficult to conclude that Congress would have wished the affected area to retain Reservation status. At some point, the tail can no longer wag the dog.[21]

---

[20] Where allotments, normally restricted for 25 years, were provided for in the opened area, it would be reasonable to suppose that the "Indian" character, or "Reservation status," of that area was intended to lapse at the end of the 25-year period—which also coincided in some cases with the time when the liquor prohibition would cease—assuming that, by then, the surplus lands also had been fully disposed of. See *Mattz*, 412 U.S. at 496.

[21] This likewise explains the ultimate redrawing of Reservation boundaries to exclude the opened area of the Red Lake Reservation considered in *Minnesota* v. *Hitchcock*, and the area of the Crow Reservation affected by the 1904 Act involved in *Ash Sheep*. In both cases, almost all the unallotted land in the opened portion of

So saying, we imply no "majority rule" under which the status of opened tribal lands depends upon whether more or less than half the acres, or the population, remain Indian. One of the familiar consequences of the allotment policy is that, as a result of numerous exceptions to the restrictions on alienation, much of the acreage of even the unopened portion of some Reservations is today in non-Indian hands. *E.g.*, *Montana* v. *United States*, 450 U.S. at 548 (Crow Reservation); *United States* v. *Mitchell*, No. 81-1748 (June 27, 1983), slip op. 3. So, also, the concentration of a large non-Indian population in a few alienated town sites within a Reservation sometimes left the Indians grossly outnumbered. *E.g.*, *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 470 (1979). Since these disparities do not affect the status of the Crow Reservation, the Quinault Reservation, or the Yakima Reservation, there is no cause to treat like patterns of land ownership or population as inconsistent with Reservation status for once opened areas. It is only when the Indain character of former tribal lands is wholly destroyed that it seems justifiable to sever the area from the Reservation.

B. The 1908 Act

Applying the principles just outlined to the case before the Court yields a clear conclusion against diminishment of the Cheyenne River Reservation. The points are quickly stated.

1. First and foremost, the 1908 Act involved here is typical opening up legislation, of a piece with the statutes considered in *Seymour* and *Mattz*. There was no present

---

the Reservation was sold before 1934. See *United States* v. *Holt State Bank*, 270 U.S. 49, 52-53 (1926). In the case of the Crow Reservation, only some 10,000 acres (out of a total of more than 1 million acres) in the area opened by the 1904 Act remained unsold, as attested by the "restoration" Act of May 19, 1958, Pub. L. No. 85-420, 72 Stat. 121.

cession for an agreed price, but, instead, an arrangement whereby the Government—expressly avoiding any obligation to buy itself—undertook to sell tribal lands to settlers for the account of the Tribe. No language of cession is to be found, nor any other terms "precisely suited" to disestablishment. Indeed, there was no prior agreement with the Tribe.

The basic character of the congressional action is perfectly clear. It cannot be changed into an immediately effective cession merely because the drafters carelessly spoke of the unopened portion of the Reservation as "diminished" in one place (§ 2 (35 Stat. 461); Pet. Br. 19-20), and, in another (§ 9 (35 Stat. 464); Pet. Br. App. A16), to the opened area as "part of the public domain." These were, of course, half-truths. Except for any allotments selected in the territory opened to settlers, the area of Indian occupancy *was* diminished temporarily; and, ultimately, if all went as expected, the Reservation would be permanently reduced in size. Similarly, although the opened area could not accurately be assimilated to the "public domain" because it remained encumbered by tribal equitable ownership and was only made available to settlers on special conditions,[22] those lands were, for the time being, given some of the attributes of "public lands."[23]

At all events, such convenient short-hand references to the two portions of the Reservation cannot overcome the detailed provisions of the statute. Cf. *Mattz*, 412 U.S. at 498. Knowing the true nature of the arrangement, we cannot be misled by a wrong label. In all essential re-

[22] See n.17, *supra*.

[23] The "surplus lands" were, after all, opened to entry under some of the "public land laws," albeit with significant qualifications. Perhaps the most useful short-hand description of unsold "surplus" lands opened to sale is that given by the Interior Department Solicitor in 1938 (56 Interior Dec. at 338): "qualified public lands and also qualified Indian lands."

spects, the 1908 Act is indistinguishable from the statutes examined in *Seymour* and *Mattz* and the consequences should be the same.[24]

2. Resort to legislative history gives no different answer. To be sure, the Indians were briefly consulted as to their willingness to part with the area to be opened. Since it was anticipated that purchasers would be found for all the lands, the Government representative quite understandably did not advert to the legal status of the area in the event that expectation was disappointed. And it is equally unsurprising that tribal spokesmen did not discuss that eventuality. Interestingly, one tribal leader preferred to have the Government "buy [the surplus lands] outright," fearing that "it [would] take years for all of the land to be disposed of." Pet. Br. App. A153. He was firmly told that a "lump sum" payment was impossible because "Congress will not accept anything of that kind." Pet. Br. App. A158. Nevertheless, the Indians presumably believed that white men wanted the land and would buy it sooner or later, and that, except for allotments, the entire area would be taken. Given that premise, there is nothing in the minutes of the truncated Indian meetings held by Inspector McLaughlin or in his report that casts useful light on our question.

[24] The Act of Mar. 22, 1906, ch. 1126, 34 Stat. 80 *et seq.*, considered in *Seymour*, is identical to the present statute except that (1) it does not contain a "school section" provision or one prohibiting the introduction of intoxicants, and (2) it provided for sale, rather than reservation of minerals on the opened tracts. As we have already noted, the first difference is irrelevant to our inquiry. The second, on the other hand, cuts in favor of continued Reservation status here.

The Act of June 17, 1892, ch. 120, 27 Stat. 52 *et seq.*, considered in *Mattz*, is much more abbreviated. If anything, it is more susceptible to being construed as a "termination" statute because the opened lands are made available under the land and mineral laws *without condition*. This was more arguably a "restoration to the public domain" than can be found in the 1908 Act now before the Court.

What is relevant, however, is that, at the end of the day, no cession resulted. The Tribe, told it had no real option in light of *Lone Wolf*, mostly listened and never fully acquiesced in the opening arrangment. See, *e.g.*, Pet. Br. App. A124-A125, A127-A129, A141, A145-A146, A152, A161.[25]

Nor do the congressional debates and reports offer more. Again, although the Congress was careful not to commit itself to any payment from the Treasury (except for school sections), the prevailing optimism foreclosed any discussion of the consequences if homesteaders did not come forward in sufficient numbers. In these circumstances, no significance can be attached to a reference to the Reservation in one Committee Report as "diminished" (Pet. Br. App. A28). Indeed, another Report speaks of surplus lands "on the Cheyenne River and Standing Rock Indian reservations" (Pet. Br. App. A21, A36).

Finally, an amending statute of 1910 is invoked (Pet. Br. App. A17-A20). Reinstating the figure recommended two years earlier, that legislation increased (from $1.50 to $2.50 per acre) the price to be paid for the school sections, and, accordingly, made a larger appropriation for that purpose. See S.D. Counties' Br. App. C1-C51. Beyond this, the 1910 Act subjected the entire original Reservation to existing laws prohibiting the introduction of intoxicants into Indian country (Pet. Br. App. A19-A20). For the reasons already given (n.16, *supra*), we cannot construe this action as bearing on the issue of diminshment or disestablishment. At all events, this later statute, enacted *at the request of the Tribe*, can hardly

[25] In fact, one of the few tribal leaders present asked for more time to consider the matter in full Council and was cavalierly told to communicate the Tribe's views to the Agency Superintendent, who must forward them to reach Washington within two weeks. See Pet. Br. App. A50, A161. Unsurprisingly, no such communication was received before Inspector McLaughlin submitted his report. Pet. Br. App. A50-A51.

affect what is claimed to have been a present cession two years earlier. See S. Rep. 518, 61st Cong., 2d Sess. 3, 5 (1910).

3. The subsequent history, as in most like cases, is confused and rife with inconsistencies. See *Seymour*, 368 U.S. at 356 n.12; *Mattz*, 412 U.S. at 484-485; *DeCoteau*, 420 U.S. at 442-444; *Rosebud*, 30 U.S. at 603-605. For the most part, it is no more reliable here than elsewhere in deciding the diminishment issue. Nevertheless, we may notice two points.

From the first, there were references to the opened area as a continuing part of the Reservation, both in Acts of Congress,[26] congressional reports and debates,[27] and executive documents.[28] So, also, the approved tribal constitution of 1935 gave the Tribe jurisdiction over the whole undiminished Reservation. See Pet. Br. 60.

Nor is the early jurisdictional history as one-sided as petitioners suggest. To be sure, in *United States* v. *La Plant*, 200 F. 92 (D.S.D. 1911), a district court, on questionable reasoning, declined jurisdiction of a homicide

[26] *E.g.*, the Act of June 23, 1910, ch. 369, 36 Stat. 602, authorizing the sale to a railroad of a tract in the opened area described as "in the Cheyenne River Reservation"; and Section 2 of the Act of Mar. 4, 1921, ch. 174, 41 Stat. 1447, permitting extension of time for payment of installments due by purchasers of land "in the Cheyenne River Reservation."

[27] *E.g.*, H.R. Rep. 1046, 61st Cong., 2d Sess. (1910); S. Rep. 723, 61st Cong., 2d Sess. (1910); H.R. Rep. 315, 62d Cong., 2d Sess. (1912); S. Reps. 209 and 216, 62d Cong., 2d Sess. (1912); 45 Cong. Rec. 5799-5810 (1910).

[28] References to the opened lands as "in" or "within" the Reservation occur in the President's opening Proclamation (38 Interior Dec. 157 (1909)), an Indian Department Order relating to selection of school sections (38 Interior Dec. 455 (1910)), and others extending the time for payment by purchasers (48 Interior Dec. 80 (1921); 49 Interior Dec. 131 (1922)).

by one non-Indian against another in the opened area,[29] and the State occasionally filled the void. But prosecutions by either sovereign, then as now, were rare, and, in fact, many civil and criminal matters continued to be handled by tribal and federal authorities within the opened lands. See *Hoxie Report* 100-108, 108-118.[30] In other respects, the United States remained the civilian administrator of the entire original Reservation, including the unsold lands. *Hoxie Report* 71-81, 87-93.

4. In our view, these facts are of secondary relevance. What is dispositive here, it seems to us, is that the opening up experiment in large measure failed, so that today the disputed area retains an important Indian character. As we have said, even though no immediate disestablishment was accomplished by enactment of the 1908 Act, that result might well have later occurred if settlers had, as expected, acquired all, or almost all, the opened lands—as was the case in *Rosebud*. But no such implied diminishment can be found when, as here, the Tribe's title to most of the opened land survived and has been formally "restored" by Interior Department orders.[31]

---

[29] At the time, a special statute (Act of Feb. 2, 1903, ch. 351, 32 Stat. 793) provided—contrary to *United States* v. *McBratney*, 104 U.S. 621 (1882)—that, regardless of the race of the offender and the victim, certain enumerated crimes were within federal jurisdiction if committed on any "Indian Reservation" in South Dakota. Accordingly, the court in *La Plant should* have focused on whether the opened area of the Cheyenne River Reservation had been disestablished. In fact, however, the court based its ruling on a finding—erroneous in light of *Ash Sheep*—that Indian title had been extinguished by the 1908 Act as to unsold tracts. See 200 F. at 94-95.

[30] F. Hoxie, *Jurisdiction on the Cheyenne River Indian Reservation: An Analysis of the Causes and Consequences of the Act of May 29, 1908* (undated manuscript) [hereinafter cited as *Hoxie Report*]. This report was part of the record in *United States* v. *Dupris*, *supra*, and was incorporated as part of the record in the instant case, now transmitted to this Court.

[31] The area opened by the 1908 Act comprises approximately 1.6 million acres. By the time of the opening Proclamation of August 19, 1909, almost 400,000 acres in that area had been allotted to tribal members, and some 133,000 acres were subsequently allotted there. *Hoxie Report* 38, 88. After deducting some 90,000 acres for state school sections, this left about 1 million acres open to homesteaders. But it appears that relatively few entries were perfected, in large part because the extravagant promise of the "boosters," having got the settlers in, could not keep them there. See *Hoxie Report* 66-67. The restoration orders, affecting unsold tracts in the opened portion of the Reservation, cover all but one of the 78 townships that are embraced in whole or in part within the opened area. See 6 Fed. Reg. 3300 (1941); 14 Fed. Reg. 471 (1949); 17 Fed. Reg. 1065 (1951); 22 Fed. Reg. 3693 (1957); 30 Fed. Reg. 15588 (1965); 32 Fed. Reg. 14276 (1967). Although the actual acreage of the unsold lands affected by the major "restorations" of 1941 and 1951 (6 Fed. Reg. 3300 and 17 Fed. Reg. 1065) is not given, the detailed exclusion of tracts as small as a sixteenth of a section and individual townsite lots suggests that most of the remaining unallotted land was unsold. But, as on many other Reservations, a large number of allotments fell into non-Indian hands and this accounts for a substantial part of the "fee" holdings now existing in the former opened area. Nevertheless, today, almost half the opened area remains in Indian ownership, all of it, with minor exceptions, in trust or restricted status.

Indeed, unless the question was irrevocably settled in 1908, it is difficult to attribute to anyone—including the Congress of 1908—an intent to treat as no longer part of the Reservation an area which includes the tribal capital, the Indian Agency and the major Indian town, within which some two-thirds of tribal members reside (outnumbering non-Indians there), and where almost half the areage is Indian owned. Common sense rebels against that result.

What is more, compelling such a complex pattern, in a case like this one, defeats more recent congressional policy and unnecessarily creates jurisdictional problems. In 1934, implementing the Indian Reorganization Act, the Secretary of the Interior halted all further sales of "opened lands," including those on the Cheyenne River Reservation. See 54 Interior Dec. 559, 561, 563-564 (1934).[32]

---

[32] On September 19, 1934, the Secretary of the Interior approved the recommendation of the Commissioner of Indian Affairs, joined

Most of the unsold area was "restored" to the Tribe in 1941 (6 Fed. Reg. 3300) and 1951 (17 Fed. Reg. 1065), smaller tracts in other years (14 Fed. Reg. 471 (1949); 22 Fed. Reg. 3693 (1957); 30 Fed. Reg. 15588 (1965); 32 Fed. Reg. 14276 (1957)). As the South Dakota Counties (Br. 46-47 & n.16) are at pains to point out, these orders expressly declared the restored acreage "part of the existing reservation." [33] Thus, it is common ground that much of the disputed area is today not merely "Indian country," but an integral portion of the Cheyenne River Reservation. In light of the congressional decision

---

by the Commissioner of the General Land Office, that all unsold lands within the opened areas of Indian Reservations be temporarily withdrawn from sale with a view to "restoration" under Section 3 of the IRA—specifically including lands covered by the 1908 Act involved here. 54 Interior Dec. at 561-562, 563. This order was later amended to cover three further opened Reservations and to embrace unsold lots in townsites. *Id.* at 563-564. It is to be noted that, at the time, the Department's view was that restoration orders under Section 3 could only reach lands "usually referred to as surplus lands of Indian reservations." *Id.* at 560. Four years later, to be sure, it was held that lands "cut off" from Reservations, but as to which Indian beneficial title had not been extinguished, were equally subject to restoration under Section 3. 56 Interior Dec. 330, 333 (1938). But that does not impugn the opinion given in 1934 that the Cheyenne River Reservation was not diminished by the 1908 Act. At all events, it is clear that, at all times, the Department viewed "restored" lands as enjoying "Reservation status" thereafter. See 56 Interior Dec. at 333.

[33] Petitioners and those who support them argue that, because restoration orders invoked both Section 3 and Section 7 of the IRA (25 U.S.C. 463, 467), they should be construed as "adding" to the Reservation lands which had previously lost that status. But there is no stronger reason to take that view here than in respect of a similarly worded "restoration," by Act of Congress, in the case of the Colville Reservation. See *Seymour*, 368 U.S. at 356. As previously noted (n.18, *supra*), such orders are ambiguous on the interim status of surplus lands. But no one disputes the validity or effectiveness of those restoration orders as confirming or granting Reservation status to the "restored" lands for the future. See n.32, *supra*.

in 1948 to give like status to allotted and alienated tracts within a Reservation, it is hardly consistent to draw Reservation boundaries in the opened area in "checkerboard" fashion so as to include only restored lands.

In our submission, every consideration argues for the obvious alternative: the Cheyenne River Reservation was not immediately diminished in 1908, and, notwithstanding the expectations of all concerned, the opened area survived as part of the Reservation. That solution is both practical and faithful to the intent of Congress. And it follows the Court's rule that only the clearest directive will destroy the protective shield of Indian Reservation status.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

REX E. LEE
Solicitor General

F. HENRY HABICHT, II
Acting Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

DAVID C. SHILTON
JANET L. STECKEL
Attorneys

OCTOBER 1983

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

No. 92-6281

ROBERT HAGEN, PETITIONER

v

STATE OF UTAH

On Writ of Certiorari to the Supreme Court of Utah

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case involves the boundaries of the Uintah Indian Reservation. The location of the boundaries affects the scope of the law enforcement obligations and powers of the United States under the Indian Major Crimes Act, 18 U.S.C. 1153, and other federal statutes that apply only in Indian country. Moreover, because of the United States' special relationship with the Indian Tribes, we have a strong interest in the development of sound principles for determining when a reservation has been diminished or extinguished.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Act of May 27, 1902, ch. 888, 32 Stat. 245, and the Act of Mar. 3, 1905, ch. 1479, 33 Stat. 1048, are reprinted in an appendix to this brief.

STATEMENT

1. On October 3, 1861, President Lincoln established an Indian Reservation along a river in the Territory of Utah then known as the Uinta, but now referred to as the Duchesne.[1] Executive Order No. 38-1, *reprinted in* 1 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 900 (1904). Congress confirmed the President's action in 1864, providing that the land in question was "set apart for the permanent settlement and exclusive occupation of such of the different tribes of Indians of [the Utah] territory as may be induced to inhabit the same." Act of May 5,1864, ch. 77, § 2, 13 Stat. 63.

Before the end of the nineteenth century, however, the Uintah Indian Reservation—like many others—became the subject of the "familiar forces" brought to bear by "the desire of non-Indians to settle upon reservation lands." *DeCoteau* v. *District County Court*, 420 U.S. 425, 431-432 (1975). Those forces led to the passage in 1887 of the General Allotment Act, which granted the President authority "to allot portions of reservation land to tribal members and, with tribal consent, to sell the surplus lands to white settlers, with the proceeds of these sales being dedicated to the Indians' benefit." *DeCoteau*, 420 U.S. at 432 (citing Act of Feb. 8, 1887, ch. 119, 24 Stat. 388).

The first significant step in the move toward allotment of the Uintah Indian Reservation came in 1894, when Congress directed the President to appoint a commission to negotiate with the Indians on the Reservation for the acceptable of allotments and "the relinquishment to the United States of the interest of said Indians in all [unallotted lands]." Act of Aug. 15, 1894, ch. 290, § 22,

[1] Another river now referred to as the Uinta is a tributary of the Duchesne that flows near the eastern boundary of the original Reservation before entering the Duchesne near the southeastern corner of the original Reservation.

28 Stat. 337.[2] Because the matter was not resolved promptly,[3] Congress in 1898 again directed the Secretary to appoint a commission to negotiate an agreement for allotment of Uintah Indian Reservation lands and "cession to the United States" of unallotted lands. Act of June 4, 1898, ch. 376, §§ 1-2, 30 Stat. 429. When the Indians resisted, Senator Rawlins of Utah introduced a series of bills that would have opened the Reservation unilaterally. S. 4867, 55th Cong., 3d Sess. (1898); S. 93, 56th Cong., 1st Sess. (1899); S. 145, 57th Cong., 1st Sess. (1902) (*reproduced in* S. Doc. No. 212, 57th Cong., 1st Sess. 3-4 (1902)); see S. Doc. No. 212, *supra*, at 4-6 (discussing resistance of Indians). Those bills, however, were not enacted.

Instead, in 1902, Congress passed an Act providing that if a majority of the adult male members of the Uintah and White River Indians consented, the Secretary of the Interior should make allotments by October 1, 1903, out of the Uintah Indian Reservation.[4] The allotments were to be in the amount of 80 acres to each head of a family and 40 acres to each other member of the Tribes. Act of May 27, 1902, ch. 888, § 1, 32 Stat. 263-264 (1902 Act). The 1902 Act also provided that when the October 1, 1903, deadline for allotments passed,

---

[2] In 1888, Congress had restored to the public domain a 7,040-acre triangle on the eastern edge of the Uintah Reservation, commonly referred to as the "Gilsonite Strip," because of the deposits of gilsonite found on that tract. Act of May 24, 1888, ch. 310, 25 Stat. 157-158. The status of the Gilsonite Strip is not at issue in this case.

[3] Negotiations with the Uintah Reservation Indians were delayed because of difficulties encountered in negotiating with the Indians on the neighboring Uncompahgre Reservation. See S. Doc. No. 32, 55th Cong., 1st Sess. 2-3 (1897).

[4] The Ute Indian Tribe participating as an amicus in this case includes the descendants of those Indians; it consists of the Uintah, Uncompahgre, and White River Bands of Indians. See Constitution and By-Laws of the Ute Indian Tribe of the Uintah and Ouray Reservation 1 (1937).

"all the unallotted lands within said reservation shall be restored to the public domain," and that those lands would be subject to entry under the homestead laws, at a rate of $1.25 per acre. 32 Stat. 263. Finally, the 1902 Act provided that the net proceeds of the sale of lands restored to the public domain, "under the direction of the Secretary of the Interior, shall be used for the benefit of said Indians." 32 Stat. 264.[5]

The allotments did not, however, proceed as provided for by the 1902 Act. Accordingly, Congress in 1903 directed the Secretary to allot the land unilaterally if the Indians did not give their consent by June 1 of that year. Act of Mar. 3, 1903, ch. 994, § 1, 32 Stat. 997-998. That Act also extended the time for the "opening [of] the unallotted lands to public entry on said Uintah Reservation" until October 1, 1904. 32 Stat. 998. When the Indians continued to oppose the plan,[6] Congress again deferred the opening date, to March 10, 1905. Act of Apr. 21, 1904, ch. 1402, § 1, 33 Stat. 207-208.

By the Act of Mar. 3, 1905, ch. 1479, 33 Stat. 1048 (1905 Act), Congress again deferred the time for opening the unallotted lands to public entry, this time to September 1, 1905, unless the President determined that the lands should be opened at an earlier date. Section 1, 33 Stat. 1069. The March 1905 Act then specified "the

---

[5] A month later, Congress supplemented the 1902 Act with a provision requiring the Secretary.

> [i]n addition to the allotments in severalty to the Uintah and White River Utes of the Uintah Indian Reservation in the State of Utah, * * * [to] select and set apart for the use in common of the Indians of that reservation such an amount of non-irrigable grazing lands therein at one or more places as will subserve the reasonable requirements of said Indians for the grazing of live stock.

J. Res. 31, 57th Cong., 1st Sess., 32 Stat. 744 (1902).

[6] Only 82 of the 280 adult male Indians eligible to vote approved the transaction. See H.R. Doc. No. 33, 58th Cong., 1st Sess. 5 (1903).

manner of opening such lands for settlement and entry, and for disposing of the same." *Ibid.* Specifically, it provided that the unallotted lands (except for such tracts as might be set aside as a national forest service, and certain mineral lands disposed of in 1902) "shall be disposed of under the general provisions of the homestead and townsite laws of the United States." *Ibid.*[7] All lands "opened to settlement and entry under this Act remaining undisposed of [within five years]" were to "be sold and disposed of for cash, under rules and regulations * * * prescribed by the Secretary of the Interior." 33 Stat. 1070. The proceeds of the sale of unallotted lands were to be applied, in accordance with the 1902 Act, for the benefit of the Indians. 1905 Act, § 1, 33 Stat. 1070.

The government failed to obtain the consent of the Indians to the arrangement. Nevertheless, President Roosevelt issued a Proclamation on July 14, 1905, which declared that "the unallotted lands in [the Uintah Indian] Reservation * * * will on and after the 28th day of August, 1905, * * * be opened to entry, settlement and disposition under the general provisions of the homestead and townsite laws of the United States." 34 Stat. 3120.[8]

[7] The 1905 Act also authorized the President, before opening the reservation to entry, to set aside additional lands for the Uintah Forest Reserve that had been established adjacent to the Reservation in 1897, as well as for reservoir and other water-supply purposes. 33 Stat. 1070.

[8] On the same day, President Roosevelt, acting pursuant to the 1905 Act, see note 7, *supra*, set aside about 1,010,000 acres within the Reservation as an addition to the Uintah Forest Reserve. 34 Stat. 3116. In 1931, Congress appropriated $1,217,221.25 to compensate the Indians for 973,777 acres of those lands, at the rate of $1.25 per acre. Act of Feb. 13, 1931, ch. 124, 46 Stat. 1092-1093. Congress compensated the Indians for the remainder of the forest reserve lands in 1956 by restoring to the Indians the title to the mineral resources on those remaining lands. Act of July 14, 1956, ch. 603, 70 Stat. 546. Pursuant to the 1905 Act, see note 7, *supra*, the President also withdrew certain lands for reservoir purposes, by proclamations issued on August 3 and August 14, 1905. 34 Stat. 3141-3143, 3143-3144. As to those lands, Congress in 1910 appropriated funds to pay the Indians $1.25 per acre, in return for which "[a]ll right, title, and interest of the Indians in the said lands [were t]hereby extinguished." Act of Apr. 4, 1910, ch. 140, § 23, 36 Stat. 285. The last major congressional action with respect to the Reservation came in 1948, when Congress "extended" the "exterior boundary of the Uintah and Ouray Reservation" to include a tract of approximately 510,000 acres, commonly referred to as the "Hill Creek Extension." Act of Mar. 11, 1948, ch. 108, § 1, 62 Stat. 72. The status of the forest reserve land, the reservoir land, and the Hill Creek Extension is not at issue in this case.

2. In 1989, petitioner was charged with distribution of a controlled substance in the District Court of Duchesne County in Utah. The offense occurred in the town of Myton, which lies within the original exterior boundaries of the Uintah Indian Reservation, in an area that was opened to non-Indian settlement under the 1905 Act. Petitioner initially pleaded guilty. Before sentencing, however, petitioner filed a motion to arrest the judgment and to withdraw his guilty plea; he contended that the trial court did not have jurisdiction because he is an Indian and the crime had been committed in "Indian country" that is not subject to the jurisdiction of the State of Utah.[9] The trial court denied that motion, finding that petitioner is not an Indian for purposes of principles governing state jurisdiction over crimes committed by or against Indians in Indian country. Pet. App. I; see Pet. App. A.

[9] The term "Indian country" is defined by 18 U.S.C. 1151 to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent." See *Oklahoma Tax Commission* v. *Sac and Fox Nation*, No. 92-259 (May 17, 1993), slip op. 8-11. As a general matter, a State has jurisdiction over an offense committed by or against an Indian in Indian country only where Congress has granted jurisdiction to the States—*e.g.*, in a special jurisdictional statute, see *Negonsott* v. *Samuels*, 113 S. Ct. 1119 (1993); or in Public Law 280, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588-590, see *Washington* v. *Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470 (1979). Utah has not acquired jurisdiction over the Indian country at issue here pursuant to either a special jurisdictional statute or Public Law 280.

3. The Utah Court of Appeals reversed. *State* v. *Hagen*, 802 P.2d 745 (1990). The court of appeals noted that the Tenth Circuit has held that Myton and other areas opened to non-Indian settlement by the 1905 Act remain within the Uintah Indian Reservation. *Id.* at 747 (citing *Ute Indian Tribe* v. *Utah*, 773 F.2d 1087 (1985) (en banc), cert. denied, 479 U.S. 994 (1986)). The court also concluded that the State failed to introduce sufficient evidence in the trial court to justify a finding that petitioner is not an Indian. 802 P.2d at 747-748. Accordingly, the court reversed petitioner's conviction and ordered him discharged. *Id.* at 748.

4. The Utah Supreme Court granted the State's petition for a writ of certiorari and reversed the Utah Court of Appeals. Pet. App. A1. In a brief opinion, the court explained that it viewed the case as controlled by its decision the same day in *State* v. *Perank*, No. 860243 (July 17, 1992), *reprinted in* Resp. App. 4a-75a.[10] In *Perank*, the Utah Supreme Court concluded that the provisions of the 1902 Act and the 1905 Act opening lands to non-Indian settlement diminished the Uintah Indian Reservation and that the town of Myton accordingly lies outside the boundaries of the Reservation. See *id.* at 28a-63a. Relying on *Perank*, the Utah Supreme Court reinstated petitioner's conviction. Pet. App. A1.

SUMMARY OF ARGUMENT

A. This Court's decision in *Solem* v. *Bartlett*, 465 U.S. 463 (1984), establishes a clear-statement rule for resolution of claims that Congress has diminished the boundaries of an Indian reservation. Under that rule, an Act of Congress generally does not diminish a reservation unless the Act includes both "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests" and "an unconditional

[10] "Resp. App." refers to the appendix to the brief of respondent in support of the petition.

commitment from Congress to compensate the Indian tribe." *Id.* at 470. A limited exception permits a finding of diminishment "[w]hen events surrounding the passage of [the statute] * * * unequivocally reveal a widely held, contemporaneous understanding that [the statute would diminish the reservation]," *id.* at 471; the statute involved in the instance cited in *Solem* for that proposition (unlike the statute at issue here) contained clear language of cession.

B. The Acts at issue here do not satisfy either requirement of the clear-statement rule articulated in *Solem*. First, they do not require unconditional compensation; rather, the compensation was limited to a share of any proceeds the United States would obtain if it was successful in disposing of the opened lands. Second, the statutes do not make any explicit reference to cession, or in any other way state that the Indians were surrendering all of their interests in the opened lands.

The only feature of the statutes that points toward a finding of diminishment is the statement in the 1902 Act that the opened lands were to be "restored to the public domain." Section 1, 32 Stat. 263. But, as the Court in *Solem* explained, such a reference is not sufficient to justify a finding of diminishment, because it could simply mean that the lands in question were returned to the public domain in the sense that they became available for non-Indian settlement; the languaeg does not expressly indictate that the lands were to be removed from the Reservation. See *Solem*, 465 U.S. at 475 n.17. Moreover, even if such a reference might in some circumstances be adequate to justify a finding of diminishment, it would not suffice here because it was included only in the 1902 Act, not the 1905 Act under which the unallotted lands on the Uintah Indian Reservation actually were opened to settlement.

C. This case does not involve the type of widely held understanding that would justify finding a reservation

diminished even though the statute does not satisfy both aspects of the clear-statement rule articulated in *Solem*. Because only Congress has the power to alter the boundaries of a reservation, the only understanding that should suffice is an understanding shared by Congress and the affected Indians. In this case, there is no basis for supposing that the Indians understood the 1905 Act would alter the boundaries of the Reservation, nor is there any explicit statement in the legislative history that the 1905 Act would have that effect. Accordingly, there is no basis for further investigation of secondary materials. In any event, because those materials are rife with inconsistency and contradiction, they cannot "unequivocally" reveal a widely held understanding sufficient to diminish the Reservation. *Solem*, 465 U.S. at 471.

ARGUMENT

The UINTAH INDIAN RESERVATION WAS NOT DIMINISHED BY THE 1905 ACT OR ITS 1902 PREDECESSOR

A. A Reservation Is Diminished Only When Congress Enacts A Statute Using Unambiguous Language Of Cession, And Either Congress Grants Unconditional Compensation To The Indians, Or There Is An Unequivocal And Widely Held Contemporaneous Understanding That The Reservation Is Diminished

Like several of this Court's previous cases, the present controversy turns on the effect of a surplus land Act opening an Indian reservation to settlement by non-Indians. The Congress that passed that Act (and others like it) no doubt anticipated the eventual demise of the reservation system. But the Court has "never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations with the passage of every surplus land Act. Rather, it is settled law that some surplus

land acts diminished reservation,[11] and other surplus land Acts did not.[12]" *Solem v. Bartlett*, 465 U.S. 463, 468-469 (1984) (citations omitted).[13] As explained in *Solem*, the Court's prior decisions have established a "fairly clean analytical structure" for distinguishing those surplus land Acts that of their own force effected an immediate diminishment of the reservation from those that permitted non-Indians to purchase land within an existing reservation and left to another day the actual redrawing of its boundaries. *Id.* at 470.

The "first and governing principle" is that "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem*, 465 U.S. at 470. The dispositive question, then, is whether "Congress [has] clearly evince[d] an intent to change boundaries." *Ibid.* (internal quotation marks,

---

[11] See, *e.g.*, *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977); *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975).

[12] See, *e.g.*, *Mattz* v. *Arnett*, 412 U.S. 481 (1973); *Seymour* v. *Superintendent*, 368 U.S. 351 (1962).

[13] As the Court noted in *Solem*, the precise location of reservation boundaries "seemed unimportant" at the time the surplus land Acts were passed. 465 U.S. at 468. Until 1913, Indian title, not the reservation boundary, generally determined which sovereign had jurisdiction over a particular tract of land. See, *e.g.*, *Bates* v. *Clark*, 95 U.S. 204, 208-209 (1877); *Ex parte Crow Dog*, 109 U.S. 556, 560-462 (1883). In 1913, however, this Court initiated an expansion of the judicial definition of Indian country to include lands that had been reserved and set apart as an Indian reservation by Executive Order, even though they were not owned by Indians. *Donnelly* v. *United States*, 228 U.S. 243, 268-269 (1913). The expansion culminated in 1948, when Congress enacted a statutory definition of Indian country that includes lands held in fee by non-Indians within reservation boundaries. Act of June 25, 1948, ch. 645, 62 Stat. 757 (codified at 18 U.S.C. 1151(a)); see generally *Solem*, 465 U.S. at 468 (summarizing the expansion of the concept of Indian country).

ellipses, and citation omitted). The most probative evidence bearing on that question is the statutory language used to open the reservation. Language that "[e]xplicit[ly] refer[s] to cession" or otherwise "evidenc[es] the present and total surrender of all tribal interests" in the opened area suggests that Congress meant to sever it from the reservation. *Ibid.* When such language is buttressed by an unconditional commitment to compensate the tribe, "there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished." *Id.* at 470-471.[14]

Cession language and unconditional compensation are not, however, absolute prerequisites to a finding of diminishment. As explained in *Solem*, "[w]hen events surrounding the passage of a surplus land Act * * * unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation," the Court has inferred that Congress shared that understanding and intended to diminish the reservation. *Solem*, 465 U.S. at 471. That portion of the *Solem* opinion was explaining the holding in *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977).[15] In that case, the Court concluded that a reservation had been diminished by a statute that, although it contained language of cession, did not offer payment to the Indians of a sum certain as compensation; the *Rosebud* Court relied heavily on the fact that the statute

[14] In the presence of both of those factors, the Court found a reservation to have been extinguished in *DeCoteau* v. *District County Court*, 420 U.S. 425, 431-449 (1975). In the presence of neither factor, the Court found reservations not to have been diminished in *Solem*, 465 U.S. at 472-476; *Mattz* v. *Arnett*, 412 U.S. 481, 494-505 (1973); and *Seymour* v. *Superintendent*, 368 U.S. 351, 355-356 (1962).

[15] See *Solem*, 465 U.S. at 471 (stating that "our opinion in *Rosebud Sioux Tribe* demonstrates" the accuracy of the discussion at hand).

was designed to implement an agreement with the Indians that used language of cession and indisputably provided for diminishment of the reservation. See *id.* at 591-595. The *Solem* Court made clear, however, that the holding in *Rosebud* was not to be given broad application, emphasizing that "[t]here are * * * limits to how far [the Court] will go to decipher Congress' intention in any particular surplus land Act,"—limits that require "substantial and compelling evidence of a congressional intention" to diminish in order to justify a ruling that a reservation has been diminished. 465 U.S. at 472. That requirement is consistent with the general rule that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *South Dakota* v. *Bourland*, No. 91-2051 (June 14, 1993), slip op. 7 (quoting *County of Yakima* v. *Confederated Tribes and Bands of the Yakima Indian Nation*, 112 S. St. 683, 693 (1992)).

B. Neither The 1905 Act Nor Its 1902 Predecessor Contained A Provision For Unconditional Compensation Of The Indians Or Language Of Cession

1. *The 1905 And The 1902 Act Did Not Provide For Payment Of A Sum Certain To The Indians*

As the Court has explained, an important indicator of congressional intent to alter reservation boundaries is the contemporaneous appropriation of funds to provide unconditional compensation—payment of a "sum certain"[16]—to the Indians for the lands being opened to settlement. See *Solem*, 465 U.S. at 470-471. Neither the 1905 Act nor the predecessor 1902 Act providing for the opening of unallotted lands on the Uintah Indian Reservation furnished unconditional compensation to the Tribe. As

[16] See *Solem*, 465 U.S. at 469 n.10; *Rosebud*, 430 U.S. at 598 n.20; *DeCoteau*, 420 U.S. at 446, 448.

mentioned above, the sole compensation offered the Indians was to come from whatever proceeds the government might obtain from the disposition of the unallotted lands. 1905 Act, § 1, 33 Stat. 1070 (incorporating by reference the provisions for application of the proceeds in Section 1 of the 1902 Act, 32 Stat. 264).[17] Hence, the government was under no obligation to compensate the Indians at all unless it was successful in disposing of the unallotted lands.[18]

The discussion of the payment mechanism in this Court's earlier decisions makes it clear that the arrangement for the Uintah Indian Reservation was not the type of unconditional compensation or sum-certain payment that suggests an intention on the part of the Congress to diminish a reservation.[19] The method of compensation

[17] That conditional payment obligation differs from the compensation later made by the United States for the forest reserve and reservoir lands discussed in note 8, *supra*. See also 32 Stat. 264 (provision of the 1902 Act providing that $70,064.48 was "to be paid to the Uintah and White River Utes" to cover various claims of the Indians against the United States, if those Indians consented to the allotment described in the 1902 Act).

[18] The legislative history suggests that Congress clearly understood the difference between the two modes of payment, and understood that the Indians had a strong preference for unconditional compensation. The Commissioner of Indian Affairs testified at a hearing before the Senate Committee on Indian Affairs:

> It will make a great difference in negotiating with [the Indians on the Uintah Indian Reservation] whether you propose to pay a cash amount or pay them as the land is sold. The system of paying the Indians for land as it is being sold has not proved the success it was hoped it would be. The Indians are afraid of it. But, generally speaking, the Indians will under certain conditions consent to sell their land if they are paid a cash sum.

S. Doc. No. 212, 57th Cong., 1st Sess. 5 (1902).

[19] See *Solem*, 465 U.S. at 469 n.10 (describing statute at issue in *Seymour* v. *Superintendent*, 368 U.S. 351, 356 (1962), under which "the Colville Tribe received whatever proceeds these sales

closely resembles the arrangements under the statutes that were found not to have effected a diminishment in *Solem*, 465 U.S. at 473; *Mattz* v. *Arnett*, 412 U.S. 481, 495 (1973); and *Seymour* v. *Superintendent*, 368 U.S. 351, 355-356 (1962). See *DeCoteau* v. *District County Court*, 420 U.S. 425, 447-449 (1975) (discussing that aspect of *Mattz* and *Seymour*).[20] Accordingly, the lack of unconditional compensation suggests that neither the 1905 Act nor its 1902 predecessor altered the boundaries of the Uintah Indian Reservation.[21]

2. *Neither The 1905 Act Nor Its 1902 Predecessor Contained Language Of Cession*

a. *The Act of March 3, 1905.*—Analysis of the relevant statutory language begins with the 1905 Act, the

generated, rather than a sum certain"); *ibid.* (distinguishing between "sum-certain payment" and "a provision guaranteeing the Tribe only the proceeds from the sale of the opened lands"); *DeCoteau*, 420 U.S. at 448 (describing "contrast" between agreement providing for "a sum certain" and agreement that "benefited the tribe only indirectly, by establishing a fund dependent on uncertain future sales of its land to settlers"); *ibid.* (describing contrast between statute that "provided that the uncertain future proceeds of settler purchases should be applied to the Indians' benefits" and "a straightforward agreement ceding lands to the Government for a sum certain").

[20] A statute involving a similar conditional compensation arrangement was found adequate to diminish a reservation in *Rosebud*. But the statute at issue in *Rosebud* contained explicit language of cession and, as *Solem* explains, further rested on the existence of a "widely held, contemporaneous understanding" sufficient to justify diminishment even where the statute itself did not satisfy the normal requirements for a finding of congressional intent to diminish. 465 U.S. at 471-472. We discuss *Rosebud* at length in Point C, *infra*.

[21] Cf. *Ash Sheep Company* v. *United States*, 252 U.S. 159, 164-166 (1920) (Indians retain equitable interest in lands ceded to United States where United States undertook to sell lands for benefit of the Indians).

statute under which President Roosevelt opened a portion of the Reservation to non-Indian settlement. It was in the 1905 Act that Congress specified "the manner of opening [unallotted] lands for settlement and entry, and for disposing of the same." Section 1, 33 Stat. 1069. In particular, the 1905 Act provided that the "unallotted lands on the Uintah Reservation * * * shall be disposed of under the general provisions of the homestead and town-site laws of the United States." *Ibid.* That language does not refer to a "cession" or otherwise "evidenc[e] the present and total surrender of all tribal interests" in the opened lands. *Solem*, 465 U.S. at 470. Rather, it closely resembles the language of the statutes at issue in *Solem*, *Seymour*, and *Mattz*.[22] As a unanimous Court explained in each of those cases, such statutes did not terminate the reservation, but merely "open[ed] the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards." *Seymour*, 368 U.S. at 356 (quoted in *Mattz*, 412 U.S. at 497, and in *Solem*, 465 U.S. at 473).

The operative language here and in those cases contrasts sharply with that of the statutes at issue in *DeCoteau* and *Rosebud*, the two recent cases in which the Court has found that reservation boundaries were altered by Congress. See *DeCoteau*, 420 U.S. at 445 (statute

[22] See Act of June 17, 1892, ch. 120, 27 Stat. 52 (Act at issue in *Mattz*, providing that excess lands were "subject to settlement, entry, and purchase under the laws of the United States granting homestead rights and authorizing the sale of mineral, stone, and timber lands"); Act of Mar. 22, 1906, ch. 1126, § 3, 34 Stat. 81 (Act at issue in *Seymour*, providing that excess lands "shall be open to settlement and entry under the provisions of the homestead laws"); Act of May 29, 1908, ch. 218, § 2, 35 Stat. 461 (Act at issue in *Solem*, providing for the disposition of unallotted lands under the "general provisions of the homestead and town-site laws of the United States").

provided that the Indians did "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands," Act of Mar. 3, 1891, ch. 543, 26 Stat. 1036); *Rosebud*, 430 U.S. at 596-597 (statute provided that Indians did "hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted," Act of Apr. 23, 1904, ch. 1484, 33 Stat. 254). In sum, the 1905 Act contains neither an "[e]xplicit reference to cession" nor any other "language evidencing the present and total surrender of all tribal interests" in the portion of the Reservation opened to non-Indian settlement. Accordingly, under *Solem*, it fails to demonstrate a clear congressional intention to alter the boundaries of the Uintah Indian Reservation.

b. *The Act of May 27, 1902.*—The 1902 Act likewise does not contain language demonstrating that Congress provided for the total surrender of all tribal interests in the portions of the Reservation that were opened to non-Indian settlement. Like the 1905 Act, the 1902 Act does not refer to any cession, sale, extinguishment, or conveyance of tribal lands.

The 1902 Act did state that unallotted lands eventually would "be restored to the public domain." Section 1, 32 Stat. 263. As the Court explained in *Solem*, a statement that lands have been restored to the public domain can point in the direction of diminishment, on the understanding that lands set aside in a reservation are, in some sense, removed from the public domain. Indeed, the 1902 Act's reference to "restor[ation] to the public domain" was the principal basis for the decision of the Utah Supreme Court in *Perank*, Resp. App. 20a-28a, on which that court relied in this case. In our view, however, the Utah Supreme Court gave insufficient deference to this Court's decision in *Solem*, the most recent occasion on which this Court considered the effect of a statute referring to a

restoration of reservation lands to the public domain.[23] In *Solem*, the Court characterized such a reference as "hardly dispositive," noting that "even without diminishment, unallotted opened lands could be conceived of as being in the 'public domain' inasmuch as they were available for settlement." 465 U.S. at 475 & n.17;[24] see also *Newhall*

[23] The Utah Supreme Court in *Perank* also relied on passages in this Court's opinions in *Seymour* and *Rosebud*. Resp. App. 20a-21a. Neither passage was related directly to the issues before the Court in those cases. In any event, even if they are taken at face value, neither reference would shed much light on the statute at issue here. First, the Court in *Seymour* referred in passing to a statute not at issue in the case, which had vacated and restored to the public domain" a portion of the reservation at issue. 368 U.S. at 354 (quoting Act of July 1, 1892, ch. 140, § 1, 27 Stat. 63). The Court implicitly assumed that the 1892 Act had diminished the boundaries of the reservation. That comment does not shed much light on the meaning of the 1905 Act, which does not use the term "vacated," a term that expresses a concept of extinguishment completely absent from the language at issue here.

Similarly, the *Rosebud* Court accepted the parties' understanding that the Act of March 2, 1889, ch. 405, § 21, 25 Stat. 896, terminated a portion of the Great Sioux Reservation by providing that it was "restored to the public domain." 430 U.S. at 589 & n.5. As the Court noted, however, that termination was accomplished with the agreement of three-fourths of the adult male Indians on the Reservation, as required by the treaty between the United States and the Sioux Nation. See *ibid.* If diminishment were found here, it would have occurred without the consent of the Indians. Moreover, the overall thrust of the 1889 Act concerning the Great Sioux Reservation, as set forth in its title, was to divide the Reservation "into separate reservations and to secure the relinquishment of the Indian title to the remainder," 25 Stat. 888 (see *Hodel* v. *Irving*, 481 U.S. 704, 706 (1987)), and the land restored to the public domain was that lying "outside of the separate reservations," § 21, 25 Stat. 896. The substitution of six smaller reservations for the single Great Sioux Reservation, and the assignment of individual Sioux members to one of the six reservations (see §§ 1-6, 16), was the functional equivalent of the cession of the remainder.

[24] Significantly, the "public domain" argument rejected by the Court in *Solem* was advanced not only by the petitioner in that case, but also by the Counties of Duchesne and Uintah, Utah, which

v. *Sanger*, 92 U.S. 761, 763 (1876) ("The words 'public lands' are habitually used * * * to describe such as are subject to sale or other disposal under general laws.").[25]

Moreover, even if a reference to the "public domain" might in some circumstances be sufficient to justify a finding of diminishment, Congress's omission of that phrase from the 1905 Act makes it particularly inappropriate to place significant weight on the reference in this case. As discussed above, the 1902 Act—in which the only reference to the "public domain" appears—conditioned implementation on the consent of the Indians. Section 1, 32 Stat. 263-264. Despite several extensions, that consent was not forthcoming. Notwithstanding the absence of consent, Congress finally provided in the 1905 Act for the allotment and subsequent opening of surplus lands to non-Indian settlement. Significantly, however, the 1905 Act, under which the Reservation was opened, did not carry forward the 1902 Act's reference to the "public domain"; instead, the 1905 Act itself specified "the manner of opening [unallotted] lands for settlement and entry," substituting a more detailed statement that the lands would be "disposed of under the general provisions of the homestead and town-site laws of the United States." Compare 1902 Act, § 1, 32 Stat. 263, with 1905 Act, § 1, 33 Stat. 1969.[26] As in earlier cases in which Con-

appeared as amici, presumably because of the reference to the public domain in the 1902 Act concerning the Uintah Reservation. See 465 U.S. at 475 n.16.

[25] Cf. *Utah Division of State Lands* v. *United States*, 482 U.S. 193, 206 (1987); *Amoco Production Co.* v. *Village of Gambell*, 480 U.S. 531, 548-549 n.15 (1987). In evaluating the significance of a reference to lands being in the "public domain," it is important to recall that at the time the statute containing that reference was enacted, the question whether the opened lands continued to be a portion of the reservation would have had little practical significance; it would not, for example, have affected criminal jurisdiction. See note 13, *supra*.

[26] The differences between the two statutes are not limited to the deletion of the reference to the "public domain." Under the 1902

gress failed to enact bills that more clearly suggested an intent to diminish or disestablish a reservation, Congress's abandonment of the public domain language suggests that any effort "to terminate the reservation * * * failed completely." *Mattz*, 412 U.S. at 504.[27]

At bottom the Utah Supreme Court's analysis rests on the conclusion that the 1905 Act evidenced an intent to diminish the Uintah Indian Reservation by implicitly in-

---

Act, Congress provided that "*all the unallotted lands* within said reservation *shall be restored to the public domain.*" 32 Stat. 263 (emphasis supplied). The 1905 Act, by contrast, provided more generally that the "unallotted lands [except for mineral lands and lands for a forest reserve] shall be disposed of [under the homestead laws] and shall be opened to settlement and entry by proclamation of the President," 33 Stat. 1069, and also authorized the President to set aside lands "necessary to conserve and protect the water supply for the Indians or for general agricultural development," 33 Stat. 1070.

[27] The proposition that Congress retreated in the face of continued opposition on the part of the Ute Indians on the Uintah Indian Reservation is supported by Congress's continued efforts to gain that consent over a period of several years. See S. Doc. No. 212, 57th Cong., 1st Sess. 4 (1902) (statement of Commissioner of Indian Affairs at congressional hearing of his "understand]ing] that there is a treaty arrangement with those Indians which will make it necessary for you to treat with them before it can be thrown open to settlement"); see *id.* at 5 (discussing failure of previous negotiations). Those persistent negotiating efforts contrast favorably with Congress's treatment of the neighboring Uncompahgre Indians, with respect to whom Congress—in the same statute that appointed the first commission to seek consent from the Ute Indians—authoried unilateral and immediate allotment. See Act of Aug. 15, 1894, ch. 290, § 20, 28 Stat. 337-338. As a contemporary House Report explained, the difference in treatment rested on Congress's view that the Uncompahgres had only "the privilege of temporary occupancy," while the Uintah Reservation Indians were "the owners of the lands within the reservation, because * * * it was provided that the lands within the Uintah Reservation should be 'set apart for the permanent settlement and exclusive occupation of the Indians.'" H.R. Rep. No. 660, 53d Cong., 2d Sess. 1, 2-3 (1894) (quoting Act of May 5, 1864, ch. 77, § 2, 13 Stat. 63).

corporating a phrase from the 1902 Act. Given the omission of that phrase from the 1905 Act, the failure of the conditions on which the 1902 Act was predicated, and the ambiguity of the phrase in the first place, the use of the phrase "public domain" in the 1902 Act fails to carry the State's burden of showing "that Congress clearly evince[d] an intent to change [the] boundaries" of the Reservation. *Solem*, 465 U.S. at 470 (internal quotation marks, ellipses, and citation omitted).[28]

C. The 1905 Act And The 1902 Act Do Not Reflect An Unequivocal And Widely Held Contemporaneous Understanding That They Would Diminish The Uintah Indian Reservation

Relying on the decision in *Rosebud*, the Court stated in Solem that in some cases a statute will be held to diminish or extinguish an Indian reservation even if it does not bear all of the usual marks of such a statute—express language of cession and unconditional compensation for the Indians. In the words of the *Solem* Court, that result is appropriate

> [w]hen events surrounding the passage of a surplus land Act—particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to

---

[28] An additional feature of the statutes that suggests they were not intended to alter the boundaries of the reservation is the absence of a specific statutory description of the land that was, in respondent's view, removed from the Reservation. In *DeCoteau* and *Rosebud*, the relevant statutes precisely described the areas that were found to have been removed from reservation status; the finding of diminishment in those cases therefore comported with the requirement that Congress itself must "clearly evince an 'intent . . . to change . . . boundaries.'" *Solem*, 465 U.S. at 470 (quoting *Rosebud*, 430 U.S. at 615). By contrast, in this case Congress did not describe the areas of the Uintah Indian Reservation that were to be opened to non-Indian settlement, but instead left it to the Executive Branch to identify such lands in the future.

> Congress—unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation.

465 U.S. at 471.

The circumstances of *Rosebud* that were held sufficient to justify diminishment illustrate the narrowness of that exception to the general rule. *Rosebud* involved an unequivocal and universally shared understanding among the participants to the transaction that the statute in question (the Act of Apr. 23, 1904, ch. 1484, 33 Stat. 254) would diminish the boundaries of the Rosebud Sioux Reservation. In particular, it is clear that the Indians had agreed to a diminishment of the Reservation; in 1901, three-fourths of the adult male Indians on the Rosebud Sioux Reservation had executed an agreement (negotiated by Inspector James McLaughlin)[29] under which they would "cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to" the land in question, in return for an unconditional payment of just over $1,000,000. See *Rosebud*, 430 U.S. at 590-591 & n.8.[30] Because Congress was unwilling to agree to outright payment for the lands, Inspector McLaughlin returned to that Reservation to renegotiate the agreement. See id. at 591-592. Although he failed to secure the consent of three-fourths of the adult male Indians, he did secure the consent of a simple majority to a 1903 agree-

[29] Interestingly, Inspector McLaughin also conducted the unsuccessful negotiations with the Sioux Indians over the land at issue in *Solem*, see 465 U.S. at 476-477, and with the Ute Indians over the land at issue in this case, see H.R. Doc. No. 33, 58th Cong., 1st Sess. 3-7 (1923) (report by Inspector McLaughlin of unsuccessful negotiations).

[30] The applicable treaty with the Sioux Indian Nation provided that no treaty for cession of any part of its reservation would be valid without the consent of three-fourths of the adult male Indians on that reservation. See *Rosebud*, 430 U.S. at 589.

ment that—using the same language of cession as the 1901 agreement—made payment contingent upon successful sale of the land, with the compensation per acre raised from $2.50 to $2.75. See *id.* at 592-594. Congress promptly enacted a statute that set forth the 1901 agreement in its entirety, and then "accepted, ratified, and confirmed [that Agreement] as * * * amended and modified" to delete the obligation of unconditional compensation. Act of Apr. 23, 1904, ch. 1484, 33 Stat. 254-256; see *Rosebud*, 430 U.S. at 594-597.

As the *Rosebud* Court explained, a ruling that the Rosebud Sioux Reservation was not diminished by the 1904 Act at issue there could only have frustrated congressional intent. The statute used unequivocal language of cession, and adopted an agreement of the Indians that unequivocally approved the cession (albeit with modifications approved by only a simple majority of the adult male Indians). Inspector McLaughlin advised the Indians in unambiguous language that both the 1901 and the 1903 Agreements, if enacted by Congress, would alter the boundaries of the Reservation. See *Rosebud*, 430 U.S. at 591-593. The legislative history reviewed by the Court contained "no indication that Congress intended to change anything [from the 1901 Agreement] other than the form of, and responsibility for, payment," *id.* at 594-595, and the House Report in fact flatly stated that the bill would "ratify and amend an agreement * * * providing for the cession to the United States of the unallotted portion of [the Indians'] lands," see *id.* at 595 (quoting H.R. Rep. No. 443, 58th Cong., 2d Sess. 3 (1904)).

Application of the *Rosebud* analysis to this case shows that whatever the desires of individual Members of Congress, there is no evidence—let alone unequivocal evidence—of a widely held contemporaneous understanding that the opened lands would be removed from the Uintah Indian Reservation. First, there is no document in this case that establishes the "unmistakable baseline purpose

of disestablishment" that was so important to the Court in *Rosebud*, 430 U.S. at 592; none of the relevant documents—the 1905 Act, the previous Acts dealing with the Reservation, or any agreement with the Indians—uses the indisputable language of cession that was a feature of all of the relevant documents in *Rosebud*. Moreover, in our view, the requirement in *Solem* that the "understanding" be "widely held" requires proof that the Indians shared in an understanding that alteration of the Reservation's boundaries was at hand; the only obvious manifestation of such an understanding on the part of the Indians is an agreement of cession, like the one approved in *Rosebud*. Because the Indians in this case steadfastly refused to consent to any alteration of the Reservation boundaries, there is no such agreement in this case.[31] Accord-

[31] Indeed, as Inspector McLaughlin explained, the Indians on the Uintah Indian Reservation firmly believed "that their reservation could not be opened to settlement without their consent," and that "they were thus advised by officials of the Department [of the Interior] during their visit to Washington." H.R. Doc. No. 33, 58th Cong., 1st Sess. 5 (1903). The view of the Indians was not entirely unreasonable, considering the date of the negotiations in question—May 1903, only four months after this Court's January 1903 decision in *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 566-568, first upheld the power of Congress to diminish a reservation unilaterally.

Given the Indians' view on that question, the Utah Supreme Court erred in relying (Resp. App. 37a) on Inspector McLaughlin's advice to the Indians that "there will be no outside boundary line to this reservation." Minutes of Council Meetings Between Inspector McLaughlin and the Ute Indians 42 (May 18-23, 1903), JX 162. "JX" refers to the joint exhibits of the parties in *Ute Indian Tribe* v. *Utah*, 521 F. Supp. 1072 (D. Utah 1981); the parties have stipulated that the record in this case includes the record in the *Ute Indian* case, see Resp. App. 164a-165a.) In any event, the Indians' response to Inspector McLaughlin's advice was to reject the proposal by an overwhelming margin, see note 6, *supra*. Because the allotment program under the 1902 Act was conditioned on the Indians' consent, it failed and was replaced by the program set forth in the 1905 Act, at issue here. There is no suggestion that any representative of the government advised the Indians that the 1905 Act would alter the boundaries of the Reservation.

ingly, it would be inappropriate to rely on "understandings" to conclude that the Reservation was diminished.

The Utah Supreme Court's contrary conclusion rested to a considerable degree on its understanding of a variety of materials regarding the contemporaneous and subsequent understanding of the 1902 and 1905 Acts. Resp. App. 44a-61a. For two reasons, we do not believe that those materials support the decision of the court below. First, although the Court's decision in this area frequently have mentioned such materials, we believe they have at best only limited relevance. See *Solem*, 465 U.S. at 471 (noting that the Court has considered such materials relevant "[t]o a lesser extent" than the statutory text and other sources discussed above).[32] The suggestion of the *Solem* Court that a widely held, contemporaneous understanding in some cases could be sufficient to justify a finding of diminishment was not a license for the lower courts to conduct a wide-ranging investigation into the views that individual legislators and administrative officials took of legislation. Because only Congress and the Indian Tribes have the power to alter the limits of a Tribe's sovereignty, it is not appropriate to rest decisions regarding those limits on the views of third parties who could not themselves alter those limits.

Second, we do not believe that the historical record supports the Utah Supreme Court's view that both Congress and the Executive Branch understood the 1902 and 1905 Acts to alter the boundaries of the Uintah Indian Reservation. Rather, the historical record here, as in *Solem*, is "so rife with contradictions and inconsistencies

[32] Moreover, it is not clear that such secondary materials have affected any of the Court's recent holdings in the area. As we explained in note 14, *supra*, all of the Court's recent decisions other than *Rosebud* can be explained by the bright-line rule articulated in *Solem*; and, as discussed above, *Rosebud* itself appears to rest primarily on the terms of congressional enactments and tribal agreements, rather than on the understanding other parties had of those documents.

as to be of no help to either side." 465 U.S. at 478. Most of the materials on which the Utah Supreme Court relied are ambiguous, indicating only that the land in question was to be restored to the "public domain."[33] As discussed above, such references, even in the opening statute itself, do not directly address the question at issue in this case.

To be sure, a few federal statutes enacted shortly after the 1905 Act referred to the Reservation as having been diminished by the 1902 and 1905 Acts.[34] But a number of other statutes apparently rested on the contrary assumption that the Reservation was not diminished by the 1902 and 1905 Acts.[35] Still other statutes referred to the "former" Reservation, a reference that cannot be correct, because all agree that at least the allotted parcels continued to constitute a reservation.[36] Finally, on some

[33] See, *e.g.*, Resp. App. 45a-46a (President Roosevelt's Proclamations), 51a-52a (subsequent statements of officials in the Department of the Interior), 54a-55a (1971 order of the Department of the Interior, 57a-60a (subsequent judicial decisions).

[34] Act of Jan. 27, 1906, ch. 7, 34 Stat. 9 (referring to "lands which were heretofore a part of the Uintah Indian Reservation"); Act of Apr. 4, 1910, ch. 140, § 23, 36 Stat. 285 (referring to "lands within the ceded Uintah Indian Reservation"); Act of July 20, 1912, ch. 244, § 1, 37 Stat. 196 (referring to "land which was formerly a part of the Uintah Indian Reservation"). As the Court in *Solem* explained in a similar context, those references may well have been referring to land as having left the common lands of the Reservation, rather than having left the Reservation entirely. 465 U.S. at 475 n.17.

[35] Act of Aug. 1, 1914, ch. 222, § 21, 38 Stat. 604 (referring to "the bridge at Myton, on the Uintah Indian Reservation"); Act of Mar. 4, 1929, ch. 705, § 1, 45 Stat. 1584 (referring to "the State Experimental Farm * * * within the Uintah and Ouray Indian Reservation"); Act of Apr. 22, 1932, ch. 125, § 1, 47 Stat. 111 (same). Similarly, two statutes referred to an extension of the "exterior boundary" of the Reservation, a reference that assumes the Reservation remained a cohesive whole including the opened lands. Act of Mar. 11, 1948, ch. 108, § 1, 62 Stat. 72; Act of Aug. 9, 1955, ch. 263, 69 Stat. 544. See generally *Ute Indian Tribe* v.

occasions contradictory references were included in the same Act.[37] As in *Solem*, the ready availability of "ex-

Utah, 521 F. Supp. 1072, 1133-1134 (D. Utah 1981) (cataloguing legislative materials that assume the opened lands remain in the reservation), aff'd in relevant part, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986).

An extensive number of statutes referred to the Reservation as continuing in existence. Act of Mar. 3, 1921, ch. 119, § 21, 41 Stat. 1245 (obligation to construct bridge "free from all expense to the * * * Indians of the Uintah and Ouray Reservation"); Act of Mar. 4, 1931, ch. 522, 46 Stat. 1567 (appropriation for "[i]rrigation system, Uintah Reservation"); Act of Feb. 2, 1932, ch. 12, 47 Stat. 22 (same); Act of June 19, 1934, ch. 648, § 1, 48 Stat. 1033 (same); Act of Aug. 9, 1937, ch. 570, § 1, 50 Stat. 573 (referring to funds "apportioned to the Indians of the Uintah and Ouray Reservation"); Act of Mar. 16, 1950, ch. 59, 64 Stat. 19 (referring to the "Ute Indian Tribe of the Uintah and Ouray Reservation"); Act of Aug. 21, 1951, ch. 338, §§ 1-2, 65 Stat. 194 (same); Act of Aug. 27, 1954, ch. 1009, §§ 1-2, 68 Stat. 868 (same); Act of July 14, 1956, ch. 603, §§ 1-5, 70 Stat. 546-547 (same).

[36] Act of June 21, 1906, ch. 3504, 34 Stat. 375 ("former Uintah Reservation"); Act of June 29, 1906, ch. 3599, 34 Stat. 611 ("former Uintah Indian Reservation"); Act of Apr. 4, 1910, ch. 140, § 23, 36 Stat. 285 ("former Uintah Reservation"); Act of May 14, 1920, ch. 187, 41 Stat. 599-600 ("former Uintah Indian Reservation"); see also Presidential Proclamation of Sept. 1, 1906, 34 Stat. 3228 (referring to the "former Uintah Indian Reservation"). Indeed, one statute referred to the "allotted lands of any Indian of the former Uintah * * * reservation," Act of Apr. 30, 1908, ch. 153, 35 Stat. 95, a reference that can make sense only on the understanding that the allotted lands had left the "reservation" in the general (though inaccurate) sense that they were no longer common lands set aside for and beneficially held by a tribe.

[37] Section 21 of the Act of Mar. 3, 1911, ch. 210, 36 Stat. 1073-1074, refers at one point to persons having made "homestead entry for land in the Uintah Indian Reservation"—a reference that assumes the opened lands remained in the Reservation—and later on the same page refers to "the proceeds of the sale of lands within the ceded Uintah Indian Reservation"—a reference that appears to rest on the opposite assumption. Similarly, the Act of Apr. 4, 1910, ch. 140, § 23, 36 Stat. 285, which compensated the Indians for land set apart for reservoir purposes, see note 8, *supra*, refers to those

amples pointing in both directions leave[s] one with the distinct impression that subsequent Congresses had no clear view whether the opened territories were or were not still part of the * * * Reservation." 465 U.S. at 479.[38] Given the hazards involved in attempting to infer the intent of one Congress from the views of subsequent Congresses, see *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980), the inconsistent references contribute nothing of substance to the decision of this case.

Finally, the Utah Supreme Court relied on its belief that the Department of the Interior had treated the 1902 and 1905 Acts as having diminished the Reservation. See Resp. App. 52a-56a, 57a n.27. As with the statutory materials, many of the items on which the court relied do not address the question at hand.[39] The two formal

---

lands as lying "in the former Uintah Indian Reservation," but later in the same paragraph states that "[a]ll right, title, and interest of the Indians in the said lands are hereby extinguished."

[38] To the extent conclusions can be drawn from the legislative record, it appears that Utah's Senators Sutherland and Smoot were the principal sources of references suggesting that the 1902 and 1905 Acts had diminished the Reservation. Such references ceased shortly after Senator Sutherland's departure from the Senate in 1917. See *Ute Indian Tribe* v. *Utah*, 521 F. Supp. 1072, 1133 (D. Utah 1981), aff'd in relevant part, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986).

[39] The bulk of the materials the court cites at Resp. App. 57a n.27 do nothing more than refer incorrectly to the "former" Uintah Indian Reservation. See H.R. Rep. No. 5010, 59th Cong., 1st Sess. 1-2 (1906); Letter from C.F. Darrabee, Acting Commissioner of Indian Affairs, to H.C. Means (Sept. 26, 1907), JX 336; Letter from First Assistant Secretary of the Department of the Interior to Commissioner of Indian Affairs (Nov. 8, 1907), JX 338; Letter from Secretary of the Department of the Interior to Secretary of the Treasury (Dec. 19, 1908), JX 341. Moreover, given the limited information contained in those documents, it is difficult to ascertain whether the documents involved portions of the Reservation that were opened to settlement under the 1905 Act, rather than land

notices of the Secretary on which the court relied are as ambiguous as much of the statutory material, although on balance they seem to support our understanding.[40] To be sure, some of the items do include statements by lower level officials in the Department of the Interior indicating that the lands opened to non-Indian settlement under the 1905 Act were removed from the Reservation.[41] But, in light of the inconsistent practice of Congress and the Secretary, there is no basis for relying on those statements to provide a definitive resolution of the question against the Tribe.

* * * *

At bottom, the 1902 and 1905 Acts do not contain the clear expression of intent to change the Reservation's

---

that might have been affected by one of the other actions Congress had taken with respect to the Reservation.

[40] Although the 1945 Order Notice, 10 Fed. Reg. 12,409, discussed at length at Resp. App. 52a-54a, does state at one point that the lands not sold pursuant to the 1902 and 1905 Acts should be "added to and made a part of the existing reservation," at an earlier point it describes those lands as "lands which are now or may hereafter be classified as undisposed-of opened lands *of the Uintah and Ouray Reservation*." *Ibid.* (emphasis added). The latter reference rests on the assumption that the lands in question had never been severed from the Reservation. Similarly, the 1971 Order Notice, 36 Fed. Reg. 19,920, states that the lands in question "were restored to the public domain"; it does not state that they were severed from the Reservation. Indeed, the notice refers at another point to "the undisposed-of opened lands of said reservation" being "restored to tribal ownership," suggesting that the opening of the lands had altered ownership but not severed the lands from the Reservation. *Ibid.* For a similar reference, see Commissioner of Indian Affairs, *Annual Report* 44 (1918), JX 394 (referring to "areas of unallotted land within this reservation" that had been opened to homestead entry).

[41] 1929 Annual Report of Uintah and Ouray Agent 1, JX 420; 1931 Annual Report of Uintah and Ouray Agent 4-6, JX 425; 1932 Annual Report of Uintah and Ouray Agent 1-2, JX 427; Bureau of Indian Affairs, Phoenix Area Office, *Information Profiles of Indian Reservations in Arizona, Nevada, & Utah* 151, 155 (1976), JX 480.

boundaries that this Court's cases have required. Nor can the State establish the type of widely shared understanding of the effect of those Acts that would justify treating the Acts as going farther than the terms Congress chose to express its action. The Tribe consistently refused to consent to any alteration of the Reservation's boundaries, and Congress never adopted any statute explicitly attempting to alter the boundaries unilaterally. Accordingly, this Court should hold that the Reservation was not diminished by the provisions of the 1905 Act, and its 1902 predecessor, that opened portions of the Reservation to non-Indian settlement.

CONCLUSION

The judgment of the Supreme Court of Utah should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

MYLES E. FLINT
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Acting Deputy Solicitor General

RONALD J. MANN
Assistant to the Solicitor General

EDWARD J. SHAWAKER
MARTIN W. MATZEN
Attorneys

JUNE 1993

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

No. 86-1436

YANKTON SIOUX TRIBE OF INDIANS, PETITIONER

v.

STATE OF SOUTH DAKOTA, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 796 F.2d 241. The prior opinion of the court of appeals is reported at 683 F.2d 1160. The opinion of the district court (Pet. App. 9-33) is reported at 604 F. Supp. 1146, and the prior opinions of the district court are reported at 566 F. Supp. 1507 and 521 F. Supp. 463.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1986, and a timely petition for rehearing was denied on November 7, 1986 (Pet. App. 34). On January 29, 1987, Justice Blackmun extended the time within which to file the petition for a writ of certiorari to and including March 9, 1987. The petition for a writ of

certiorari was filed on March 4, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns the title to the bed of Lake Andes, a shallow, navigable water body of approximately 4,000 acres in South Dakota. Lake Andes lies within the exterior boundaries of the Yankton Sioux Indian Reservation, which was established by the 1858 Treaty with the Yankton Tribe of Sioux, 11 Stat. 743 (Pet. App. 35-46). In 1803, the United States acquired sovereignty over the lands at issue by the Louisiana Purchase. In the years following 1803, the Yankton Sioux began moving into the general area in the vinicity of Lake Andes. Pet. 5. In Article I of the 1858 Treaty, the Tribe ceded and relinquished to the United States all of the lands claimed by them "except four hundred thousand acres thereof" (Pet. App. 36). The exterior boundary of this reservation was described in Article I, and Lake Andes falls within that boundary.

The State of South Dakota was admitted into the Union by the Act of February 22, 1889, ch. 180, 25 Stat. 676. Several years thereafter, in 1892, the United States and the Tribe entered into a cession agreement, which was later ratified by Congress as part of the Indian Department Appropriations Act of 1894, ch. 290, § 12, 28 Stat. 314-319. Article I of the Cession Agreement stated that the Indians "hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said Indians [by the 1858 Treaty]" (28 Stat. 314). In return, Article II provided that "[i]n consideration for the lands ceded, sold, relinquished, and conveyed to the United States as aforesaid, the United States stipulates and agrees to pay to the said Yankton tribe of Sioux Indians the sum of six hundred thousand dollars ($600,000)" (28 Stat. 315).

2. The Lake Andes Migratory Waterfowl Refuge was established by Executive Order No. 7292, dated February 14, 1936, "in order to effectuate further the purposes of the Migratory Bird Conservation Act (45 Stat. 1222) * * *." In the following years, the Fish and Wildlife Service began to acquire property interests to allow it to control and manage Lake Andes as part of the Refuge. In 1939, the State of South Dakota and the United States executed an agreement by which the State, which had asserted title to the lakebed, granted the United States an exclusive and perpetual right to operate and maintain the lakebed for migratory waterfowl and wildlife conservation purposes. Pet. App. 11-12. Since that time, Lake Andes has been managed by the Fish and Wildlife Service (or its predecessor agencies) in the Department of the Interior as the most important component of the Refuge.

3. In the summer of 1976, the bed of Lake Andes was dry and had become covered with vegetation. Three non-Indians obtained permits from the State and began to harvest kochia (fireweed) from the bed. The Tribe then intiated this action in the United States District Court for the District of South Dakota against the non-Indians, alleging that they were trespassing upon Indian lands. Subsequently, the State and Charles Mix County intervened as defendants, the individual defendants were dismissed from the suit, and the case proceeded, in essence, as a quiet title action. Pet. App. 3, 12.

On September 19, 1981, the district court entered summary judgment in favor of the Tribe. *Yankton Sioux Tribe v. Nelson*, 521 F. Supp. 463. The court ruled that the Tribe held aboriginal title to the lakebed prior to the 1858 Treaty, that its aboriginal title was not expressly extinguished by the United States, and that, for this reason, title to the lakebed had not passed from the United States to the State, under the Equal Footing Doctrine, upon its admission to the Union. See Pet. App. 3-4.

The court of appeals vacated the district court's judgment and remanded the case without resolving the merits. 683 F.2d 1160 (1982). Rather, noting that the parties were advancing conflicting theories of ownership that depended upon whether Lake Andes was navigable at various times, the court of appeals instructed the district court to make findings concerning the navigability of the Lake at the time of the 1858 Treaty and at the time South Dakota was admitted to the Union in 1889. See Pet. App. 4.

4. On remand, the district court found that Lake Andes was navigable in law and in fact at the relevant times and again entered judgment in favor of the Tribe. 566 F. Supp. 1507 (1983).

In September 1983, while post-judgment motions were pending before the district court, the United States moved to intervene as a plaintiff. The motion to intervene was accompanied by a proposed complaint and cross-claim, in which the United States asserted a property interest in the bed of Lake Andes free from any beneficial interest of the Tribe.[1] The intervention motion was granted by the district court (Pet. App. 12-13), which then again entered judgment in favor of the Tribe (*id.* at 9-33).

Relying upon the judgments entered in two actions brought by the Tribe against the United States pursuant to the Indian Claims Commission Act, ch. 959, 60 Stat. 1049, 25 U.S.C. (1976 ed.) 70 *et seq.*, in which the Tribe had recovered awards relating to the lands that it ceded in the 1858 Treaty and the 1892 Cession Agreement, the court first held that the United States was barred by the doctrine of collateral estoppel from contesting the Tribe's claim of aboriginal title to the lakebed as of 1859 (Pet. App. 15-

[1] The United States did not request any determination of the status of its interests vis-a-vis those of the State, nor has the State ever requested any such determination. Hence, the question whether the State or the United States has the better claim to the lakebed is not at issue in this case.

18). The court further held that the Tribe's title to the lakebed had not been extinguished by events other than the 1858 Treaty or the 1892 Cession Agreement, including the United States' establishment and maintenance of the Wildlife Refuge, and that the Tribe had not voluntarily abandoned its beneficial ownership of the lakebed (Pet. App. 18-26). On these grounds, the court concluded that "[t]he Yankton Sioux Tribe of Indians owns the bed of Lake Andes" (*id.* at 33).

5. The State, the County and the United States appealed. The State and County argued that the State had acquired unencumbered title to the lakebed under the Equal Footing Doctrine upon South Dakota's admission to the Union and, in the alternative, that any interest that the Tribe might have had in the lakebed was extinguished by the 1892 Cession Agreement. Although the United States had supported the State's Equal Footing Doctrine argument in district court, it did not renew that argument on appeal.[2] Instead, the United States contended that the 1892 Cession Agreement had extinguished any interest the Tribe might have had in the lakebed and that the United States was not collaterally estopped from challenging the Tribe's claims of ownership.

The court of appeals reversed (Pet. App. 1-8). The court held that, under the Equal Footing Doctrine, the United States, upon acquiring the Louisiana Territory, immediately began to hold lands underlying navigable waters within the acquired territory, including Lake

[2] The United States urged that the case instead should be resolved on the "narrow ground" that the 1892 Cession Agreement extinguished any interest the Tribe might have had. The United States further stated: "[W]e note that the Equal Footing Doctrine argument is one that is most appropriately raised by a state itself, rather than by the United States, and that the State of South Dakota is in fact ably making that argument in its own appeal. Hence, there is no need here for the United States to repeat that same argument on its own behalf." U.S. Br. 22 n.14.

Andes, in trust for future States (Pet. App. 4-5). The court found that the Tribe's aboriginal title in the area did not attach until after it was acquired by the Louisiana Purchase (*id.* at 7), and it held that such a claim of aboriginal title arising after the United States acquired the territory in question cannot defeat the State's title. In the court's words: "Even assuming that aboriginal title can ever attach to the bed of navigable waters, we hold that when sovereign title is in place and operation of the equal footing doctrine begins before any claim of aboriginal title has ripened, the state's claim of ownership is preeminent unless a recognized exception to the equal footing doctrine is applicable" (*id.* at 7). Finding no conveyance of the lakebed to the Tribe that was either "explicit or clearly inferrable from the circumstances" (*ibid.*, citing *Montana* v. *United States*, 450 U.S. 544, 551-552 (1981), and *United States* v. *Holt State Bank*, 270 U.S. 49, 54-55 (1926)), the court concluded that the lakebed passed to the State of South Dakota in 1889 under the Equal Footing Doctrine (Pet. App. 7-8). The court therefore found it unnecessary to address any of the other issues presented (*id.* at 8).

ARGUMENT

The court of appeals' conclusion that the Yankton Sioux Tribe holds no present ownership interest in the bed of Lake Andes is correct, and its decision presents no question of general importance warranting review by this Court.

1. The United States has managed Lake Andes as the principal component of the Lake Andes National Wildlife Refuge for almost 50 years. In the court of appeals, the appellants made two independent arguments concerning ownership of the bed of Lake Andes, either of which would fully sustain the United States' right to continue to manage the Lake and its bed as part of the Refuge and would, correspondingly, defeat the Yankton Sioux Tribe's claim of aboriginal title to the lakebed.

First, the United States and the State argued that the Tribe had ceded any interest it had in the lakebed to the United States in the 1892 Cession Agreement. That Agreement necessarily conferred on the United States, at least as against the Tribe, the right to exercise complete control over the lakebed for wildlife conservation or other purposes. Second, the State argued that the Tribe did not have aboriginal title to the lands prior to the Louisiana Purchase in 1803; that after 1803, the United States held the bed in trust, to be conveyed to the future State of South Dakota under the Equal Footing Doctrine; and that aboriginal title could not attach during this period in a manner that would defeat the State's claim under the Equal Footing Doctrine after statehood. Because the State thereafter granted the United States a permanent easement to enable it to maintain Lake Andes as part of a wildlife refuge, the United States succeeded to any interests the State acquired under the Equal Footing Doctrine to the extent necessary to assert control over the lakebed for refuge purposes. Accordingly, under this second argument as well, the Tribe's claim of aboriginal ownership would be defeated.

The United States did not rely in the court of appeals on the second rationale just discussed, but the court of appeals nevertheless adopted it. See pages 6-7 and note 2, *supra*.[3] This rationale presents novel theoretical issues regarding the interrelationship between a State's rights under the Equal Footing Doctrine and a tribe's claim of aboriginal title that attached to the same submerged land after the United States acquired the territory. Petitioner Yankton Sioux Tribe appears to acknowledge that its

[3] The court of appeals determined as a factual matter that the Tribe's exclusive occupancy of the area did not begin until after the Louisiana Purchase in 1803 (Pet. App. 6-7). That fact-bound holding does not warrant review by this Court. In any event, the Tribe concedes that "[t]he United States acquired sovereign title to the area in 1803 before the Tribe's use of the area had ripened into aboriginal title" (Pet. 5 n.2).

aboriginal claim, whenever it attached, would not actually defeat the State's *fee title* to the lakebed under the Equal Footing Doctrine, and that the Tribe therefore would have no more than the traditional aboriginal right to use or occupy the lakebed until that right was extinguished by the United States. See Pet. 6-8. Accordingly, as the Tribe suggests (Pet. 7), it might be legally possible for the courts to recognize both the Tribe's aboriginal claim and the State's fee-title claim to the same lakebed.

It might also be that the Tribe is correct that an absolute rule that aboriginal rights can *never* attach to lands underlying navigable waters after the United States acquired the territory would go too far. Thus, we may assume for present purposes that if a tribe moved into a new area on the public domain, the tribe, after the passage of an appropriate period, might be held to have acquired a new homeland on the public domain. By the same token, the United States might be held to have sufficiently acknowledged that new home by some official act. In that event, it would not be unreasonable to conclude that some or all of the tribe's aboriginal rights had been effectively transferred to the new location. And in appropriate circumstances, it is possible that this aboriginal right in turn might extend in some meassure to a navigable body of water and its underlying bed—at least if the water body was sufficiently central to the tribe's way of life at the new location and was regarded as such by responsible federal officials. Cf. *Montana* v. *United States*, 450 U.S. at 556. Even then, however, it would be necessary to reconcile the respective interests of the tribe and the State in order to define the nature and extent of such aboriginal rights, if any, that were thus acquired and that were later retained by the tribe when the fee title to the bed itself passed to the State upon its admission to the Union.

There is, however, no need for the Court to address these difficult theoretical and factual issues in this case. Questions concerning the recognition of aboriginal rights

in lands underlying navigable waters have arisen only rarely in the lower courts. Moreover, as the State argues (Br. in Opp. 7-8), and as the Tribe concedes (Pet. 7-8 nn. 4-5), the Eighth Circuit's treatment of those issues in this case does not directly conflict with the appellate decisions petitioner cites (Pet. 7-8)—*Turtle Mountain Band of Chippewa Indians* v. *United States*, 490 F.2d 935 (Ct. Cl. 1974); *United States* v. *Romaine*, 255 F. 253 (1919); and *Heckman* v. *Sutter*, 119 F. 83 (1902)—because the question whether aboriginal title ripened after the United States acquired the territory was not actually litigated in those cases. See also *United States* v. *Pend Oreille Cty. Pub. Util. Dist. No. 1*, 585 F. Supp. 606, 608 (W.D. Wash. 1984), quoted at Pet. 12 ("The courts have never squarely addresed the question of the competing claims to the same navigable waters by an Indian tribe and a state, where the Indian claim is based on aboriginal title."). Finally, we submit that resolution of the issues the Eighth Circuit chose to address is unnecessary to the outcome of this case, because, as we explain below, the United States' right to control Lake Andes and its bed, to the exclusion of the Yankton Sioux Tribe, is in any event secured by the 1892 Cession Agreement.

2. a. Article I of the 1892 Cession Agreement states that the Indians "hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to *all the unalloted lands* within the limits of the reservation set apart to said Indians [by the 1858 Treaty]" (28 Stat. 314 (emphasis added)). The bed of Lake Andes, of course, consisted entirely of unallotted lands. Hence, under the plain language of Article I, whatever interest the Tribe might once have had in the lakebed passed from the Tribe to the United States in 1892. Several considerations reinforce the conclusion that the explicit text of Article I should be given its natural effect of defeating any continuing claim of title by the Tribe.

First, Article I is framed in terms that this Court has repeatedly characterized as "express language of cession." *Oregon Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, No. 83-2148 (July 2, 1985), Slip op. 15 n.19; *Solem* v. *Bartlett*, 465 U.S. 463, 469 (1984). In *DeCoteau* v. *District County Court*, 420 U.S. 425, 445 (1975) (emphasis added), this Court, in considering a similar and contemporaneous cession agreement, found that the same language was "precisely suited" to the purpose of conveying to the United States, "for a sum certain, *all* of [the Indians'] interest in *all* of their unallotted lands."

Second, the retention of the lakebed by the Tribe would have been inconsistent with the purposes of the 1892 Cession Agreement. Those purposes consisted not only of opening additional lands for non-Indian settlement, but also of paving the way for the anticipated end of the tribal way of life. As this Court stated in *Solem* v. *Bartlett* (465 U.S. at 468 (footnote omitted)):

> Another reason why Congress did not concern itself with the effect of surplus land acts on reservation boundaries was the turn-of-the-century assumption that Indian reservations were a thing of the past. Consistent with prevailing wisdom, members of Congress voting on the surplus land acts believed that within a short time—within a generation at most—the Indian tribes would enter traditional American society and the reservation system would cease to exist.

Finally, there is nothing in the extensive legislative history of the 1892 Cession Agreement to indicate that the parties intended that the Tribe would retain any ownership interest in the bed of Lake Andes. See S. Rep. 196, 53d Cong., 2d Sess. (1894); H.R. Rep. 570, 53d Cong., 2d Sess. (1894); S. Misc. Doc. 134, 53d Cong., 2d Sess. (1894). If such an exception had been intended, it is reasonable to expect some mention of that fact in the

account of the negotiations contained in the legislative history.

b. The Tribe cites (Pet. 9-10) several post-1892 statutes that it believes support the contention that it owns the lakebed. Those statutes, however, do not support the Tribe's position. In 1896 and 1906, Congress passed two measures appropriating funds for the purpose of enabling the Secretary of the Interior to "put down an artesian well or wells at or near Lake Andes, on the Yankton Indian Reservation * * * for the purposes of supplying said Indians with water for domestic purposes, for stock, and for irrigation purposes" (Indian Appropriations Act of 1896, ch. 398, 29 Stat. 343; Indian Appropriations Act of 1906, ch. 3504, 34 Stat. 371). It is apparent from the text of the Acts that their purpose was to provide a source of water for Indian allotments located upland of Lake Andes. Hence, those statutes shed no light on the question of the ownership or use of lands underlying the Lake itself.

Thereafter, in 1922, Congress enacted a statute authorizing the Commissioner of Indian Affairs to construct and maintain a spillway to stabilize the Lake's maximum elevation. Act of Sept. 21, 1922, ch. 358, 42 Stat. 990. The legislative history of this provision shows that its purpose was to prevent the flooding of adjacent farmlands, including lands "held by Indians under Government restrictions," from the rising waters of Lake Andes. See H.R. Rep. 1073, 67th Cong., 2d Sess. (1922). The 1922 Act thus likewise does not suggest that the Tribe retains aboriginal ownership of the bed of Lake Andes.

3. For the foregoing reasons, it is clear that the 1892 Cession Agreement terminated any ownership interest that the Tribe then had in the bed of Lake Andes.[4] Accord-

[4] The district court found that the United States was precluded by collateral estoppel "from litigating the issues of aboriginal title and the Cession Agreement of 1892" (Pet. App. 15-16). The district court relied upon the judgments entered in two Indian Claims

ingly, even if the tribe once had an interest in the lakebed that survived South Dakota's admission to the Union in 1889, any such interest was promptly extinguished in 1892. Accordingly, the judgment of the court of appeals, which rejects the Tribe's claim of a *present* ownership interest in the lakebed, is clearly correct. The decision below therefore does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

DAVID C. SHILTON
ROBERT L. KLARQUIST
Attorneys

MAY 1987

Commission proceedings in which the Yankton Sioux Tribe recovered awards relating to the lands that it had ceded in the 1858 Treaty and the 1892 Cession Agreement (*id.* at 16-17).

Plainly, however, neither of the two Commission judgments barred the United States from challenging the Tribe's ownership of the lakebed in this case. The action regarding lands ceded by the 1858 Treaty, *Yankton Sioux Tribe* v. *United States*, 24 Ind. Cl. Comm. 208 (Docket No. 332-C), aff'd, *Sioux Tribe* v. *United States*, 500 F.2d 458 (Ct. Cl. 1974), was based on a claim for compensation only for lands outside of the exterior boundaries of the reservation established by that Treaty. Because Lake Andes was within the reservation boundaries, the lakebed was not at issue in that action. The second Commission judgment, entered in *Yankton Sioux Tribe* v. *United States*, aff'd, *Yankton Sioux Tribe* v. *United States*, 623 F.2d 159 (Ct. Cl. 1980) (Docket No. 332-D), involved a claim seeking compensation for lands ceded under the 1892 Cession Agreement. However, as the Tribe conceded below (Br. 32), it specifically framed its claim so as to *exclude* the bed of Lake Andes. See 623 F.2d at 183; Pet. App. 17. As a result, no question concerning the lakebed was placed in issue in that case. In any event, collateral estoppel would not bar the State from asserting an interest in the lakebed, since the State was not a party to the proceedings before the Indian Claims Commission.

No. 96-1581

Supreme Court, U.S.
FILED
AUG 7 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

STATE OF SOUTH DAKOTA,

Petitioner,

v.

YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,

Respondents,

and

SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX
VOLUME I, PAGES 1-202

MARK W. BARNETT*
Attorney General
State of South Dakota
JOHN PATRICK GUHIN
Deputy Attorney General
500 East Capitol Avenue
Pierre, SD 57501-5070
Telephone: (605) 773-3215
Counsel for Petitioner
State of South Dakota

JAMES G. ABOUREZK*
BOBBIE J. RASMUSSON
ABOUREZK LAW OFFICES, P.C.
P.O. Box 1164
Sioux Falls, SD 57101-1164
Telephone: (605) 334-8402
Counsel for Respondents
Yankton Sioux Tribe and
Darrell E. Drapeau

KENNETH W. COTTON*
WIPF & COTTON
P.O. Box 370
Wagner, SD 57380-0370
Telephone: (605) 384-5471
Counsel for Respondent
Southern Missouri Waste
Management District

*Counsel of Record

Petition For Certiorari Filed April 4, 1997
Certiorari Granted June 9, 1997

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

United States District Court Docketing Statement .. 1

Eighth Circuit Court of Appeals Docketing Statement 14

Verified Complaint (September 28, 1994) 21

Answer by Southern Missouri Recycling & Waste Management District (October 4, 1994)..... 38

Third Party Complaint (October 20, 1994)..... 76

Answer to Third Party Complaint (November 4, 1994)..... 81

Answer of State of South Dakota (November 4, 1994) 84

District Court Judgment (June 14, 1995)..... 95

Instructions to Commissioners (July 27, 1892) 98

Report of the Commissioner of Indian Affairs (September 16, 1893) (EXH 10)..... 102

Report on Indians Taxed & Indians not Taxed in United States – Eleventh Census 1890 (Government Printing Office 1894) (EXH 610) 105

Senate Document 27, 53rd Congress, 2nd Session, Letters from Indian Commissioner concerning treaties with Yankton and Dakota or Sioux Indians, negotiations, and other papers (January 18, 1894) (EXH 605)..... 108

1. Letter from the Secretary of the Interior, Hoke K. Smith, transmitting Letter from Indian Commissioner concerning treaties with Yankton and Dakota or Sioux Indians, January 18, 1894.... 108

2. Letter from the Acting Commissioner, Frank C. Armstrong, concerning the Report to the Department of Interior, December 9, 1893 109

TABLE OF CONTENTS – Continued

Page

3. Report of the Yankton Indian Commission, March 31, 1893 122

4. Letter of Commissioner S.W. Lamoreaux, December 26, 1893..... 163

5. Draft of a Bill to ratify and confirm an agreement with Yankton tribe 166

6. Ratification of agreement by Congress..... 178

7. Report of John W. Cadman, United States Indian Inspector, regarding investigation into fraudulent methods or undue pressure against the Indians to sign the agreement, November 13, 1893 180

8. Articles of Agreement between the United States and the Yankton Sioux Indians, December 31, 1892 190

9. Report and testimony of Indians and Commissioners at the Council of the Yankton Indians to consider the question of selling their surplus lands, various dates, from October 8, 1892, through January 21, 1893 203

10. Letters from Missionaries John P. Williamson and Joseph W. Cook, to the Commissioners, January 3, 1893..... 317

11. Telegram sent to the Secretary of Interior from a Committee of Yankton Indians requesting recall of the Commissioners, December 27, 1892..... 319

12. Telegram sent from the Secretary of Interior, John W. Noble, responding to request for a recall of Commissioners, December 28, 1892..... 319

TABLE OF CONTENTS – Continued

Page

13. Report of meeting of Commissioners at the Council of the Yankton Indians to consider the question of selling their surplus lands, January and February 1893..... 321

14. Report and testimony of Commissioner Cole regarding obtaining the signatures of Yankton Indian soldiers..... 343

15. Report and testimony of meeting of Commissioners at the Council of the Yankton Indians to announce the completion of the treaty, March 2, 1893 343

16. Telegrams regarding Commissioner Cole's questions regarding signing and squaw men and Secretary Noble's response, January 23, 1893..... 352

17. Report of Commissioner Cole regarding agreement 352

18. Report on Council to examine signatures to the agreement, March 4, 1893 356

Letter to Chairman, Committee Indian Affairs, from Yankton Agency (March 2, 1894) (EXH 606)..... 359

Congressional Record 1894 (EXH 669)..... 362

Annual Report of the Commissioner of Indian Affairs (September 14, 1894) (EXH 11) 450

Letter to Secretary of the Interior from T.P. Smith, Acting Commissioner (March 29, 1895) (EXH 27)..... 451

Presidential Proclamation Yankton Sioux Lands (May 16, 1895) (EXH 602) 453

TABLE OF CONTENTS – Continued

Page

The State of South Dakota v. Andrew War, Information for Rape (September 21, 1895) (EXH 638) 458

House of Representatives report re: Homestead Settlers upon Yankton Indian Reservation (January 21, 1896) (EXH 611)..... 460

29 Stat. 16 (1896) (February 26, 1896) (EXH 18) 465

Twelfth Census of the United States (February 1, 1901) (EXH 612)..... 466

Letter to Secretary of the Interior (November 28, 1903) (EXH 29)..... 468

Historical Atlas of South Dakota 1904 (EXH 630)... 469

Report of the Commissioner of Indian Affairs to the Secretary of the Interior 1907 (EXH 43)..... 471

Letter to William Bean, et al, Yankton Indians (May 13, 1910) (EXH 664) 473

Inspection Report of Albert H. Kneale, Supervisor (October 7, 1913) (EXH 22) 475

Hearings before the Joint Commission of the Congress of the United States to Investigate Indian Affairs (January 31 and March 9, 1914) (EXH 623) 477

Letter to Chairman, Committee on Indian Affairs from Secretary, Department of Interior (February 1, 1921) (EXH 665)..... 480

Letter to Joseph V. King, Yankton Agency, from Commissioner C.J. Rhoads (August 20, 1930) (EXH 667)..... 481

Constitution and Bylaws of the Yankton Sioux Tribal Business and Claims Committee (October 5, 1932) (EXH 651)..... 483

TABLE OF CONTENTS – Continued

Page

Petition to the Chairman, Senate Investigating Committee, from Yankton Agency (December 3, 1932) (EXH 23)..... 489

M-27671 Letter to Department of the Interior from Nathan R. Margold, Solicitor (March 1, 1934) (EXH 627)..... 492

Amended Constitution and Bylaws of the Yankton Sioux Tribal Business and Claims Committee (July 2, 1962) (EXH 652) 493

M-36783 Authority of Yankton Sioux Tribe of South Dakota to Establish a Tribal Court (September 10, 1969) (EXH 628)..... 518

1990 Census of Population and Housing (EXH 614)... 527

58 Federal Register No. 194 (October 8, 1993) (EXH 661)..... 530

59 Federal Register No. 67 (April 7, 1994) (EXH 662)..... 532

A History of Yankton Tribal Governance (1995) (EXH 78)..... 534

Yankton Sioux Tribal Land History (1995) (EXH 31)... 545

Trial Transcript Excerpts (April 1995) 563

MAPS:

General Land Office map, Ex. 615 (1889)..... 712

Bureau of Indian Affairs map, Ex. 33 (1889) 713

Bureau of Indian Affairs map, Ex. 35 (1896) 714

Bureau of Indian Affairs map, Ex. 36 (1897) 715

Bureau of Indian Affairs map, Ex. 37 (1898) 716

General Land Office map, Ex. 620 (1901)..... 717

TABLE OF CONTENTS – Continued

Page

Bureau of Indian Affairs map, Ex. 39 (1901) 718

State map, County Atlas, Ex. 631 (1906)..... 719

Charles Mix County map, County Atlas, Ex. 631 (1906)..... 720

Bureau of Indian Affairs map, Ex. 43 (1907) 721

General Land Office map, Ex. 621 (1910)..... 722

Bureau of Indian Affairs map, Ex. 46 (1912) 723

State map, County Atlas, Ex. 632 (1912)..... 724

Charles Mix County map, County Atlas, Ex 632 (1912)..... 725

TABLE OF CONTENTS – Continued

Page

The following Documents are printed in the Petitioner's Appendix and not reprinted in the Joint Appendix.

United States Court of Appeals for the Eighth Circuit; Opinion (October 24, 1996) .....App. 1

United States District Court, District of South Dakota, Southern Division; Memorandum Opinion and Order (June 14, 1995) .....App. 66

United States Court of Appeals for the Eighth Circuit; Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc (January 6, 1997) .....App. 98

Treaty with the Yankton Sioux, 1858 .....App. 99

Agreement with the Yankton Sioux or Dakota Indians, in South Dakota, 1894 .....App. 111

Opinion of the Supreme Court of South Dakota in *State v. Greger*, February 19, 1997 .....App. 125

The following Documents are printed in the Respondents' Appendix and are not reprinted in the Joint Appendix.

South Dakota Enabling Act § 10, 25 Stat. 676 (February 22, 1889) .....Resp. App. 1

Constitution of South Dakota, art. XXVVI, § 18 (Adopted October 1, 1889).....Resp. App. 2

U.S. District Court
District of South Dakota (Southern Div)

CIVIL DOCKET FOR CASE #: 94-CV-4217

Yankton Sioux Tribe, et al v. Southern Missouri
Assigned to: Lawrence L. Piersol Filed: 09/28/94
Demand: $0,000 Nature of Suit: 893
Lead Docket: None Jurisdiction: Federal
Dkt# in other court: None Question

Cause: 42:6901 Resource & Recovery Act

YANKTON SIOUX TRIBE, a federally recognized tribe of Indians and its individual members plaintiff	Robin L. Zephier [COR LD NTC] Abourezk Law Offices PO Box 9460 Rapid City, SD 57709 342-0097 Michael H. Scarmon [COR LD NTC] Stickney & Groe PO Box 579 117 W. Main St. Elk Point, SD 57025 356-2129 James G. Abourezk [COR LD NTC] Abourezk Law Offices, PC PO Box 1164 Sioux Falls, SD 57101-1164 334-8402
DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe plaintiff	Robin L. Zephier (See above) [COR LD NTC] Michael H. Scarmon (See above) [COR LD NTC]

	James G. Abourezk (See above) [COR LD NTC]
v.	
SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a non-profit corporation defendant	Kenneth W. Cotton [COR LD NTC] Wipf & Cotton PO Box 370 Wagner, SD 57380 384-5471
==========	
SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT third-party plaintiff	Kenneth W. Cotton [COR LD NTC] Wipf & Cotton PO Box 370 Wagner, SD 57380 384-5471
v.	
SOUTH DAKOTA, STATE OF third-party defendant	Roxanne Giedd [COR LD NTC] John P. Guhin [COR LD NTC] Charles D. McGuigan [COR LD NTC] Attorney General's Office 500 E. Capitol Pierre, SD 57501-5070 773-3215

9/28/94	1	VERIFIED COMPLAINT: 1 summons(es) issued handed to plaintiff's counsel (kj) [Entry date 09/29/94]
9/28/94	2	CIVIL COVER SHEET (kj) [Entry date 09/29/94]

9/28/94	–	FILING FEE PAID: on 9/28/94 in the amount of $ 120, receipt # 08082. (kj) [Entry date 09/29/94]
9/28/94	3	MOTION for temporary restraining order, and for preliminary injunction by plaintiff Yankton Sioux Tribe, plaintiff Darrell E. Drapeau (kj) [Entry date 09/29/94]
9/28/94	3	MEMORANDUM by plaintiff Yankton Sioux Tribe, plaintiff Darrell E. Drapeau in support of motion for temporary restraining order [3-1], of motion for preliminary injunction [3-2] (kj) [Entry date 09/29/94]
10/20/94	4	ANSWER by defendant Southern Missouri to complaint [1-1] (kt) [Entry date 10/24/94]
10/20/94	5	THIRD-PARTY COMPLAINT: by defendant Southern Missouri; adding SD, State of (kt) [Entry date 10/24/94]
10/20/94	6	RESPONSE by defendant Southern Missouri to motion for temporary restraining order [3-1], motion for preliminary injunction [3-2] (kt) [Entry date 10/24/94]
10/26/94	7	ORDER by Lawrence L. Piersol setting hearing on motion for temporary restraining order [3-1] 9:00 10/28/94, setting hearing on motion for preliminary injunction [3-2] 9:00 10/28/94 (cc:all counsel) (jm)
10/28/94	8	EXHIBIT LIST by plaintiff Yankton Sioux Tribe, plaintiff Darrell E. Drapeau, defendant Southern Missouri (dm)

10/28/94	9	MINUTES RE: Enter hearing on Plaintiffs' motions for temporary restraining order and preliminary injunction before the Hon. Lawrence L. Piersol, Judge. Motions Denied. Trial date set: 1-31-95 @ 9:00 AM. (dm)

* * * *

10/28/94	10	ORDER by Lawrence L. Piersol denying motion for temporary restraining order [3-1], denying motion for preliminary injunction [3-2]; Court trial set for 1/31/95 at 9:00 a.m. ; Motion filing ddl set for 12/22/94 ; Discovery ddl set for 12/15/94 (cc:all counsel) 1994 SDOB 464 (jm) [Entry date 10/31/94]
11/7/94	11	ANSWER by third-party defendant SD, State of to Complaint [1-1] (dm)
11/7/94	12	ANSWER TO THIRD PARTY COMPLAINT [5-1] by third-party defendant SD, State of (dm)

* * * *

12/15/94	16	MOTION for summary judgment by third-party defendant SD, State of (dm)
12/15/94	17	MEMORANDUM/BRIEF by third-party defendant SD, State of in support of motion for summary judgment [16-1] (dm) [Edit date 12/15/94]
12/15/94	18	STATEMENT of Material Facts by third-party defendant SD, State of in support of its motion for summary judgment [16-1] (dm)
12/15/94	19	APPENDIX by third-party defendant SD, State of in support of its motion for

summary judgment [16-1] (not fastened in) (dm) [Edit date 01/18/95]

* * * *

12/15/94	24	MEMORANDUM/AFFIDAVIT of Robin L. Zephier by plaintiff Yankton Sioux Tribe, plaintiff Darrell E. Drapeau in support of motion to continue trial [23-1] (dm)

* * * *

12/23/94	32	MOTION for summary judgment by defendant Southern Missouri (dm) [Entry date 12/27/94]
12/23/94	33	MEMORANDUM by defendant Southern Missouri in support of motion for summary judgment [32-1] (dm) [Entry date 12/27/94]
1/9/95	34	RESPONSE by plaintiff Yankton Sioux Tribe, plaintiff Darrell E. Drapeau to motion for summary judgment [16-1] (sh) [Entry date 01/10/95]
1/9/95	35	MEMORANDUM/Brief by plaintiff Yankton Sioux Tribe, plaintiff Darrell E. Drapeau in support of motion response [34-1] (sh) [Entry date 01/10/95]
1/9/95	36	STATEMENT of Contested Material Facts to third party defendant by plaintiff Yankton Sioux Tribe, plaintiff Darrell E. Drapeau (sh) [Entry date 01/10/95]
1/17/95	37	MEMORANDUM/Brief by plaintiff Yankton Sioux Tribe, plaintiff Darrell E. Drapeau in opposition to motion for summary judgment [32-1] (sh)

1/18/95 38 REPLY by third-party defendant SD, State of to Tribe's response to Motion for Summary Judgment [34] (dm)

1/18/95 39 SUPPLEMENTAL APPENDIX by third-party defendant SD, State of to Defendant's Reply Re Motion for Summary Judgment [16-1] (not fastened in) (dm) [Edit date 01/18/95]

* * * *

1/26/95 47 MEMORANDUM/Brief by plaintiff Yankton Sioux Tribe, plaintiff Darrell E. Drapeau in support of motion to strike third party claim [46-1], and of motion to dismiss third party defendant [46-2] (sh)

* * * *

2/1/95 54 ORDER by Lawrence L. Piersol denying motion to dismiss third party defendant [46-2], denying motion in limine prohibiting the testimony of Leigh Price, Leonard Bruigier, Fred Nickalson and Mark Leutbecker [44-1], granting motion in limine prohibiting the Tribe from introducing evidence at the trial for its failure to comply with FRCP 26(a)(3)(C) [44-2] ; Court trial set for 4/3/95 at 1:00 p.m. (cc:all counsel) 1995 SDOB 32 (jm) [Entry date 02/02/95]

* * * *

2/3/95 56 TRANSCRIPT of TRO hearing held on 10/28/94 (in expando) (sh) [Entry date 02/06/95]

* * * *

3/22/95 69 TRIAL BRIEF submitted by plaintiff Yankton Sioux Tribe, plaintiff Darrell E. Drapeau (sh)

3/22/95 70 TRIAL BRIEF submitted by third-party defendant SD, State of (sh)

* * * *

3/23/95 72 TRIAL BRIEF submitted by defendant Southern Missouri (sh)

* * * *

3/29/95 75 RESPONSE to defendant's trial brief by plaintiff Yankton Sioux Tribe, plaintiff Darrell E. Drapeau (sh) [Entry date 04/10/95]

3/29/95 76 RESPONSE to third-party defendant's trial brief by plaintiff Yankton Sioux Tribe, plaintiff Darrell E. Drapeau (sh) [Entry date 04/10/95]

3/29/95 77 RESPONSE by plaintiff Yankton Sioux Tribe, plaintiff Darrell E. Drapeau to motion for order to prohibit the introduction of certain evidence [66-1] (sh) [Entry date 04/10/95]

3/29/95 78 MEMORANDUM/Brief by plaintiff Yankton Sioux Tribe, plaintiff Darrell E. Drapeau in support of motion response [77-1] (sh) [Entry date 04/10/95]

3/29/95 79 REPLY BRIEF by third-party defendant SD, State of (sh) [Entry date 4/10/95]

3/29/95 80 RESPONDING BRIEF by defendant Southern Missouri (sh) [Entry date 04/10/95]

* * * *

3/31/95	86	ORDER by Lawrence L. Piersol denying motion for summary judgment [32-1], denying motion for summary judgment [16-1] (cc:all counsel) (sh) [Entry date 04/03/95]
* * * *		
4/4/95	88	TRANSCRIPT of Court Trial testimony of Herbert Hoover held on 4/3/95 (in expando) (sh) [Entry date 04/05/95]
* * * *		
4/7/95	90	EXHIBIT LIST by third-party defendant SD, State of (sh) [Entry date 04/10/95]
4/7/95	91	EXHIBIT LIST by defendant Southern Missouri (sh) [Entry date 04/10/95]
* * * *		
4/7/95	92	MINUTES RE: Court Trial from 4/3/95 through 4/7/95 before the Hon. Lawrence L. Piersol, Sioux Falls, SD (sh) [Entry date 04/10/95]
* * * *		
5/2/95	93	POST-TRIAL BRIEF by third-party defendant SD, State of (dm) [Entry date 05/03/95]
5/2/95	94	BRIEF by third-party defendant SD, State of, Regarding Section Eighteen Issues (dm) [Entry date 05/03/95]
5/2/95	95	APPENDIX by third-party defendant SD, State of to Brief of Third Party Defendant State of South Dakota Regarding Section Eighteen Issues [94-1] (not fastened in) (dm) [Entry date 05/03/95]

* * * *

5/2/95	97	POST TRIAL BRIEF: Article XVIII of Articles of Agreement between Yankton Sioux Tribe The United States Government submitted by plaintiff Yankton Sioux Tribe, plaintiff Darrell E. Drapeau (dm) [Entry date 05/03/95]
5/2/95	98	SUPPLEMENT/SUMMARY of Trial Evidence by plaintiff Yankton Sioux Tribe, plaintiff Darrell E. Drapeau (dm) [Entry date 05/03/95]
5/2/95	99	POST TRIAL BRIEF by defendant Southern Missouri Recycling and Waste Management District (lz) [Entry date 05/04/95]
* * * *		
6/14/95	100	MEMORANDUM OPINION AND ORDER by Lawrence L. Piersol; that Congress did not disestablish boundaries of Yankton Sioux Reservation and therefore exterior boundaries remain intact; plaintiffs failed to establish that the Tribe may exercise jurisdiction over proposed landfill on non-Indian land within exterior boundaries; that Southern Missouri may proceed with construction of waste disposal at the selected site; that during construction Southern Missouri will install a composite liner; and other relief requested is denied (cc: all counsel) Correct Copy Entered 1995 SDOB Page #223 (sh) [Entry date 06/15/95]
6/14/95	101	JUDGMENT by Lawrence L. Piersol; dismissing case 1995 Southern Division

Order Book, page 224; (cc: all counsel) (sh) [Entry date 06/15/95]

6/21/95 102 AFFIDAVIT of Timothy R. Whalen (sl)

6/21/95 103 MOTION for injunction pending appeal by third-party defendant SD, State of (lz)

6/21/95 104 MEMORANDUM by third-party defendant SD, State of in support of motion for injunction pending appeal [103-1] (lz)

6/21/95 105 NOTICE OF APPEAL by third-party defendant SD, State of from [101-2] , Appeal fee pd. – cc: all counsel, Ct Rptr (lz)

* * * *

6/23/95 109 MINUTES RE: Enter hearing on motion by third party defendant State of South Dakota for injunction pending appeal before the Hon. Lawrence L. Piersol, Judge. Ruling: Taken Under Advisement and Court to rule on motions later today; Stay ends Saturday 6/24/95. (dm)

* * * *

6/23/95 116 ORDER GRANTING STAY by Lawrence L. Piersol granting motion for injunction pending appeal [103-1] (1995 SDOB Page 232) (cc:all counsel mailed on 6/23/95) (dm) [Entry date 06/26/95]

* * * *

6/26/95 118 AMENDMENT by third-party defendant SD, State of to motion for injunction pending appeal [103-1] (lz)

* * * *

7/3/95 120 MEMORANDUM OPINION on Stay Pending Appeal granting stay without requiring supersedeas bond be posted by the State by Lawrence L. Piersol (cc: all counsel) Correct Copy Entered 1995 SDOB Page # 276 (dm) [Entry date 07/05/95]

* * * *

8/21/95 125 TRANSCRIPT of Court Trial held on April 3, 1995, before the Honorable Lazwrence [sic] L. Piersol, Sioux Falls (VOLUME I) [92-1] (in expando) (lz) [Entry date 08/22/95]

8/21/95 126 TRANSCRIPT of Court Trial held on April 4, 1995, before the Honorable Lawrence L. Piersol, Sioux Falls (VOLUME II) [92-1] (in expando) (lz) [Entry date 08/22/95]

8/21/95 127 TRANSCRIPT of Court Trial held on April 5, 1995, before the Honorable Lawrence L. Piersol, Sioux Falls, (VOLUME III) [92-1] (in expando) (lz) [Entry date 08/22/95]

8/21/95 128 TRANSCRIPT of Court Trial held on April 6, 1995, before the Honorable Lawrence L. Piersol, Sioux Falls (VOLUME IV) [92-1] (in expando) (lz) [Entry date 08/22/95]

8/21/95 129 TRANSCRIPT of Court Trial held on April 7, 1995, before the Honorable Lawrence L. Piersol, Sioux Falls (VOLUME V) [92-1] (in expando) (lz) [Entry date 08/22/95]

2/20/96 130 MOTION to vacate stay pending appeal by plaintiff Yankton Sioux Tribe, plaintiff Darrell E. Drapeau (sh)

• • • •

2/27/96 135 MEMORANDUM/RESPONSE by third-party defendant SD, State of in opposition to motion to vacate stay pending appeal [130-1] (ds)

• • • •

2/29/96 137 ORDER by Lawrence L. Piersol granting motion to vacate stay pending appeal [130-1], vacating [116-1] order (cc:all counsel) 1996 SDOB page 89 (sh) [Entry date 03/01/96]

7/29/96 138 MOTION with Exhibits A and B for relief from judgment FRCP 60(b) by defendant Southern Missouri (sl)

• • • •

8/5/96 140 MEMORANDUM/RESISTANCE by plaintiff Yankton Sioux Tribe in opposition to motion for relief from judgment FRCP 60(b) [138-1] (dm) [Entry date 08/06/96]

• • • •

12/11/96 161 ORDER by Lawrence L. Piersol granting motion for relief from judgment FRCP 60(b) [138-1]; that the 6/14/95 Memorandum Opinion and Order and Judgent [sic] entered in this case are amended to delete the requirement that "during construction of the solid waste disposal facility, Southern Missouri will install a composite liner as defined in 40

C.F.R. 258.40(b)."; that the defendant must make good faith efforts to comply with all conditions imposed by the EPA as efforts to comply with all conditions imposed by the EPA as a condition of granting the composite liner waiver; that the Court expressly retains jurisdiction to hear a motion for comtempt [sic] in the event the defendant does not comply with this Order by making good faith efforts to satisfy any condition imposed by the EPA as a condition of granting the composite liner waiver (cc:all counsel) (ds) [Entry date 12/13/96]

• • • •

1/9/97 164 ORDER from 8th Circuit COA denying suggestion for rehearing en banc; petition for rehearing by panel is also denied; Judge Wollman took no part in this case. (lz)

• • • •

4/21/97 175 PETITION FOR WRIT OF CERTIORARI filed in U.S. Supreme Court (lz)

EIGHTH CIRCUIT COURT OF APPEALS

DOCKETING STATEMENT

* * * *

Proceedings include all events.
95-2647 Yankton Sioux Tribe, et al v. State of SD

Caption

YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe

Plaintiffs - Appellees

v.

SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a non-profit corporation

Defendant-Third party plaintiff - Appellee

v.

STATE OF SOUTH DAKOTA

Third party defendant - Appellant

CHARLES MIX COUNTY, SOUTH DAKOTA; FLANDREAU SANTEE SIOUX TRIBE, INC.; UNITED STATES OF AMERICA;

Amicus Curiae

VINE DELORIA, JR.; PHILIP S. DELORIA; PHILIP LANE, SR.; PHILIP LANE, JR.; JAMES WEDDELL, Descendants of Francois Deloria, Signatory to the Treaty of 1858, and descendants and relatives of Philip J. Deloria, Chief of the Yankton Sioux Tribe, at the time of the negotiation and ratification of the agreement of December 31, 1892.

Amici Curiae

6/28/95	Civil Case Docketed. (jmb) [95-2647]
6/28/95	CERTIFIED copies notice of appeal, docket entries, order and judgment of 6/14/95 and order of 6/23/95 granting stay waiving supersedeas bond pending appeal. [95-2647] [588904] (jmb) [95-2647]

* * * *

9/18/95	BRIEF FILED – Brief of Appellant – State of SD 64 pgs w/addendum . . . .
9/18/95	RECORDS received. Appendix filed by Appellant State of SD consisting of 2 Volume(s), 3 Copies. . . .
9/19/95	ERRATA sheet received for brief of Appellant State of SD, as well as copy of the 6/23/95 district court order. Both inserted into aplnt's brief. . . .

* * * *

9/21/95	BRIEF FILED – Brief of Amicus-Curiae – Charles Mix County, South Dakota, on behalf of appellant – 20 pages – w/service 9/20/95 . . . .
9/21/95	ADDENDUM FILED – Amicus – (CHARLES MIX COUNTY, SD) addendum. 10 copies w/service 9/20/95. . . .

* * * *

9/28/95	RECORDS received: Transcript, consisting of 9 Volumes (5 trial, 1 TRO Hrg., 2 Testimony, 1 Partial). Location STP. . . .
9/28/95	RECORDS received: Exhibits, Located in: STP, consisting of Plaintiff's Exhs. 1,2,3 an Defendant's Exhs. A, B, C. . . .

* * * *

10/11/95 MOTION, with brief in support, of aplnt, State of SD, to supplement the record. . . .

* * * *

10/17/95 ORDER filed: Appellant's motion to enlarge record is hereby ordered taken with the case for consideration by the panel to which this case is submitted for disposition on the merits. . . .

10/18/95 BRIEF FILED – Brief of Appellees – Yankton Sioux Tribe, Darrell E. Drapeau. 60 pgs – w/addendum – 10 copies – w/service 10/17/95. . . .

10/18/95 RECORDS received: Appendix filed by Appellees Yankton Sioux Tribe, Appellees Darrell E. Drapeau, Appellee Southern MO Waste consisting of 1 Volume(s), 3 Copies. . . .

* * * *

10/19/95 BRIEF FILED – Brief of Amicus-Curiae FLANDREAU SANTEE SIOUX TRIBE, SD – on behalf of aplees – 15 pgs – 10 copies w/service 10/16/95. . . .

10/19/95 BRIEF FILED – Brief of Amicus-Curiae USA – on behalf of aplees – 20 pgs – 10 copies w/service 10/18/95. . . .

10/19/95 BRIEF FILED – Brief of Amicus-Curiae – Vine Deloria, Philip S. Deloria, Philip Lane, Philip Lane, James Weddell on behalf of aplees – 19 pgs – copies w/service 10/18/95. . . .

10/20/95 RESPONSE of aplee, Yankton Sioux Tribe, Darrell E. Drapeau, in opposition to appellant motion to supplement record filed by State of SD . . . .

* * * *

10/31/95 RECORD TENDERED: Supplemental Appendix filed by Appellant State of SD consisting of 1 Volume(s), 3 Copies . . . .

11/1/95 BRIEF FILED – Reply brief – State of SD. 25 pgs – 10 copies – w/service 10/31/95. . . .

11/2/95 RECORDS received: Appendix filed by Amici Curiae Vine Deloria consisting of 1 Volume(s), 3 Copies. . . .

* * * *

12/4/95 Brief Correction(s) received from Amici Curiae Vine Deloria. Correction(s): 6 copies of AMICUS (Deloria, et al.) briefs received. Filestamped 10/19/95, with history #631454. . . .

* * * *

2/26/96 JUDGE ORDER: Due to Judge Wollman recusing himself from this matter, this case is hereby removed from the March 1996 calendar and will be rescheduled on the May 1996 calendar in St. Paul, Minnesota. . . .

2/26/96 CASE REMOVED FROM CALENDAR. . . .

3/8/96 Notice from amicus USA of related case, dated 3/5/96, from Tseming Yang for Amicus Curiae USA in 95-2647. . . .

3/11/96 MOTION, with supporting memorandum, of aplnt, State of SD in 95-2647, for stay. [95-2647] [683988] w/service 3/8/96. . . .

* * * *

3/20/96 RESPONSE of aplee, Yankton Sioux Tribe in 95-2647, in opposition to appellant motion for stay filed by State of SD. . . .

* * * *

3/25/96 MOTION of amicus curiae United States to file response to aplnt's motion for stay. TO COURT. . . .

3/25/96 RECEIVED reply from Amicus Curiae United States in 95-2647 to aplnt's motion for stay. TO COURT. . . .

4/1/96 ERRATA sheet (titled Attachment I) received for memorandum of Amicus Curiae USA responding to aplnt's motion for stay in 95-2647. [95-2647] Also received copy of slip opinion cited by Amicus Curia USA on page 5 of memorandum. [692854] TO COURT. . . .

4/4/96 JUDGE ORDER: granting amicus USA's motion to file reply to aplnt's motion for stay, and [6869918-1] [95-2647] [693690], denying appellant's motion for stay [683988-1] filed by State of SD. . . .

4/4/96 RESPONSE of amicus curiae, USA in 95-2647, to appellant's motion for stay filed by State of SD [683988-1] [95-2647]. . . .

5/6/96 ERRATA sheet received for brief of Amicus Curiae USA in 95-2647. . . .

5/7/96 28(j) citation received and filed from Appellant State of SD in 95-2647 TO COURT. . . .

5/8/96 RESPONSE to 28(j) citation filed by Appellees Yankton Sioux Tribe in 95-2647, Appellees Darrell E. Drapeau in 95-2647. TO COURT. . . .

5/13/96 ARGUED AND SUBMITTED IN ST. PAUL TO JUDGES Richard S. Arnold, Chief Judge, Frank J. Magill, Circuit Judge, Diana E Murphy, Circuit Judge. John P. Guhin for Appellant State of SD, James G. Abourezk for

Appellees Darrell E. Drapeau, Appellees Yankton Sioux Tribe, Tseming Yang for Amicus Curiae USA. Rebuttal by: John P. Guhin. RECORDED. . . .

7/1/96 28(j) citation received and filed from Appellant State of SD in 95-2647 TO COURT. . . .

10/24/96 THE COURT: Richard S. Arnold, Frank J. Magill, Diana E. Murphy. OPINION FILED by Diana E. Murphy PUBLISHED, DISSENT by Frank J. Magill. . . .

10/24/96 JUDGMENT: Richard S. Arnold, Frank J. Magill, Diana E. Murphy: The judgment of the lower court is AFFIRMED in accordance with the opinion . . . .

12/6/96 PETITION for REHEARING with suggestions for rehearing en banc. Filed by appellee Southern MO Waste in 95-2647, w/service 12/5/96., TO COURT. . . .

12/9/96 BRIEF FILED – Brief of Amicus-Curiae – Charles Mix Cty. in 95-2647 in support of South Dakota's petition for rehearing with suggestion for rehearing en banc. 16 pgs – 21 copies with service 12/6/96. TO COURT. . . .

* * * *

12/23/96 RESPONSE to petition for Rehearing with suggestion for rehearing en banc filed by Southern MO Waste [788781-1] [794164]. (Overlength by 5 pages) Response filed by Yankton Sioux Tribe in 95-2647, Darrell E. Drapeau in 95-2647. w/service 12/20/96 TO COURT.

1/6/97 JUDGE ORDER: denying petition for Rehearing with suggestion for rehearing en banc

[788781-1] filed by Southern MO Waste. Judge Bowman, Judge Magill and Judge Loken would grant the suggestion. Petition for panel Rehearing is also denied. Judge Wollman took no part in the consideration or decision of this case. . . .

1/14/97 MANDATE ISSUED [95-2647]. . . .

* * * *

4/14/97 U.S. Supreme Court notice regarding petition for writ of certiorari. Filed in the Supreme Court on 4/7/97. Supreme Ct. Case No.: 96-1581. . . .

FILED
Sep 28, 1994
William F. Clayton
Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

The YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members, and DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,	)	Civ. No. 94-4217
Plaintiffs,	)	VERIFIED COMPLAINT
vs.	)	
SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a non-profit corporation,	)	
Defendant.	)	

Plaintiff for their complaint against the Defendant, state and allege as follows:

I.

This action arises under article 1, section 8, clause 3 of the United States Constitution; the fifth amendment to the United States Constitution; the Treaty with the Yankton Sioux, 1858, entered into by the United States of America, 11 Stat. 743; 1892 Agreement with the Yankton Sioux or Dakota Indians, in South Dakota, ratified in

1894, 28 Stat. 286; § 13 of Title 25 of the United States Code; the 1851 Treaty of Fort Laramie, entered into by the United States of America with the Yankton Sioux Tribe, 11 Stat. 749; 1601 *et seq.* of Title 25 of the United States Code; § 6924, *et seq.* of Title 42 of the United States Code – the Resource Conservation and Recovery Act, Pub.L. 94-580; § 261.1 *et seq.*, § 264.3 *et seq.* of Title 40 of the Code of Federal Regulations; the 1934 Indian Reorganization Act and subsequent amendments; and the special trust relationship between the Federal government and the Indians.

II.

This Court has jurisdiction under § 1331 of Title 28 of the United States Code; § 1362 of Title 28 of the United States Code; a request for declaratory relief pursuant to § 2201 *et seq.* of Title 28 of the United States Code; and a request for injunctive relief and a temporary restraining order pursuant to Rule 65 of the Federal Rules of Civil Procedure.

III.

Venue lies in this Court under § 1391(e) of title 28 of the United States Code.

IV.

Plaintiffs are requesting that Defendant be temporarily and permanently restrained from constructing and operating a solid waste disposal facility at the site which lies within the exterior boundaries of the Yankton Sioux

Indian Reservation, said site being near the City of Lake Andes. The South Dakota State Board of Minerals and Environment, on December 23, 1993, granted the permit to Southern Missouri Waste Management District. The United States Environmental Protection Agency has not yet given final permitting authority to the State of South Dakota over the lands within the boundaries of the Yankton Sioux Reservation. The State had already issued a permit to Southern Missouri Waste Management District before having been given permitting authority by the United States Environmental Protection Agency.

V.

Plaintiff Yankton Sioux Tribe is an Indian tribe with a governing body duly recognized by the Secretary of the Interior. Its principal headquarters are located at Yankton Sioux Tribe headquarters in the City of Marty, County of Charles Mix, State of South Dakota. Plaintiff Yankton Sioux Tribe is responsible for the health, safety and welfare of its individual tribal members. Plaintiffs', individual members of the Yankton Sioux Tribe, are enrolled members of the Yankton Sioux Tribe and are protected and secured by the Tribe through the continued duty of the Tribe to regulate, prevent, and render safe any hazardous waste danger to its members by internal or external forces by virtue of the Tribe's responsibility for the health, safety and welfare of its individual tribal members. Plaintiff Darrell E. Drapeau (hereinafter referred to as "Drapeau") is an enrolled member of the Yankton Sioux Tribe.

VI.

Defendant, Southern Missouri Waste Management District (hereinafter "District" formerly known as "Association") is a four-county, non-Indian, not-for-profit, association formed in February 1992 for the purpose of a developing a regional concept for waste disposal. The District's members include the Counties of Charles Mix, Douglas, Gregory and Bon Homme in south central South Dakota. The proposed dump site is located approximately one and one-half miles west of Lake Andes, South Dakota, on property presently owned by Kenneth McBride.

VII.

The proposed dump site is located on the following described land parcel:

> The south one-half north one-quarter (S1/2 N1/4), Section 6, Township 96 North, Range 65 West (S6, T96N, R65W) of the Fifth Principal Meridan [sic], Charles Mix County, South Dakota.

VIII.

The proposed landfill will fill the west half of this eighty-acre parcel. Seven trenches covering approximately thirty acres will be filled with solid waste. The whole site will occupy approximately fifty acres. Based upon reasonable information and belief, it is believed that the District plans to purchase the east forty-acre area for possible future use after the original landfill is developed.

IX.

The Federal government, by and through its executive agency, the United States Environmental Protection Agency, has and had jurisdiction and permitting authority for solid waste landfills. 42 U.S.C. § 6924 *et. seq.* The United States Environmental Protection Agency has that jurisdiction and authority by virtue of the Resource Conservation and Recovery Act of 1976, until such time as the Environmental Protection Agency grants away, in part or in whole, that permitting authority to the State.

The Environmental Protection Agency had never granted the State of South Dakota the permitting authority to grant authorization for construction of the proposed landfill by Southern Missouri Waste Management District.

X.

The permit granted to Southern Missouri Waste Management District by the State of South Dakota is invalid, in that the State issued the permit before it itself was granted the permit-issuing authority by the Federal Environmental Protection Agency. The State was therefore without the proper jurisdiction and legal authority when it granted the landfill permit to Southern Missouri Waste Management District on December 23, 1993.

XI.

The United States Environmental Protection Agency is prohibited, under the United States Constitution, art. III, § 8, cl.3, from passing any laws or regulations relating

to Indians and Indian tribes, or diminishing in any way the rights or lands of Indians or Indian tribes, unless the Congress has so legislated first. The Federal government, by and through its Environmental Protection Agency are also charged with the duty of fulfilling the trust responsibility to the Tribe as established by the treaty and federal law. This trust responsibility must include and encompass the protection of the Tribal members' general health, safety and welfare to protect both those members and the Tribe itself from exposure to obnoxious and hazardous waste dangers. It is clear that a solid waste landfill can and may be an obvious source of such obnoxious and hazardous waste to the Tribe and its members under these circumstances, and taking into account the proposed landfill site's proximity to the Tribe and its people.

XII.

The proposed construction and operation of a solid waste landfill at the proposed site will immediately and forever threaten the health, safety and welfare of the members of the Yankton Sioux Tribe and as well as the Tribe's property interests in the adjacent geographical area.

XIII.

The method of dump site selection was improper in that it was done before any engineering studies on aspects such as hydraulic conductivity, hidden ecological conditions, or borings and soil samples, were done. The site was selected by the Defendant by visual inspection alone, and selection occurred even before Bon Homme

and Gregory Counties were a part of the District. The Defendant chose the proposed site without any meaningful prioritizing of possible alternative locations.

XIV.

Once the District had chosen the proposed dump site, a preliminary site characterization was submitted to the State Department of Environment and Natural Resources in August, 1992, despite the fact that the engineers needed more information to determine a complete understanding of the site's hydro-geologic characteristics.

XV.

The final application for the proposed dump site permit was submitted by the Defendant to the Department on July 29, 1993. No environmental impact statement was prepared. No risk assessment was made. The State Department of Environment and Natural Resources nonetheless published notice of its approval of the proposed landfill on or about December 23, 1993.

XVI.

The proposed landfill site is within one thousand feet of known streams, springs, wells and stock dams. A stream runs very close to the dump site and flows most of the time. Leakage from the waste trenches will flow toward this stream. A well on an adjoining parcel of land owned by Tom Svatos is just three hundred sixty-six feet away from the dump site. Individuals who own the adjoining land plan to use water from these sources for

domestic purposes, including human consumption. These persons, including the Plaintiffs' members, are legitimately concerned about the potential for pollution of these waters.

XVII.

The proposed dump site has a discernible potential for a landslide or "slumping" as a result of an imbalance of geologic forces. The District's experts have conceded that the soils at the proposed dump site could be unstable. The Defendants had a poorly performed slope stability examination, which inadequately stated that geologic instability would not be a problem.

XVIII.

The Defendant did not address methane gas production or control in its permit application. The Defendant has no clue about how much methane gas the landfill will generate. The proposed design does not call for any methane gas-collection system. Monitoring for methane gas on the boundaries of the site, as proposed, is inadequate because it will not detect dangerous levels of concentrated gas.

XIX.

The risk of contaminating underground aquifers is magnified in this case. The subsurface soil in the area consists of glacial till, primarily sandy clay. Test borings reveal subsurface sand and gravel, porous "lenses", near the proposed waste trenches. There is no way to predict

where or how extensive these lenses are without drilling additional holes across the site. These two wells were drilled to analyze the soils. These two wells were drilled in an area adjacent to the actual trench sites – not where the actual waste is proposed to be located. Once the landfill is constructed, if leachate escapes through undetected sand or gravel lenses, there is really no feasible way to correct the problem.

XX.

The proposed landfill is not environmentally sound and not in the public interest. The District conducted no meaningful examination of the proposed site, nor of any other land within the boundaries of its county members. The District conducted only limited analysis of the chosen site. The tests that were conducted revealed that the site is a potential environmental disaster waiting to happen. Gravel and sand lenses permeate the subsurface. The site is possibly unstable. The proposed site is very near surface water that adjoining land owners intend to use for human consumption. Furthermore, the proposed design incorporates minimal safeguards and admittedly will allow leachate, including life threatening chemicals, to escape the waste cells. The monitoring wells that the District proposes will not detect escaping leachate unless by chance, they happen to be placed in one of the gravel or sand lenses through which the leachate migrates.

XXI.

Further forecasts for the District (then, "Association"), say that it is possible that the District's proposed

dump will receive garbage from outside the four-county area. The District further projects that approximately fifteen thousand, six hundred tons of waste per year will fill the trenches, although it could accept up to twenty-five thousand tons per year, under the proposed permit in issue.

XXII.

The District has plans to accept "special waste", including asbestos. It is unknown as to what chemicals may be found in the leachate generated by the waste. The leachate could include chemicals that cause birth defects and cancer, according to State Department of Environment and National Resources engineers.

XXIII.

Hazardous, obnoxious waste and residue which would be present because of the dump, will cause immediate and irreparable harm to the Plaintiffs and their property. The long term future effects, both known and unknown, will undoubtedly impact the entirety of the physical area as well as the nearby property and population base. This population base clearly includes the Tribe and its individual members.

XXIV.

Persons living next to the proposed landfill site area, including Yankton Sioux Tribal members, are adamantly opposed to it. The Yankton Sioux Tribe is also adamantly

opposed to the proposed landfill, its design, and its location.

XXV.

The Tribe's interest in preserving the environment and natural resources of its ancestral lands is not to be easily disregarded. An Indian tribe may retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the Tribe.

XXVI.

The proposed landfill site is designed to be constructed on the former ancestral lands of the Yankton Sioux Tribe. Said site is within the original undiminished portion of the Yankton Sioux Reservation. Although the proposed site is presently owned by Kenneth McBride, a fee owner, it was once owned by the Tribe. The Tribe intends to repurchase ancestral and has begun a program designed to further this goal. This parcel would be included.

XXVII.

Southern Missouri Waste Management District plans and intends to begin development and construction of the proposed solid waste landfill at the described site, as evidenced by its preparation and introduction of its letting out of construction contract bids. Upon information

and belief, some kind of construction or pre-construction activities have already begun on the landfill site. The immediacy of the beginning of construction of the landfill, justify the judicial intervention of injunctive and declaratory relief in light of the likely impact the landfill will have upon the land and population located near the proposed site, including the Tribe and its individual members.

XXVIII.

Based upon reasonable knowledge and belief, it is known that the Southern Missouri Waste Management District has set September 29, 1994 as the date for letting out bids for construction contracts for the construction of the landfill at the proposed dump site. (See Exhibit #A, public notice published in Lake Andes Ware [sic] newspaper on Wednesday, September 7, 1994)

XXXI. [sic]

The requested temporary restraining order and preliminary injunction sought, are in reaction to the proposed construction of the landfill at the dump site and the letting of bids to begin construction, such letting out of bids to occur on September 29, 1994. If a temporary restraining order and preliminary injunction relief are not granted, it may likely have the effect of causing additional parties, private construction contractors, which may have to be intervened in a much more complex lawsuit than envisioned at this time. The interests of justice and judicial economy dictate that the preliminary injunctive relief at such time when the letting out of

construction bids are sought, would avoid the possibility or necessity of bringing in further parties.

XXX.

The Yankton Sioux Tribe has never been subject to judicial declaration as to their rights and interests to retain the permitting power over its ancestral lands, which would include the proposed dump site. The eastern counties of the Rosebud Sioux Reservation and the Sisseton-Wahpeton Reservation have been subject to such declarations in the past. The Yankton Sioux Tribe intends to exert it sovereign influence over the situation in each and every regard and to seek such judicial declaration and relief as is just and fair and in the best interests of the general health, safety and welfare of the Tribe and its individual members.

XXXI.

The proposed commencement of construction and operation of the landfill, if maintained, constitute irreparable injury to the individual members of the Yankton Sioux Tribe. The September 29, 1994 letting out of bids for construction contractors by Southern Missouri Waste Management District is the initial stage of operation of the landfill project and will constitute irreparable harm to the individual members of the Yankton Sioux Tribe if the Defendant is allowed to begin construction and operation of the proposed landfill at the proposed site, and in particular, to let out bids to contractors on or after September 29, 1994. (See Exhibit #A).

XXXII.

The Plaintiffs seek both a Preliminary Injunction and a Permanent Injunction. Injunctive relief is sought to force the Defendants to refrain from any further efforts to commence construction on the landfill. This requires that Preliminary Injunctive relief be made available to Plaintiffs to prevent any further commencement of the construction and operation of the landfill at the proposed site. This is necessary to prevent the possible contamination of persons and property as a proximate result of the proposed landfill operation which the Plaintiffs assert has an unsafe design.

Permanent injunctive relief should also be granted for the same reasons as set forth in the Memorandum in Support of Preliminary Injunction and Temporary Restraining Order. Until such time as the United States Environmental Protection Agency changes its policies or expressly approves the permitting power to the Yankton Sioux Tribe over this proposed landfill site or any other within the original Yankton Sioux Reservation, the Defendant should be permanently enjoined from proceeding any further in the letting out of bids on or after September 29, 1994, and the construction and operation of the proposed landfill. Such preliminary and permanent injunctive relief is available under Rule 65 of the Federal Rules of Civil Procedure.

XXXIII.

In view of the Defendant's actual and threatened construction and operation of the proposed landfill and the letting out of bids for construction of September 29,

1994, Plaintiffs' contention that the granting of the permitting power to the State of South Dakota by the Environmental Protection Agency is contrary to federal law and regulation, and thus the permit to Southern Missouri Waste Management District is null and void, there is an actual controversy within the jurisdiction of this Court. Declaratory and injunctive relief will effectively adjudicate the rights of the parties.

WHEREFORE, Plaintiffs pray that:

1. A Preliminary Injunction, pursuant to Rule 65 of the Federal Rules of Civil Procedure, be granted enjoining the Defendant from any further construction or operation of the proposed landfill at the proposed site, and enjoining the Defendant from letting out construction contract bids to any contractors, which is scheduled to take place on September 29, 1994.

2. A Permanent Injunction, pursuant to Rule 65 of the Federal Rules of Civil Procedure, be granted enjoining the Defendant from any further construction or operation of the proposed landfill at the proposed site, or from letting out any bid to contracts or after September 29, 1994, until such time as the Defendants have fully complied with all applicable provisions of the United States Constitution, federal law and federal regulations, including the required provisions for obtaining permitting authority under the Resource and Conservation Recovery Act.

3. A decree of declaratory judgment be entered by the Court, pursuant to 28 U.S.C. § 2201 *et. seq.* specifying to Defendant that:

a. Defendant did not properly follow the requirements of 42 U.S.C. § 6924 *et. seq.* when it sought application for ~~a~~ permit to construct and operate a solid waste landfill facility on the proposed site, and in particular that the permit granted by the State of South Dakota and tentatively approved by the United States Environmental Protection Agency is invalid and contrary to federal law and regulation.

b. Defendant did not comply with the necessary safety requirements and analysis in order to adequately assure the protection of the general health, safety and welfare of the Plaintiff and its individual members and others, from the foreseeable harmful effects of the hazardous and obnoxious dangers presented by the proposed landfill.

c. Any other decree of declaratory judgment by the Court deemed just, proper and necessary based upon the pleadings, facts, law and evidence.

4. The Court make awards of costs, disbursements and attorney fees to the Plaintiffs, pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 *et. seq.*, and other applicable authority.

5. The Court provide such other and further relief as it may deem necessary and proper.

Dated this 28th day of September, 1994.

ABOUREZK LAW OFFICES, P.C.
Attorney for Yankton Sioux Tribe
Post Office Box 9460
Suite 101, Rushmore Building
2040 West Main Street
Rapid City, South Dakota 57709
(605) 342-0097
By: /s/ Robin L. Zephier

VERFICATION [sic]

State of South Dakota)
) §§
County of Pennington)

Robin L. Zephier, being first duly sworn, deposes and states that he has read the foregoing document and knows the contents thereof, and that the same is true of his own belief, except as to matters herein stated on information and belief, and as to those matters he believes them to be true.

/s/ Robin L. Zephier
Robin L. Zephier

Subscribed and sworn to before me the 28th day of September, 1994.

/s/ _____
Notary Public, South Dakota

My Commission Expires: 4/14/2000
(SEAL)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

Southern Division

The YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members, and DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,	)	FILE NO. 94-4217
Plaintiffs,	)	ANSWER BY SOUTHERN MISSOURI RECYCLING AND WASTE MANAGEMENT DISTRICT, A POLITICAL SUBDIVISION OF THE STATE OF SOUTH DAKOTA
vs.	)	
SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a non-profit corporation.	)	
Defendant.	)	

COMES NOW, Southern Missouri Recycling and Waste Management District, a Political Subdivision of the State of South Dakota, formerly known as Southern Missouri Waste Management Association, Inc., a South Dakota Corporation, hereinafter referred to as "District," erroneously referred to in Plaintiff's verified complaint as Southern Missouri Waste Management District, a non-profit corporation, by and through it's [sic] legal counsel, Kenneth W. Cotton, Wipf & Cotton, Attorneys at Law, Wagner, South Dakota and respectfully sets forth the following answer to Plaintiff's complaint, to-wit:

I.

That Plaintiff's complaint fails to state a claim upon which relief can be granted.

II.

That Defendant denies each and every matter, thing, and allegation contained in Plaintiff's complaint except as hereinafter specifically admitted, modified, or clarified; and as to those matters denied, Defendant puts Plaintiff to its strict proof thereon.

III.

That due to the length and content of Plaintiff's verified complaint, Defendant hereby responds to each numbered paragraph therein, as follows:

Plaintiff's paragraph I: Defendant admits these citations exist and is without sufficient information or knowledge from Plaintiff's pleadings with which to either admit or deny that the citations included in this paragraph have relevance to the issue at hand; also, that Defendant states the 1892 Agreement with the Yankton Sioux or Dakota Indians in South Dakota was ratified in 1894, not 1994.

Plaintiff's paragraph II: Defendant admits this paragraph.

Plaintiff's paragraph III: Defendant admits this paragraph.

Plaintiff's paragraph IV: The first sentence is not an allegation which requires a response in Defendant's answer; Defendant admits that the

South Dakota Board of Minerals & Environment granted a permit to operate a Subtitle D, Category 2B landfill facility to Southern Missouri Waste Management Association, Inc., a South Dakota non-profit corporation, on December 23, 1993, after an extensive three and a half day hearing before the said South Dakota Board of Minerals and Environment which was held in Pierre, South Dakota, on December 8, 9, 10 & 20, 1993; that the Environmental Protection Agency of the United States has delegated permitting authority to South Dakota over all lands except "former reservation lands" of the Yankton Reservation, and other lands in South Dakota, and that on April 1, 1994, EPA made a tentative decision to grant unto South Dakota the authority to administer the National Solid Waste Program on "former reservation lands" on the Yankton Reservation and other lands, which tentative decision is the most recent statement by the Environmental Protection Agency of the United States on the matter of who is best suited to administer the National Solid Waste Program in South Dakota; that the EPA of the United States does not have permit authority and does not issue permits to operate Subtitle D landfills; that the Plaintiff's have not been delegated authority by the EPA of the United States to administer the National Solid Waste Program; and that if South Dakota does not have authority to issue a permit to District, then, and in that event, no permit is needed by the District, to construct, operate, and maintain a Regional Solid Waste Disposal Facility, as long as same meets all appropriate State and Federal regulation.

Plaintiff's Paragraph V: Defendant admits Plaintiff is a Federally recognized Tribe of Indians duly recognized by the United States Secretary of Interior; Defendant admits that the Tribe's principal place of business is in Marty, Charles Mix County, South Dakota; Defendant is without sufficient information to admit or deny that the "individual members" referred to in this lawsuit are all enrolled members of the Yankton Sioux Tribe; Defendant denies "hazardous waste" is an issue in this matter; Defendant is without sufficient information to admit or deny that Chairman Darrell E. Drapeau is an enrolled member of the Yankton Sioux Tribe.

Plaintiff's Paragraph VI: Defendant hereby admits the first sentence; admits the second sentence and modifies said sentence to include 21 southeastern South Dakota communities which are also members of the District, as was the Plaintiff Yankton Sioux Tribe, up until July, 1993, when leadership of the Tribe changed and the Tribe withdrew from participation in the District; that the proposed *landfill site* is located one and half miles west of Lake Andes, SD, on property owned legally owned by Kenneth McBride, subject to an existing contract for deed running in favor of the Southern Missouri Recycling and Waste Management District, duly recorded in the office of the Register of Deeds in Charles Mix County, South Dakota, on June 24, 1994, in Book 108, pages 1051-1053.

Plaintiff's Paragraph VII: Defendant admits with the exception that the correct legal description of the property upon which the proposed landfill will be located is as follows:

Plaintiff's Paragraph VIII: Defendant admits and clarifies that the District has purchased the entire 80 acre tract above described from Kenneth McBride, and that the west 50 acres of said tract will be used for municipal solid waste disposal, and that the east 30 acres will be used for administration and operational areas of the facility and will not be used for solid waste disposal.

Plaintiff's Paragraph IX: Defendant denies paragraph IX as being inaccurate and hereby puts Plaintiff's there [sic] strict proof thereon.

Plaintiff's Paragraph X: Defendant denies this paragraph in whole and puts Plaintiff to its strict proof thereon.

Plaintiff's Paragraph XI: Defendant denies and puts Plaintiff to its strict proof thereon, and further Defendant specifically denies that the land upon which the proposed landfill is to be placed is subject to any other jurisdiction other than that of the State of South Dakota.

Plaintiff's Paragraph XII: Defendant denies this paragraph in whole and puts Plaintiff to its strict proof thereon.

Plaintiff's Paragraph XIII: Defendant denies the first sentence; denies the second sentence as to visual inspection alone, as there were other factors considered in selecting the proposed landfill site; Defendant admits that Bon Homme and Gregory counties, South Dakota, were not members of the association when the proposed sight [sic] was selected; and Defendant specifically denies the fourth sentence of this paragraph and puts Plaintiff to its strict proof thereon.

Plaintiff's Paragraph XIV: Defendant admits that after the site was selected for the proposed landfill facility that a preliminary site characterization study was submitted to the South Dakota Department of Environment & Natural Resources in August, 1992, that additional information was requested by the Department, and that later a final site characterization study was submitted to the Department.

Plaintiff's Paragraph XV: Defendant admits the first sentence of this paragraph; admits the second sentence of this paragraph, and further modifies to state that an Environmental Statement is not required on a landfill project of this size; Defendant denies the third sentence of this paragraph; Defendant denies the South Dakota Department of Environment & Natural Resources published notice of approval of landfill site on 12-23-93, and clarifies this position to state that the 12-23-93 date was the date that the South Dakota Board of Minerals and Environment granted to the District a permit to operate a regional landfill facility, after the extensive contested case hearing which was held in Pierre, South Dakota, in early December of 1993, and that actual notice of the intent to approve the application was made far earlier by the Department of Environment & Natural Resources for South Dakota, and from that approval came the contested case hearing before the Board of Minerals & Environment in early December of 1993, wherein all of the issues raised in this verified complaint of Plaintiff's were fully, completely, and totally litigated, with Plaintiff's participating every step of the way.

Plaintiff's Paragraph XVI: Defendant admits that the proposed landfill is within 1000 feet of known streams, springs, wells, and stock dams, however, Defendant states by way of clarification that none of these streams, wells, or stock dams are classified for fish life propagation, and consequently violate no state or federal regulation, or are in conformity with same, and therefore have no bearing upon the issue at hand whatsoever; Defendant further states that all of this paragraph was completely and totally litigated in the extensive contested case hearing held before the South Dakota Board of Minerals & Environment in December of 1993, with Plaintiff's voluntarily appearing therein throughout the duration of all proceeding; that Defendant denies the remainder of this paragraph and puts Plaintiff to is strict proof thereon.

Plaintiff's Paragraph XVII: Defendant denies this paragraph as being taken completely out of context, and puts Plaintiff to its strict proof thereon.

Plaintiff's Paragraph XVIII: Defendant denies this paragraph in whole and puts Plaintiff to its strict proof thereon.

Plaintiff's Paragraph XIX: Defendant denies this paragraph in whole and puts Plaintiff to its strict proof thereon.

Plaintiff's Paragraph XX: Defendant denies this paragraph in whole and puts Plaintiff to its strict proof thereon.

Plaintiff's Paragraph XXI: Defendant admits this paragraph.

Plaintiff's Paragraph XXII: Defendant admits this paragraph.

Plaintiff's Paragraph XXIII: Defendant denies this paragraph in whole and puts Plaintiff to its strict proof thereon.

Plaintiff's Paragraph XXIV: Defendant denies this paragraph in whole and puts Plaintiff to its strict proof thereon.

Plaintiff's Paragraph XXV: Defendant specifically denies that the Yankton Sioux Tribe of Indians has any jurisdiction over District's lands or this proposed landfill facility.

Plaintiff's Paragraph XXVI: Defendants [sic] admit [sic] that its land is in the exterior boundaries of the Yankton Sioux Reservation; further, Defendants [sic] specifically deny [sic] that the old exterior boundaries of the Yankton Sioux Reservation have any further utility; that Defendant is without sufficient information with which to admit or deny that Plaintiff Yankton Sioux Tribe has commenced a program to repurchase former "ancestral" lands, or that this parcel owned by the District would be included on that list.

Plaintiff's Paragraph XXVII: Defendant admits the first two sentences; Defendant denies the last sentence.

Plaintiff's Paragraph XXVIII: Defendant admits this paragraph (Note: Plaintiff's complaint jumped from Paragraph XXVIII to XXXI on page 11 and will be answered accordingly)

Plaintiff's Paragraph XX[illegible] on page 11 of Complaint: Defendant denies this paragraph in whole and puts Plaintiff to its strict proof thereon.

Plaintiff's Paragraph XXX: Defendant denies this paragraph in whole and puts Plaintiff to its strict proof thereon.

Plaintiff's Paragraph XXXI on page 12: Defendant denies this paragraph in whole and puts Plaintiff to its strict proof thereon.

Plaintiff's Paragraph XXXII: Defendant denies this paragraph in whole and puts Plaintiff to its strict proof thereon.

Plaintiff's Paragraph XXXIII: Defendant denies this paragraph in whole and puts Plaintiff to its strict proof thereon.

IV.

The Plaintiff's actions should be dismissed for failure to join an indispensable party, i.e. the State of South Dakota, in as much as the State of South Dakota has previously issued a permit to Defendant to construct, operate, and maintain a subtitle D Category II B solid waste disposal facility, part of Plaintiff's Complaint being that the State of South Dakota does not have jurisdiction over the proposed landfill site and consequently cannot issue this permit, therefore the State of South Dakota should be and is, an indispensable party to this lawsuit.

V.

The Plaintiff's action should be dismissed based upon the doctrine of Abstention, in that Plaintiff selected the forum in which they wished to contest the issuing of the South Dakota permit to construct, operate, and maintain the Defendant's proposed solid waste facility, and

Plaintiff did, in fact, actively participate for more than one year in the South Dakota Administrative and Judicial proceedings before the South Dakota Board of Minerals and Environment, and the 6th Judicial Circuit Court in and for Hughes County, South Dakota, as appears more fully by the hereto attached Findings of Fact, Conclusions of Law, and Order of the Board of Minerals and Environment, and the Order Affirming the Prior Action the Board of Minerals and Environment issued by the 6th Judicial Circuit in and for Hughes County, South Dakota, said attachments being marked Exhibit A, B, & C, respectively, and made a part hereof as fully and completely as if set forth verbatim herein; and that whether or not the State of South Dakota has jurisdiction to issue the said permit to Defendant is a question of state law best administered by the South Dakota administrative agencies and Courts, without interference or needless conflict created by a separate Federal Court action. Moreover, it is not in the best interest of judicial economy of either the State administrative or Court system, nor the Federal Court system, to allow an issue that has been fully resolved by the State administrative board and Court system to then be brought into the Federal system alleging the same facts, thereby requiring Defendant to again go through the extraordinary defense of again defending something that it has already defended successfully on two prior occasions.

VI.

That Plaintiff's actions should be dismissed for failure on Plaintiff's part to fully exhaust its State of South Dakota administrative and judicial remedies, despite

Plaintiff's participation in said proceedings for more than one year prior to the filing of this lawsuit.

VII.

That by way of affirmative defense, Defendant specifically alleges the defenses of laches, estoppel, waiver, and res judicata are applicable in this case, based upon the fact that Plaintiff has actively been contesting the citing [sic] and design of the proposed landfill facility in controversy for more than one year prior to the commencement of this action, that Plaintiff has lost in every proceeding to date in its attempt to stop the proposed landfill facility, and based upon their prior participation for more than one year to stop the facility they have waived their rights to go into Federal Court on essentially the same issue, and are engaged in nothing more than forum shopping if the Court allows them to proceed in Federal Court; that Defendant has invested well over $250,000.00 as well as its time and labor to date in citing [sic], designing, and defending the proposed landfill facility against attack by those opposed to it, including this Plaintiff; that Plaintiff knows, and has known through out [sic] this period, that Defendant must have said landfill facility operational by not later October 9, 1995, in order to meet strict Federal and State solid waste disposal mandates or subject its four South Dakota counties and 21 municipalities members fines and penalties, which total in their maximum $250,000.00 per day for every day after October 9, 1995, that said facility does not meet the Federal mandate; that Plaintiff submission and participation in the State of South Dakota proceedings the last one year has been relied upon by Defendant, to its

detriment if Plaintiff is now allowed to proceed on this Federal Court action, and Plaintiff should be estopped from maintaining this Federal Court action; and further, based upon Plaintiff's substantial participation State administrative and judicial facilities previously had over the last one year, as appears more fully by Exhibits A, B, & C attached hereto, the Plaintiff [sic] are guilty of latches and should further be prevented from bringing their Federal Court action at this late date based upon the theory of latches; further, that the Plaintiff brought this same suit for declaratory relief against the State of South Dakota on or about February 14, 1994, and proceeded to drop said proceedings just prior to the State of South Dakota answering the Complaint, for reasons unknown to Defendant.

VIII.

That Plaintiff's action in this matter is vexatious, frivolous, and is meant only to delay and impede the Defendant from complying with the Federal mandate that it is required to comply with; that Plaintiff's action is malicious and capricious in nature; and that as a result thereof Defendant is entitled to sanction and penalties from Plaintiff in an amount to be determined later by this Court.

IX.

That Defendant verily believes that the "Yankton Sioux Reservation" was disestablished by the Treaty of 1892, and subsequent State and Federal legislation and case law and that the former boundaries of the Yankton

Reservation established in the treaty of 1858 were likewise disestablished and are of no longer any force or effect on fee land in southern Charles Mix County, South Dakota, such as the land upon which the proposed landfill facility to be built upon.

X.

That Defendant specifically states that it verily believes the State of South Dakota has at the very minimum concurrent jurisdiction over the land upon which the proposed landfill facility is to be constructed and operated upon; that in the event the State of South Dakota does not have the requisite jurisdiction then the Defendant does not need any permit, as the Environmental Protection Agency does not have the administrative machinery nor does issue any permits to anybody to operate solid waste disposal facility, and that Plaintiff has not been delegated and given the permitting authority to issue said permits by the Environmental Protection Agency.

WHEREFORE, Defendant respectfully prays that the Court enter relief in this matter as follows:

1. That Plaintiff's action be dismissed in total and that Plaintiff recover nothing thereon.

2. That Defendant recover sanctions against Plaintiff for its vexatious, harassing, capricious, frivolous, and dilatory nature of this lawsuit.

3. That Defendant be awarded its costs and disbursements on this action, including reasonable attorney's fees.

4. That Plaintiff request and Motion for Temporary Restraining Order and Temporary and Permanent Injunction be forthwith and summarily dismissed, with prejudice.

5. That Defendant be awarded such other and further relief as the Court may deem just and equitable in the premises.

Dated this 18th day of October, 1994.

/s/ Kenneth W. Cotton

Kenneth W. Cotton
Wipf & Cotton
107 S. Main
Wagner, SD 57380
Phone: 605-384-5471
Attorney for Defendant –
Southern Missouri Recycling
and Waste Management District,
A political sub-division of
the State of South Dakota.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the Answer by Southern Missouri Recycling and Waste Management District, a political sub-division of the State of South Dakota, was duly mailed by First Class mail with postage prepaid thereon, to Plaintiff's attorney, at his last known address, to-wit: Mr. Robin L. Zephier, of Abourezk Law Offices, PC, PO Box 9460, Rapid City, South Dakota 57709 post office, said

mailing being made by the undersigned on October 19, 1994.

/s/ Kenneth W. Cotton
Kenneth W. Cotton
Wipf & Cotton
107 S. Main
Wagner, SD 57380
Phone: 605-384-5471
Attorney for Defendant

Exhibit A

STATE OF SOUTH DAKOTA

BEFORE THE BOARD OF MINERALS AND ENVIRONMENT

IN THE MATTER OF A PROPOSED MUNICIPAL SOLID WASTE PERMIT TO SOUTHERN MISSOURI WASTE MANAGEMENT ASSOCIATION	) FINDINGS OF FACT AND) CONCLUSIONS OF LAW

The above entitled matter having come on regularly for hearing before the South Dakota Board of Minerals and Environment (the Board) at the Matthews Training Center, at 523 E. Capitol, Pierre, Hughes County, South Dakota, at 10:00 o'clock A.M., on Wednesday, December 8, 1993, and continuing on December 9 and 10, 1993, at said location, the Honorable Lee M. McCahren, attorney at law and member of the Board, presiding as the appointed and acting Hearing Examiner for the Board; the following board members being present for the said hearing: Chairman Richard C. Sweetman, Robert E.

Hayes, Vivian Pappel, Linda Hilde, Craig Grotenhouse, Grace Petersen, Mary Wiese, and Wilbert Blumhardt; said contested hearing having come on pursuant to the Petition For a Contested Case Hearing duly filed herein by H. Allen and Carol M. McBride, contesting the proposed issuance of a solid waste permit by the South Dakota Department of Environment and Natural Resources (Department) to the Southern Missouri Waste Management Association (Association), and the Petition for Contested Case-Petition to Intervene of Donald Pay; Intervenor Petition of Ihanktunwan Game, Fish and Wildlife; Intervenor Yankton Sioux Tribe; and Intervenor Voices Organized to Save the Environment (VOTE); the Association being represented by Kenneth W. Cotton, of Wipf & Cotton, Attorneys-At-Law, Wagner, South Dakota 57380, the State of South Dakota being represented by assistant attorney general Charles D. McGuigan and Diane Best; H. Allen and Carol M. McBride appearing Pro Se; Donald Pay appearing Pro Se; Ihanktunwan Game Fish and Wildlife and Yankton Sioux Tribe being represented by James G. Abourezk, of Abourezk Law Offices, Rapid City, South Dakota; and VOTE being represented by legal counsel, Matthew J. Chachere, of New York, New York; Lee McCahran as Hearing Examiner having previously ruled on prehearing matters on September 27, 1993, October 15, 1993, and the pre-hearing Conference and Motion Hearing of December 3, 1993; Discovery, including Depositions of Experts and Requests for production of documents having been taken by the parties hereto; that prior to the formal presentation of evidence and testimony to the Board, individuals were allowed to make informal statements of support or objections to the Board

regarding the application by SMWMA, Inc., for a permit to operate a regional solid waste disposal site; that testifying for the Association were Terry Wotterstorff, Kenneth Kredit, Bruce Bakken, Brian Bernhard, Vernon Arens, John Childs, Bryan Maas, Bob Foster, and Nathan Hunke; that testifying for Department was Terry Wolterstorff and Derric Iles; that testifying for the Yankton Sioux Tribe and Ihanktunwan were Dr. Henry Mott, Dr. Perry Rahn, Tribal Chairman Darrell Drapeau, and tribal member Vince Two Eagles; that VOTE put on no witnesses; that Donald Pay, Pro Se, put on no witnesses and did not attend the hearing on December 10, 1993; that H. Allen McBride and Carol M. McBride, Pro Se, testified themselves but did not put on witnesses; that there were introduced 48 separate evidentiary exhibits by the parties hereto, including the Complete Site Characterization Study and Permit Application, consisting of more than one hundred (100) pages of technical reports, correspondence, studies and documents; the Board having heard the testimony and considered all evidence and exhibits presented at said hearings, and being fully knowledgeable in the records, files and premises herein, and based upon the entire original record in this matter, and upon good cause, now makes the following:

FINDINGS OF FACT

I.

That the Board has jurisdiction of these proceedings pursuant to SDCL § 1-26 and SDCL § 34A-6, and acts amendatory thereto, as well as pursuant to ARSD § 74:09 and 74:27, et. seq., and amendments thereto.

II.

That Association, a South Dakota Non-Profit Corporation was granted Corporate status by the South Dakota Secretary of State on February 26, 1992, with the stated purpose of developing, constructing and maintaining a regional landfill.

III.

That initially Association membership included Charles Mix and Douglas County, the communities located therein, and the Yankton Sioux Tribe, who sent a delegate to each Association meeting through the 7-20-93 meeting; that all members have executed joint powers agreements to become part of the Association, with the exception of the Yankton Sioux Tribe who never executed the Joint Powers Agreement. That Association meets monthly and has encouraged its members to publish minutes and next meeting date in their localities – many of which did.

IV.

That Association engaged the services of B & E Engineering of Yankton, South Dakota, to aid in the locating, permitting, and construction of a regional landfill facility. B & E Engineering was hired in part because it had experience in designing the Vermillion, SD, Subtitle D landfill.

V.

That Association also availed itself of help from Planning and Development District III, of Yankton, South Dakota, to aid it in developing a regional landfill; that District III is in the process of preparing a Source Reduction and Recycling Plan for the Association; that Association realizes its responsibility toward recycling and will be actively encouraging its members to recycle locally as Bon Homme County currently does.

VI.

That Association selected a "Site Selection Committee" from its membership in order to located [sic] a suitable site for the location of a regional landfill.

VII.

That Association published notice in local newspapers soliciting available parcels of land to locate a regional landfill on, that these publications were made in Charles Mix and Douglas County only, as those were the only two counties comprising the Association at that time. That no responses to this advertisement was [sic] received by the Association.

VIII.

That the Site Selection Committee of Association thereupon actively went out and looked for potentially suitable sites upon which to build a regional landfill.

IX.

That several potential sites were looked at by Site Selection Committee using site criteria given it by District III and B & E Engineering and those sites were then turned over to B & E Engineering for further review. That Several Sites were excluded for various reasons, including being too close to the Lake Andes Airport, containing wetlands, or overlaying shallow aquifers.

X.

The Site Selection Committee was looking for a potential site that met EPA and SD guidelines for the permitting of a landfill and also that site would be somewhat centered in the two county area (i.e., Charles Mix and Douglas), in order to mitigate members hauling expense to the landfill.

XI.

The Site Selection Committee recommended three possible sites to Association on June 23, 1992; and that the Association selected the S1/2 of the NW1/4 of Section 6, Township 96 North, Range 65 West of the 5th P.M., Charles Mix County, South Dakota, as the proposed site of the Association's landfill, this site known as the "McBride" site. That said site is approximately 1 1/2 to 2 miles west of Lake Andes, Charles Mix County, South Dakota.

XII.

That Association obtained an option to purchase said real property from Kenneth McBride on July 9, 1992, contingent on the site being permitted for a solid waste landfill.

XIII.

That B & E Engineering began gathering data on the proposed site in July, 1992, which included soil borings, test wells, and compliance with South Dakota Administrative rules, all of which culminated in a Site Characterization Study for Solid Waste Landfill being submitted on behalf of Association by B & E Engineering to Department on or about January 20, 1993.

XIV.

That Department had additional questions regarding the proposed site and B & E Engineering worked with Department on behalf of the Association to accomplish additional engineering data on the proposed site which culminated in the final Site Characterization Study for Solid Waste Landfill being submitted to Department on or about July 29, 1993, which said Site Characterization Study is included herein by reference as fully and completely as if included verbatim herein.

XV.

That Association applied to Department for a Solid Waste Permit on August 3, 1993; that said Permit application is in good and proper form and said Permit application is included herein by reference as fully and completely as if included verbatim herein.

XVI.

That Department conducted a thorough completeness examination of Association's Permit application and found the Permit application to be in conformity with all SD Laws and Regulations and that said Permit application is procedurally correct.

XVII.

That Department conducted a technical review of said permit application and found the application to be technically sound and in compliance with all SD Laws and Regulations; and that the Permit application addressed each of the matters required under SDCL § 34A-6 and ARSD § 74:27, and any acts amendatory thereto.

XVIII.

That Department recommended the issuance of a Permit to Construct and operate a municipal Solid Waste Landfill Facility under the South Dakota Solid Waste Program, Facility Type II B, conditioned on four (4) general requirements, five (5) design and construction requirements, three (3) monitoring requirements, nine (9)

operational requirements, three (3) record keeping and reporting requirements, and two (2) financial assurance requirements, which are attached to the proposed Permit in Department Exhibit #1 and which is incorporated herein by reference thereto.

XIX.

That Department published a recommendation of approval of said Permit application on August 12, 1993, in the Lake Andes Wave, a legal publication headquartered in Lake Andes, Charles Mix County, South Dakota.

XX.

That contestants and Intervenors herein timely contested and intervened in this matter.

XXI.

That Department sent proper and timely notices of the hearing before the Board of Minerals & Environment to all parties herein and to all persons appearing on the Department's official mailing list.

XXII.

That there is substantial public support for the granting of Association's Permit application as evidenced by the verbal support and resolutions of Charles Mix, Douglas, Bon Homme and Gregory Counties, and the cities of Tabor, Springfield, Scotland, Delmont, Wagner, Avon, Burke, Bonesteel, Ravinia, Platte, Lake Andes, Tyndall,

Fairfax, and state representatives Albert Kocer, Frank Kloucek, and Ed Van Gerpen; and further that contestants and intervenors stipulated at the commencement of the hearing that there was public support for this landfill; and based upon the public comment received at the public hearing conducted by the Department in Lake Andes, South Dakota, on July 8, 1993; and further that no citizens testified in opposition to association being granted a Solid Waste Permit at the public comment portion of the hearing.

XXIII.

That Bryan Maas, of Maas & Associates, a real estate appraising firm, from Parkston, SD, testified on behalf of Association that the proposed landfill would not result in lower or reduced property values for surrounding property owners based on his study of property values surrounding the Runge landfill at Sioux Falls, SD, the nearest Subtitle D landfill to the proposed Association Landfill, and his review of property values around the existing town dumps of Platte, Wagner and Lake Andes, which said testimony was unrefuted by Contestants and intervenors; and the Board finds the location of said landfill will not adversely impact surrounding property values.

XXIV.

That Dr. Perry Rahn expressed his concerns as an expert witness for the Yankton Sioux Tribe, regarding the proposed site, which included the possibility of (1) a major aquifer lying beneath the proposed site, (2) not

enough test wells being drilled, (3) possible presence of continuous sand or gravel lenses under the proposed site and (4) possible fractures, fissures or lineaments leading vertically to the Codell aquifer are unfounded and rejected by the Board based on Derric Iles testimony that the Kumes/Hedges Study of the Geddes Aquifer clearly shows that aquifer Northeast of proposed site and that the likelihood of finding a major aquifer under proposed site was minimal; that Dr. Rahn himself testified Derric Iles was an expert in this area; further, that John Childs of B & E Engineering stereoscopically examined the SD Geological Survey aerial photographs of the proposed site and found no evidence of fractures, fissures or lineaments, which Dr. Rahn testified would raise his comfort level with proposed site; further, that the lineament map admitted in evidence during the testimony of Derric Iles shows no known lineaments traversing the proposed site; further, that it is economically impossible for the Association to place 871 test wells or borings on the proposed 50 acre site, and based upon Bob Foster and Nathan Hunke's testimony, the number of test wells and borings are adequate to make a reasonable engineering determination as to what will be found on proposed site when construction begins; that Derric Iles testified, and the Board finds that because sand and gravel was found in some wells and borings and not in wells and borings adjacent, the sand and gravel lenses on proposed site are likely discontinuous and can well be remedied in the Construction Assurance Plan; and that the Nevzel theory upon which Dr. Rahn bases his concern for vertical cracks and fissures in the Pierre shale above the Codell Aquifer has been admitted to be in error by Nevzel himself.

XXV.

That Dr. Henry Mott's concerns as an expert witness for the Yankton Sioux Tribe, which included (1) no methane gas collection system, (2) inadequacy of the proposed liner and leachate collection system, and (3) ground water mounding, are unfounded and rejected by the Board based upon Dr. Mott's testimony that a methane gas collection system is not required by SD Regulations; that technology exists to deal with Methane gas accumulation at a later date if quarterly monitoring as proposed by the Association finds methane to be an explosive or human health hazard; that Dr. Mott testified that he did not know if either the Sioux Falls or Rapid City landfills have methane gas collection systems; that Dr. Mott has never designed or constructed a Subtitle D landfill; that Bob Foster of Great Plains Engineering, as soil consulting engineer to B & E Engineering, testified the soil at the proposed site can, in his opinion, be compacted to the required 1 x 10(-7) cm/sec. rate at slightly over 96% compaction; that glacial tills in Vermillion, SD and proposed site are similar and that B & E was able to achieve the same compaction results in the Vermillion field as the lab and he believes B & E will achieve similar results as to compaction of the liner on proposed site; that Nathan Hunke is an expert in hydrogeology and that he has previous experience working on seven (7) other landfills and hydrological/geological problems associated therewith and feels the compaction of 1 x 10(-7) cm/sec. can easily be achieved on proposed site, that the underlying glacial till provides a very impermeable layer under the liner to further protect the environment, that the 1 x

10(-3) cm/sec. permeability of the leachate collection system will cause nearly all leachate to enter collection system to be routed to collection point or be circulated over existing cell; and that he does not believe ground water mounding will be a problem at the proposed site. That Nathan Hunke also testified that based on his experience the number of test wells and borings were adequate to analyze the proposed site's substrata.

XXVI.

That the double liner – double leachate collection system proposed by Dr. Mott is not required by South Dakota solid waste regulations.

XXVII.

That approximately 16 small town unregulated dumps can be closed if the proposed landfill is permitted, thus resulting in substantial benefit to the public and resulting in increased protection for the environment.

XXVIII.

That the proposed facility will not cause significant adverse affect [sic] on wildlife, recreation, aesthetic value of the area, or threatened or endangered species; is not located within 1000' of bodies of water classified for fish life propagation; is not located within an area where leachate can potentially contaminate ground water; is not located within the 100 year flood plain; and is not visible or within 1000' of a public park and is in an area that does not constitute a potential safety hazard to the public.

XXIX.

That Association has not violated any of the conditions for denial set forth in SDCL § 34A-6-1.3, and is a fit and proper entity to which a Solid Waste Disposal Permit may be issued.

XXX.

That Association has provided all necessary information and evidence to Department and Board to comply with all applicable laws and regulations in order for the Board to make a decision regarding Association's Permit Application.

XXXI.

That Yankton Sioux Tribal Chairman Darrell Drapeau testified the Tribe has two reasons for contesting the issuance of the requested Solid Waste Disposal Permit to the Association. First, that the Tribe felt the site was inappropriate and Second, that the Tribe felt the design was flawed based on their experts [sic] statements and reports, which the Board has previously rejected. The Tribal Chairman testified that the McBride site was not Tribal land, that the Tribe may someday want to buy back the McBride site, that he didn't know if Subtitle D regulations were applicable to Indian Tribes.

XXXII.

That locating, permitting, constructing, and operating a subtitle D landfill involves a series of steps; that permitting the facility comes before the final design of

facility is completed; that most all of the Contestants-Intervenors objections to proposed facility are items associated with Final design, not site suitability.

XXXIII.

That the proposed groundwater monitoring program is not yet complete, however, the ground water monitoring program is provided for in Permit Condition No. 3.1.

XXXIV.

That the permit conditions specifically address the design of the facility in order to protect groundwater, surface water, and the environment.

XXXV.

That for all the reasons set forth in these Findings, the entire record in this matter, all evidence and testimony included therein, the Board finds that the proposed site is suitable for disposal of Municipal Solid Waste, is appropriate for the planned use, and is an environmentally safe site.

XXXVI.

That the Board finds that with regard to all the issues and concerns raised by the Contestants-Intervenors herein and their witnesses regarding the proposed facility, in each case those issues and concerns have been answered to the satisfaction of the Board by witnesses on behalf of Association or Department, and the entire

record, including all exhibits, in this case; further, that all other objections to the granting of the Solid Waste Disposal Permit to Association are without merit and denied by the Board.

XXXVII.

That the Solid Waste Disposal Permit will be subject to the permit conditions attached thereto and incorporated herein by reference.

Now, and from the foregoing FINDINGS OF FACT the Board makes the following:

CONCLUSIONS OF LAW

I.

That the Board has jurisdiction of the parties and subject matter of these proceedings pursuant to SDCL § 1-26 and SDCL § 34A-6, as well as pursuant to ARSD § 74:09 and 74:27, et. seq., and any acts amendatory thereto.

II.

That Contestants, Intervenors, and People of South Dakota have been afforded due process in this hearing.

III.

That Association is a SD Non-Profit Corporation, is comprised of member governments duly exercising mutual joint powers agreements; that Association has not

violated SDCL § 34A-6-1.3 and is therefore eligible to receive a Solid Waste Disposal Permit.

IV.

That Association's application for a Solid Waste Disposal Permit is complete, contains all items required by, and meets the requirements of, all applicable laws and regulations, both procedural and substantive, for the issuance of a Solid Waste Disposal Permit.

V.

That the proposed facility complies fully with all applicable requirements of SDCL § 34A-6 and ARSD § 74:27, inclusive, and otherwise fulfills all requirements for the issuance of a Solid Waste Disposal Permit.

VI.

Association's proposed facility, if operated in accordance with the submitted application and the permit conditions imposed by the Board, will not cause adverse impacts to the environment or Natural resources of South Dakota.

VII.

The proposed facility and the granting of a Solid Waste Disposal Permit to Association for the proposed site is in the public interest.

Dated this 23rd day of December, 1993.

/s/ Lee M. McCahren
Lee M. McCahren, Hearing Officer
SD Board of Minerals and Environment

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Amended Findings of Fact and Conclusions of Law along with the Order Dismissing Contestant's and Intervenor's Petitions and Authorizing Solid Waste Permit To SMWMA, Inc., has been provided by United States mail, postage paid to each of the following this 22nd day of December, 1993:

H. Allen and Carol M. McBride
Route 2, Box 57
Lake Andes, SD 57356

James G. Abourezk
816 St. Joseph Street
Rapid City, SD 57701

Charles D. McGuigan
Assistant Attorney General
State of South Dakota
500 E. Capitol
Pierre, SD 57501-5070

Bruce Ellison
Attorney at Law
PO Box 2508
Rapid City, SD 57709

Matthew J. Chachere
Center for Constitutional Rights
666 Broadway
New York, NY 10012-2317

Donald Pay
114 E. Philadelphia
No. 3
Rapid City, SD 57701

Dated this the 22nd day of December, 1993.

/s/ Kenneth W. Cotton
Kenneth W. Cotton

Exhibit B

STATE OF SOUTH DAKOTA

BEFORE THE BOARD OF MINERALS AND ENVIRONMENT

IN THE MATTER OF A PROPOSED MUNICIPAL SOLID WASTE PERMIT TO SOUTHERN MISSOURI WASTE MANAGEMENT ASSOCIATION	)))))))	ORDER DISMISSING CONTESTANT'S AND INTERVENOR'S PETITIONS AND AUTHORIZING SOLID WASTE PERMIT TO SMWMA, INC.

The above entitled matter having come on regularly for hearing before the South Dakota Board of Minerals and Environment (the Board) at the Matthews Training Center, at 523 E. Capitol, Pierre, Hughes County, South Dakota, at 10:00 o'clock A.M., on Wednesday, December 8, 1993, and continuing on December 9, 10, and 20, 1993, at said location, the Honorable Lee M [sic] McCahren, attorney at law and member of the Board, presiding as the appointed and acting Hearing Examiner for the Board; said contested hearing having come on pursuant to the Petition For A Contested Case Hearing duly filed herein by H. Allen and Carol M. McBride, contesting the proposed issuance of a solid waste permit by the South Dakota Department of Environment and Natural Resources (Department) to the Southern Missouri Waste Management Association (Association), and the Petition for Contested Case-Petition to Intervene of Donald Pay; Intervenor Petitioner of Ihanktunwan Game, Fish and Wildlife; Intervenor Yankton Sioux Tribe; and Intervenor Voices Organized to Save the Environment (VOTE); the

Association being represented by Kenneth W. Cotton, of Wipf & Cotton, Attorneys-At-Law, Wagner, South Dakota 57380, the State of South Dakota being represented by assistant attorney general Charles D. McGuigan and Diane Best; H. Allen and Carol M. McBride appearing Pro Se; Donald Pay appearing Pro Se; Ihanktunwan Game Fish and Wildlife and Yankton Sioux Tribe being represented by James G. Abourezk, of Abourezk Law Offices, Rapid City, South Dakota; and VOTE being represented by legal counsel, Matthew J. Chachere, of New York, New York; the Board having heard the testimony and considered all evidence and exhibits presented at said hearings, and being fully knowledgeable in the records, files and premises herein, and upon the Findings of Fact and Conclusions of Law duly filed herein, and upon good cause shown; it is hereby,

ORDERED, that the Petition for a Contested Case hearing duly filed herein by H. Allen and Carol M McBride, as well as the Petition to Intervene by Donald Pay; Ihanktunwan Game, Fish and Wildlife; Yankton Sioux Tribe; and Voices to Save the Environment (VOTE), are hereby denied; and it is further,

ORDERED, that proposed issuance of a solid waste permit by Department be ratified and confirmed and a solid waste permit is hereby awarded to SMWMA, Inc., Subject to whatever conditions placed upon same by Department.

Dated this 23rd day of December, 1993.

South Dakota Board of Minerals and Environment

By: /s/ Lee McCahran
Lee McCahran, Hearing Officer
SD Board of Minerals and Environment

EXHIBIT C

STATE OF SOUTH DAKOTA)
) SS.
COUNTY OF HUGHES)

IN CIRCUIT COURT

SIXTH JUDICIAL CIRCUIT

CIV #94-34

IN THE MATTER OF A PROPOSED MUNICIPAL SOLD [sic] WASTE PERMIT TO SOUTHERN MISSOURI WASTE MANAGEMENT ASSOCIATION, INC.	) ORDER AFFIRMING) BOARD OF MINERALS) AND ENVIRONMENTS) FINDINGS OF FACT) CONCLUSIONS OF LAW,) AND ORDER DISMISSING) CONTESTANTS AND) AUTHORIZING SOLID) WASTE PERMIT TO) SMWMA, INC.

The above entitled matter came on regularly for hearing before the Honorable Steven L. Zinter, Circuit Court Judge in and for the Sixth Judicial Circuit, on the 28th day of September, 1994, at the hour of 2:00 o'clock p.m., at the Hughes County Courthouse, located in the City of Pierre, Hughes County, South Dakota; appellant voices organized to save the environment, hereafter referred to as

"VOTE," appeared in the person of their attorney, Mr. James G. Abourezk, of 816 St. Joseph St., #206, Rapid City, SD 57701; Appellee Southern Missouri Waste Management Association, Inc., appeared in the person of their attorney, Kenneth W. Cotton, of Wipf & Cotton, Attorneys at Law, PO Box 370, Wagner, SD 57380; Appellee State of South Dakota appeared in the person of Charles D. McGuigan, Assistant Attorney General with the State of South Dakota, 500 E. Capitol St, Pierre, SD 57501; This matter having come on before the Court pursuant to a Notice of Appeal filed with the Court on or about January 18, 1994, by Appellant Vote, said hearing being the agreed upon time for oral arguments on VOTES appeal on the South Dakota Board of Mineral and Environments Findings of Fact, Conclusions of Law, and Order Dismissing Petitioners and Interveners Petitions and granting a Solid Waste Permit to SMWMA, Inc., said order being dated on or about December 23, 1993; the Court having fully reviewed the record in this matter, including all of the oral testimony given at the contested case hearing held before the Board of Minerals and Environment on December 8, 9, & 10, and continued on December 20, 1993, as well as all the evidentiary exhibits and engineering data submitted therein, and upon consideration of the briefs duly filed in this matter, and the oral arguments given by counsel at the hearing on this matter; and further, the Court being fully knowledgeable in the records, files, and premises herein, and upon good cause shown; it is hereby,

ORDERED that the Findings of Fact, Conclusions of Law, and Order dismissing petitioners and interveners petitions and authorizing the issuance of a solid waste

permit to Southern Missouri Waste Management Association, Inc., duly made and entered by the South Dakota Board of Minerals and Environment, on or about December 23, 1993, is in all respects affirmed; and it is further,

ORDERED that the administrative appeal filed by Appellant VOTE is hereby denied in all respects based upon the above affirmants [sic] of the prior action taken by the South Dakota Board of Minerals and Environment in this matter.

Dated this 4th day of October, 1994.

BY THE COURT:

/s/ Steven L. Zinter
Judge of the Circuit Court

ATTEST:

/s/ Mary L. Erickson
Clerk of Courts

/s/ by Sharon McEntaffer
(SEAL) Deputy

STATE OF
SOUTH DAKOTA
CIRCUIT COURT,
HUGHES CO.
FILED

OCT 04 1994

Mary L. Erickson Clerk
By /s/ Deputy

State of South Dakota)
) ss
County of Hughes)

I hereby certify that the foregoing instrument is a true and correct copy of the original on file in my office.

Dated this 6th day of Oct. 1994.
MARY L. ERICKSON,
Clerk of Courts
By /s/ Sharon McEntaffer
Clerk of Courts/
Deputy

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

Southern Division

The YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members, and DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe, Plaintiffs, vs. SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a non-profit corporation. Defendant.	FILE NO. 94-4217 THIRD PARTY COMPLAINT

COMES NOW, Southern Missouri Recycling & Waste Management District, a South Dakota Political Subdivision, hereinafter referred to as "District", by and through its legal Council, [sic] Kenneth W. Cotton, of Wipf & Cotton, Attorneys at Law, 107 S. Main St., Wagner, South Dakota, and respectfully sets forth the following cause of action against the State of South Dakota, hereinafter "State," as follows:

I.

That District hereby incorporates its Answer to Plaintiff's Verified Complaint, duly filed herein, as fully and completely as if set forth verbatim herein, and attaches a

copy of said Answer to this Third Party Complaint, marked Exhibit 1.

II.

That State was duly admitted into the union pursuant to an enabling act, the same being the Act of February 22, 1889, Chapter 180, 25 stat. 676.

III.

That District is a political subdivision of the State of South Dakota, and is set up and structured as a Regional Recycling & Waste Management District pursuant to SDCL § 34-A-16-1, [sic] et. seq.; that said District was duly created by the filing of Articles of Incorporation with the South Dakota Secretary of State's Office, on or about August 22, 1994; that per such statute the District is a political subdivision of the State of South Dakota, and as such, is entitled to rely upon any information given it by the State of South Dakota as to jurisdiction and legality of permits sought by the District from the State of South Dakota for municipal solid waste disposal; and that the predecessor organization to the District was known as Southern Missouri Solid Waste Management Inc., as [sic] South Dakota non-profit corporation, which was formed in February, 1992, for purposes of providing a regional landfill facility for four (4) counties, twenty-one (21) communities, and originally the Yankton Sioux Tribe, all lying in southeastern South Dakota.

IV.

That District has spent in excess of $250,000.00 to date on this proposed landfill facility in site selection, land acquisition, site testing, engineering, design, contested case hearings and expert witness fees, all based upon District's reliance on statements made to it by the State of South Dakota that the South Dakota Board of Minerals and Environment, through the State of South Dakota, had jurisdiction to issue the Subtitle D, Category IIB landfill permit that it did issue the District on or about December 23, 1994.

V.

That District had expended said funds to date on said landfill facility based upon the State's position that the State has jurisdiction over the land upon which the facility is to be constructed.

VI.

That Plaintiff alleges in its Complaint that the State of South Dakota does not have jurisdiction to issue said permit, nor does the State have any jurisdiction whatsoever over lands lying within the "former boundaries" of the original Yankton Sioux land area granted by the Treaty of 1858.

VII.

That in the interest of judicial economy and in the interest of fully and completely litigating all issues raised by the Plaintiff in their Complaint, District alleges that

the State of South Dakota is an indispensable party to this lawsuit, as to the jurisdictional and lack of authority questions raised in Plaintiff's Complaint against the State of South Dakota; and District has a right to have the State involved in these proceedings to defend the jurisdictional and other claims made by the Plaintiff against the State's authority to issue the permit previously referred to.

VIII.

That District is entitled to bring State into this lawsuit as a 3rd party defendant.

WHEREFORE, District respectfully prays the Court to enter judgment, as follows:

1. That State of South Dakota be made a 3rd party defendant in this particular action.

2. That the State be required to defend the permit that it has previously issued to the District and to show the validity thereof, based upon their previous statements that the State of South Dakota has jurisdiction over the land upon which the proposed facility is to be built.

3. That the District recover its costs and disbursements on this action, including reasonable attorney fees.

4. That the District be awarded such other and further relief as the Court may deem just and equitable in the premises.

Dated this 18th day of October, 1994.

/s/ Kenneth W. Cotton
Kenneth W. Cotton
Wipf & Cotton
107 S. Main St.
Wagner, SD 57380-0370
Phone: 605-384-5471
Attorney for District

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon each of the attorneys of record of all adverse parties in the above-entitled cause of action by enclosing the same in an envelope addressed to each such attorney at his respective address as disclosed by the pleadings of record herein, with postage fully paid, and by depositing said envelope in a United States Post Office Depository in Wagner, SD, on the 20th day of October, 1994.

/s/ Kenneth W. Cotton
Wipf & Cotton
Attorneys for Southern Missouri
and Waste Management District

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

The YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members, and DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe, Plaintiffs, v. SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a non-profit corporation, Defendant, v. STATE OF SOUTH DAKOTA, Third Party Defendant.	CIV. NO. 94-4217 ANSWER TO THIRD PARTY COMPLAINT

COMES NOW Third Party Defendant, State of South Dakota, by and through its undersigned counsel of record, and for its answer to the third party complaint filed herein, alleges as follows:

I.

State of South Dakota admits paragraph I and joins in Defendant District's Answer to the extent it does not conflict with the Answer of the State of South Dakota, filed herewith.

II.

State of South Dakota admits paragraphs II and III.

III.

State of South Dakota admits all of paragraph IV except the last three lines of that paragraph which states that South Dakota had jurisdiction to issue a subtitle D permit to the district. State admits that it has the jurisdiction to issue a State type IIB solid waste facility permit to Defendant District pursuant to SDCL ch. 34A-6. Under subtitle D of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6900 *et seq.*, a permit from the Environmental Protection Agency (EPA) is not necessary to operate a municipal solid waste landfill.

IV.

State of South Dakota has insufficient information to either admit or deny paragraph V and therefore it is deemed to be denied.

V.

State of South Dakota admits paragraphs VI and VII.

VI.

State of South Dakota denies paragraph VIII in that Defendant alleges that it is entitled to bring State into this lawsuit. State admits that it voluntarily consents to this Court's jurisdiction and does not oppose joinder into this action.

WHEREFORE, the State of South Dakota prays for the following relief:

1. That Plaintiff's action be dismissed with prejudice.

2. That the State of South Dakota recover its costs and disbursements in this action, including reasonable attorney fees.

3. That the State of South Dakota be awarded such other and further relief as the court may deem just and equitable in this matter.

Dated this 4th day of November, 1994.

/s/ Charles D. McGuigan
Charles D. McGuigan
Assistant Attorney General

/s/ John P. Guhin
John P. Guhin
Deputy Attorney General

/s/ Roxanne Giedd
Roxanne Giedd
Assistant Attorney General
500 E. Capitol
Pierre, SD 57501-5070
Telephone: (605) 773-3215

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

The YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members, and DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,	)	CIV. NO. 94-4217
Plaintiffs,	)	ANSWER OF STATE OF SOUTH DAKOTA
v.	)	(Filed Nov. 7, 1994)
SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a non-profit corporation,	)	
Defendant,	)	
v.	)	
STATE OF SOUTH DAKOTA.	)	
Third Party Defendant.	)	

COMES NOW Third Party Defendant, State of South Dakota, by and through its undersigned counsel of record, and for its answer to Plaintiff's Complaint filed herein, alleges as follows:

I.

State of South Dakota asserts that the Complaint fails to state a cause of action or claim of relief against the State of South Dakota and Defendant District for which

relief may be granted and accordingly the Complaint should be dismissed.

II.

State of South Dakota denies each and every allegation of the Complaint except as otherwise specifically admitted.

III.

State of South Dakota joins in Defendant Southern Missouri Recycling and Waste Management District's Answer to the extent it is not in conflict with this Answer of the State of South Dakota, and incorporates Defendant District's Answer as if fully set forth herein.

IV.

State of South Dakota denies that portion of paragraph I which alleges that this action arises under Art. I, § 8, cl. 3. of the United States Constitution and the Fifth Amendment to the United States Constitution. State admits the remainder of paragraph I except to clarify that the 1892 agreement with the Yankton Sioux or Dakota Indians, in South Dakota, was ratified by Congress in 1894.

V.

State of South Dakota denies that this Court has jurisdiction over the State as this matter is barred by the

Eleventh Amendment to the United State [sic] Constitution. However, State of South Dakota hereby waives its right to invoke the Eleventh Amendment as a bar to this Court's jurisdiction and hereby voluntarily consents to the Court's jurisdiction in this matter.

VI.

State of South Dakota admits paragraph III.

VII.

State of South Dakota denies paragraph IV. Defendant District's landfill site is not within the exterior boundaries of the Yankton Sioux Reservation because the Yankton Sioux Reservation was disestablished by the Act of 1894. *Wood v. Jameson*, 81 S.D. 12, 130 N.W.2d 95, 99 (1964); *State v. Williamson*, 87 S.D. 512, 211 N.W.2d 182, 184 (1973); *State v. Winckler*, 260 N.W.2d 356, 360 (S.D. 1977); *State v. Thompson*, 355 N.W.2d 349, 350 (S.D. 1984); *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *Hagen v. Utah*, ___ U.S. ___, 114 S.Ct. 958 (1994); *Marty Indian School Board, Inc. v. South Dakota*, slip op. Civ. No. 85-4006 (D. S.D. Sept. 16, 1986), *rev.* on other grounds, *Marty Indian School Board, Inc. v. South Dakota*, 824 F.2d 684 (8th Cir. 1987) (slip op. attached as Attachment A).

State of South Dakota denies that EPA grants permitting authority. Permitting authority is created by state law under SDCL ch. 34A-6, and is independent from the regulations contained in subtitle D of RCRA. Under § 4005 of RCRA, as amended by the Hazardous and Solid Waste Amendments of 1984, if the State demonstrates an

adequate solid waste permit program EPA may delegate *its enforcement activities* to the State. EPA does not delegate permitting authority rather, an adequate State permitting program is a condition precedent to EPA's delegating enforcement authority of subtitle D of RCRA to the requesting state. EPA has made a tentative determination of adequacy of the State's municipal solid waste permit program over non-Indian lands of the former lands of the Yankton Sioux Reservation, and over the non-Indian lands of the former Lake Traverse Reservation (Sisseton-Wapheton) and over non-Indian lands of certain areas which were formerly part of the Rosebud Sioux Indian Reservation. 59 Fed. Reg. 16647 (April 7, 1994). State admits that it has not received final delegation from EPA of enforcement activities for lands covered by the former Yankton Sioux Reservation.

VIII.

State of South Dakota denies paragraph V and notes that household waste by definition is not hazardous waste. ARSD 74:28:22:01, adopting by reference 40 C.F.R. § 261.4(b)(1).

IX.

State of South Dakota admits paragraph VI but points out that Defendant District will be operating a landfill, not a "dump."

X.

State of South Dakota denies paragraph VII. The correct legal description for the permitted facility is the Southwest quarter of the Northwest quarter and the West 320 feet of the Southeast quarter of the Northwest quarter of Section 6, Township 96 North, Range 65 West of the 5th Principle Meridian, Charles Mix County, South Dakota.

XI.

State of South Dakota admits the first sentence of paragraph VIII. State has insufficient information to either admit or deny the remainder of paragraph VIII and therefore it is deemed to be denied.

XII.

State of South Dakota denies paragraph IX. EPA does not have permitting authority for solid waste landfills. An operator of a solid waste landfill must comply with subtitle D of RCRA, but does not have to apply for or receive a permit from EPA. Further, EPA does not grant permitting authority to the States. EPA, upon an adequate showing by a state, may delegate its RCRA enforcement authority to a requesting state. South Dakota's permitting authority is independent from federal law. South Dakota's permitting authority is created by state law and is governed by SDCL ch. 34A-6 and ARSD art. 74:27.

XIII.

State of South Dakota denies paragraphs X, XI and XII.

XIV.

State of South Dakota denies paragraphs XIII, XIV, XV, XVI, XVII, XVIII, XIX, and XX. These claims were fully litigated in a four day contested case hearing before the South Dakota Board of Minerals and Environment and are thus barred by res judicata and collateral estoppel.

XV.

State of South Dakota has insufficient information to either admit or deny the first sentence of paragraph XXI and therefore it is deemed denied. State of South Dakota admits the remainder of paragraph XXI.

XVI.

State of South Dakota denies paragraphs XXII, XXIII and XXIV. These claims were fully litigated before the South Dakota Board of Minerals and Environment and thus barred by res judicata and collateral estoppel.

XVII.

State of South Dakota denies paragraph XXV. First, the lands involved here are not within a "Reservation." *See* paragraph VII, *supra*. Second, in the alternative, Indian tribes do not retain inherent power to exercise civil authority over non-Indian lands. *South Dakota v. Bourland*, 508 U.S. ___, 113 S.Ct. 2309 (1993); *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408 (1989); *Montana v. United States*, 450 U.S. 544 (1981).

XVIII.

State of South Dakota admits that portion of paragraph XXVI which alleges that "[t]he proposed landfill site is designed to be constructed on the *former* ancestral lands of the Yankton Sioux Tribe" (emphasis added). State of South Dakota denies that the Yankton Sioux Reservation is undiminished. *See Marty Indian School Board, Inc. v. South Dakota*, slip op. Civ. No. 85-4006 (D. S.D., Sept. 16, 1986) (Attachment A). State of South Dakota admits that the proposed site is presently owned by Kenneth McBride, a non-Indian, and admits that the parcel may have once been owned by the United States of America in trust for the Yankton Sioux Tribe. State of South Dakota has insufficient information to either admit or deny the last two sentences of paragraph XXVI and therefore they are deemed denied.

XIX.

State of South Dakota has insufficient information to either admit or deny paragraphs XXVII and XXVIII and therefore they are deemed denied.

XX.

State of South Dakota denies paragraph XXXI (sic).

XXI.

State of South Dakota denies that the Yankton Sioux Tribe has never been subject to a judicial declaration that the Yankton Sioux Reservation was disestablished. *See* paragraph XVII of Answer of State of South Dakota, *supra*

and *Marty Indian School Board, Inc. v. South Dakota*, slip op. Civ. No. 85-4006 (D. S.D., 1986) (Attachment A).

XXII.

State of South Dakota denies paragraphs XXXI, XXXII and XXXIII.

AFFIRMATIVE DEFENSES

I.

The Complaint fails to state a claim upon which relief can be granted.

II.

This action is barred in whole or in part by res judicata.

III.

This action is barred in whole or in part by the doctrine of abstention.

IV.

The Plaintiff Yankton Sioux Tribe has failed to exhaust its available administrative remedies.

V.

By consenting to the State's jurisdiction before the South Dakota Board of Minerals and Environment and

fully participating in the four-day contested case hearing resulting in the issuance of a State permit to Defendant District, the Plaintiff Yankton Sioux Tribe is estopped from alleging that the State of South Dakota now lacks jurisdiction to issue the type IIB permit to the Defendant District.

VI.

During his sworn testimony to the South Dakota Board of Minerals and Environment, Plaintiff Darrell E. Drapeau referred to the area in question as former reservation lands. Direct examination of Darrell E. Drapeau at page 556, attached as Attachment B. Plaintiff Darrell E. Drapeau is now estopped from alleging that the land in question is not a "former" reservation.

VII.

Collateral estoppel bars relitigation of the issue of disestablishment of the Yankton Sioux Reservation. This Court has determined that the Yankton Sioux Reservation was disestablished by the act of 1894. *Marty Indian School Board, Inc. v. South Dakota*, slip op. Civ. No. 85-4006 (D. S.D., Sept. 16, 1986) (Attachment A), *rev.* on other grounds, *Marty Indian School Board, Inc. v. South Dakota*, 824 F.2d 684 (1987).

WHEREFORE, the State of South Dakota prays for the following relief:

1). That Plaintiff's action be dismissed with prejudice.

2). That the court award the State of South Dakota its costs and disbursements in this action, including reasonable attorney fees.

3). That the court award the State of South Dakota other and further relief the court may deem just and equitable.

Dated this 4th day of November, 1994.

/s/ Charles D. McGuigan
Charles D. McGuigan
Assistant Attorney General

/s/ John P. Guhin
John P. Guhin
Deputy Attorney General

/s/ Roxanne Giedd
Roxanne Giedd
Assistant Attorney General
500 E. Capitol
Pierre, SD 57501-5070
Telephone: (605) 773-3215

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Answer to Third Party Complaint and Answer of State of South Dakota in the above-entitled matter, were served by United States mail, first class, postage prepaid upon James G. Abourezk and Robin Zephier, Attorneys for Yankton Sioux Tribe, 2040 West

Main Street, Rapid City, South Dakota 57702 and to Kenneth W. Cotton, Attorney for Southern Missouri Recycling and Waste Management District, Post Office Box 370, Wagner, South Dakota 57380 on this 4th day of November, 1994.

/s/ Charles D. McGuigan
Charles D. McGuigan
Assistant Attorney General

FILED
JUN 14, 1995
William F. Clayton
Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

The YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members, and DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe, Plaintiffs, -vs- SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a non-profit corporation, Defendant.	Civ 94-4217 JUDGMENT

SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT,

Third-Party Plaintiff,

-vs-

STATE OF SOUTH DAKOTA,

Third-Party Defendant.

In accordance with the Memorandum Opinion and Order filed this date with the Clerk,

IT IS ORDERED, ADJUDGED, AND DECREED:

(1) that judgment is entered in favor of plaintiffs and against defendant and third-party defendant on the disestablishment issue, as Congress did not disestablish or diminish the boundaries of the Yankton Sioux Reservation when it ratified the 1892 Agreement with the Yankton Sioux Tribe and therefore, the exterior boundaries of the reservation, as set out in the 1858 Treaty, remain intact.

(2) that judgment is entered in favor of defendant and third-party defendant and against plaintiffs on the regulatory issue, as plaintiffs failed to establish that the Yankton Sioux Tribe may exercise regulatory jurisdiction over the municipal solid waste landfill proposed to be built by Southern Missouri Recycling and Waste Management District on non-Indian land located within the exterior boundaries of the Yankton Sioux Reservation.

(3) that judgment is entered permitting Southern Missouri Recycling and Waste Management District to proceed with construction of its solid waste disposal facility at the site selected; however, during construction of the solid waste disposal facility, Southern Missouri is required to install a composite liner as defined in 40 C.F.R. § 258.40(b).

(4) that judgment is entered in favor of defendant and third-party defendant and against plaintiffs on all other grounds of relief requested by plaintiffs.

(5) that judgment is entered with prejudice.

Dated this 14th day of June, 1995.

BY THE COURT:

/s/ Lawrence L. Piersol
Lawrence L. Piersol
United States District Judge

ATTEST:
WILLIAM F. CLAYTON, CLERK
BY: /s/ Alice R. Raisly
DEPUTY
(SEAL)

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,

Washington, July 27, 1892.

Gentlemen:

The following instructions are given for your guidance in the discharge of your duties as commissioners to negotiate with the Yankton Sioux Indians for the cession of their surplus lands, the authority for your appointment being contained in the appropriation of $11,500, made by the Indian Appropriation Act for the current fiscal year, "To enable the Secretary of the Interior to negotiate with any Indians for the surrender of portions of their respective reservations, any agreement thus negotiated being subject to subsequent ratification by Congress."

The Yankton Sioux Indian Reservation, in South Dakota, was created by the first article of the treaty with the Yankton Sioux of April 19, 1858 (11 Stats., 743), by which they ceded to the United States all the lands then owned, possessed or claimed by them, except four hundred thousand acres described as follows:

"Beginning at the mouth of the Naw-izi-wa-koo-pah or Choteau River and extending up the Missouri River thirty miles; thence due north to a point; thence easterly to a point on the said Choteau River; thence down said river to the place of beginning, so as to include the said quantity of four hundred thousand acres".

As actually surveyed it contains 430,405 acres. There has been allotted and patented to the Indians some 167,325 acres under the Act of February 8, 1887 (24 Stats., 388). The allotments made under the Act of February 28, 1891, have not yet been examined and approved but it is

estimated that they will include about 95,000 acres. Some 852 acres have been reserved for government and religious purposes, leaving a surplus of some 168,000 acres.

The treaty makes no provision regarding the cession or relinquishment of the reservation or any portion thereof.

You will call a full council of the Indians and submit the subject for their consideration. No undue pressure should be used to induce them to cede the surplus lands, but the adventure to be derived from such action should be fully placed before them. Every member of the tribe has received an allotment of not less than 80 acres of agricultural land, or a double quantity of grazing land, averaging over 150 acres for each member of the tribe.

The surplus lands in their present state of reservation cannot be made to yield any considerable income, while the money which will be paid for their relinquishment, placed at 5 per cent interest will give them an income which will be sufficient to afford them all the assistance they need.

If they are unwilling to cede all the surplus land you will endeavor to obtain the relinquishment of such part thereof as they may be willing to part with.

If they consent to the relinquishment of the whole or any portion of the surplus lands the terms and conditions of sale should then be agreed upon, which should be just and equitable to the Indians as well as the United States.

It is understood that some of these lands are very valuable and will be eagerly sought after. It is therefore suggested the agreement provide for their appraisement and sale to the highest bidder.

The terms and conditions agreed upon in council should be reduced to writing and incorporated in the accompanying form of agreement which should be signed by at least a majority of the male adults of the members of the tribe.

This agreement should also provide for the disposition of the funds to be derived from the cession. If possible the whole amount, or the larger portion, should constitute a fund, the interest of which shall be applied for such purposes as may be agreed upon. Provision should not be made for the per capita payment of a large portion of the purchase money.

If possible, a portion of the interest should be made available for the payment of local taxes on the allotted lands during the trust period. (See Article IV of accompanying form).

When the agreement is freely and properly signed, your certificates and the certificate of the official Interpreter, should be attached to the instrument.

The proceedings of the council should be reduced to writing and attested by your signatures and that of the official Interpreter.

The Indians should be informed that the agreement will not be valid or binding until ratified by Congress.

You are authorized to employ an Interpreter or Interpreters when necessary and the services of the Agency Interpreter are not available.

The accompanying form of agreement is transmitted for your guidance and as an indication of the views of this office as to the proper disposition of the funds, but you are not required to adhere to the same absolutely.

Very respectfully,

/s/ T J Morgan
Commissioner.

(Allen)

P.

EXH 10

REPORT OF THE COMMISSIONER
OF INDIAN AFFAIRS
DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, D.C., SEPTEMBER 16, 1893.

. . . .

PAPERS ACCOMPANYING REPORT OF
COMMISSIONER OF INDIAN AFFAIRS.

. . . .

Location. – The Yankton Reservation consists of a tract of 430,000 acres, situated on the left bank of the Missouri River, extending about 33 miles along the river and 20 miles to the interior; it is within the boundaries of Charles Mix County in South Dakota.

. . . .

Citizenship. – Notwithstanding that all the Indians have accepted allotments and land patents have been issued to many of them for their lands, yet their relationship with local State authorities has not changed. The reservation has been within an organized county for many years, yet the county authorities decline to recognize the Indians or any of the residents of the reserve as entitled to the rights and privileges of citizenship. The constitution of the State of South Dakota expressly disclaims any right or title to any lands owned or held by an Indian or Indian tribe and are exempt from taxation, and this is held to disclaim any jurisdiction over the tribe, either civil or criminal, of the residents within an Indian country.

. . . .

The reservation is not public domain of the United States, but is, in fact, Indian country, and (unreadable) are now pending for the relinquishment of the Indian rights in the unallotted lands (unreadable) reservation, and these Indians have not signified their assent that such reservation might be embraced within the Territory of Dakota or State of South Dakota.

Section 1874 of the Revised Statutes of the United States, being part of the organic act of the Territory, provides that "all such territory (i.e., Indian country) shall be excepted out of the boundary and constitute no part of any Territory now or hereafter organized, until such tribe signifies its (unreadable) to the President to be embraced within the Territory," or State.

Article 22 of the constitution of this State provides "that we, the people inhabiting the State of South Dakota, do agree and declare that we forever disclaim all right and title * * * to all land laying within said limits (of the State) owned or held by an Indian or Indian tribes * * * . . . said Indian lands shall remain under absolute jurisdiction and control of the Congress of the United Sates."

It is clear, then, that the United States exercises sole and exclusive jurisdiction over the reservation except in so far as it may see fit to grant the State the right to exercise its jurisdiction.

No right or jurisdiction over the lands embraced in this reservation has ever been granted the (unreadable) except jurisdiction to punish certain crimes committed by Indians, etc. It must follow that (unreadable) the State nor

any of its local officers have the right to establish voting precincts upon or within the Indian country, and the application to compel the county commissioners to establish voting precincts must be denied.

. . . .

Indian court. – The court continues to hold sessions semimonthly and all cases of fault, lewdness, actions for damages, disorder, etc., come before it for trial. There are also some petitions for divorces and voluntary separations. The judges keep their (unreadable) record, and unless some appeal is taken (a seldom occurrence) their mandates are obeyed and sentences executed without complaint. The court exercises a (unreadable) restraint and a good influence.

. . . .

E.W. FOSTER,
UNITED STATES INDIAN AGENT

EXH 610

DEPARTMENT OF THE INTERIOR
CENSUS OFFICE
Bureau of the Census
Library

REPORT ON
INDIANS TAXED AND INDIANS NOT TAXED
IN THE UNITED STATES
(EXCEPT ALASKA)

ELEVENTH CENSUS: 1890.

WASHINGTON, D.C.
GOVERNMENT PRINTING OFFICE 1894
(page 573)

SOUTH DAKOTA.

TOTAL INDIAN POPULATION AS OF JUNE 1, 1890.

* * * *

INDIAN POPULATION OF RESERVATIONS.

AGENCIES AND
RESERVATIONS.

* * * *

Yankton Agency,
Yankton Reservation

Tribe.	Total.	Males.	Females.	Ration Indians.
Yankton Sioux	1,725	824	901	432

* * * *

(page 590)

YANKTON RESERVATION

The Yankton Indian reservation is situated in the eastern part of Charles Mix county, South Dakota. Commencing at the mouth of the Choteau creek, about 45 miles above the city of Yankton, the boundary line extends along the Missouri river, a distance of 30 miles in a northwesternly direction, thence it turns north to a point near Douglas county line. From this point it runs southeast parallel with the Missouri, at an average distance of 22 miles from the same, as far as Dry Choteau creek, which creek from this point to its mouth forms the eastern boundary.

The reservation contains 430,405 acres of land, 385,000 of which may tillable at seasons, but all is suitable for grazing.

* * * *

The agency is situated on the left bank of the Missouri river, midway between the eastern and western boundaries of the reservation, and 30 miles from Armour and Springfield.

* * * *

According to the treaty of 1858 the Yankton Sioux Indians surrendered all their lands in Dakota and in return accepted the present Yankton Indian reservation. The government consented to pay them * * * * It was the expectation of the government that the Indians would become civilized and self-supporting by the expiration of this time. Thirty-two years have elapsed since the treaty. During this time, systematic and organized efforts have

been made by the government and by the Presbyterian and Episcopal missions to reclaim them from heathenism and savagery.

* * * *

EXH 605
53D CONGRESS, SENATE Ex. Doc. No. 27
2d Session.

IN THE SENATE OF THE UNITED STATES.

LETTER

FROM

THE SECRETARY OF THE INTERIOR,

TRANSMITTING

Letter from Indian Commissioner concerning treaties with Yankton and Dakota or Sioux Indians, and other papers.

JANUARY 18, 1894. – Referred to the Committee on Indian Affairs and ordered to be printed.

DEPARTMENT OF THE INTERIOR.
Washington, January 16, 1894.

SIR: I have the honor to submit herewith an agreement made by the commission appointed to treat with the Yankton tribe of Dakota or Sioux Indians, and said Indians, of date December 31, 1892.

This agreement, together with the report of said commission and accompanying papers, was transmitted to this Department by the Commissioner of Indian Affairs, with his letter of December 9, 1893, which letter contains a full statement of the facts in relation to said agreement.

The Commissioner of Indian Affairs also submits a draft of a bill to ratify said agreement and to carry its provisions into effect. The matter was submitted to the

Commissioner of the General Land Office for his consideration of and report upon that part of the proposed bill relating to the disposition of the surplus lands. In his report he suggests certain changes, which have been incorporated in the draft herewith submitted.

I have the honor to be, very respectfully,

HOKE SMITH,
Secretary.

The PRESIDENT UNITED STATES SENATE.

DEPARTMENT OF THE INTERIOR.
OFFICE OF INDIAN AFFAIRS.
Washington, December 9, 1893.

SIR: Under date of July 8, 1893, the Acting Secretary transmitted to this office the report of the Yankton Indian Commission, dated March 31, 1893, submitting an agreement made by it with the Yankton tribe of Dakota or Sioux Indians in South Dakota, of date December 31, 1892, for the cession of their surplus lands in said State, with directions that I give the matter my consideration and make report thereon to the Department.

Allegations having reached this office that fraud and undue pressure had been used in securing this agreement, I recommended, under date of September 19, 1893, that an inspector of the Department be sent to the Yankton Reservation to investigate the manner in which the negotiations with said Indians had been conducted, and whether the agreement represented the wishes of a majority of the tribe, and under date of September 21,

1893, you directed that the necessary instructions be prepared for the guidance of Inspector John W. Cadman in such investigation, which instructions were prepared and submitted to the Department September 22, 1893.

I am now in receipt, by reference from the Department, of Inspector Cadman's report, dated November 13, 1893, in which he concludes that the agreement is gaining friends every day, and, so far as he finds (except possibly in one case), that no undue pressure was used or improper methods resorted to by the commissioners or any other persons, last winter, to secure signers.

The commission was appointed under the authority contained in the appropriation of $11,500, made by the act of July 13, 1892 (27 Stats., 137), "To enable the Secretary of the Interior to negotiate with any Indians for the surrender of any portions of their reservation." etc.

By the first article of the agreement the said Indians cede, sell, relinquish, and convey to the United States, all their claim, right, title, and interest, in and to all the unallotted lands within the limits of their reservation in South Dakota.

In consideration of this cession, it is agreed by Article II that the United States will pay to the Yankton tribe of Sioux Indians the sum of $600,000, as thereinafter stipulated.

By the third article it is agreed that sixty days after the ratification of the agreement by Congress, or at the time of the first interest payment, the United States will pay to the said Indians, out of the said principal sum of $600,000, the sum of $100,000, to be divided among the

members of the tribe per capita, no interest to be paid by the United States on this amount.

By the second section of said Article III, it is agreed that the remainder of the said principal sum of $600,000 shall constitute a fund for the benefit of said tribe, to be placed in the Treasury of the United States, bearing interest at the rate of 5 per cent per annum from January 1, 1893.

By Article IV it is agreed that the fund of $500,000, shall be payable at the pleasure of the United States after twenty-five years, and that during this time the United States may pay, if the necessities of the Indians require it, such part of said sum as the Secretary of the Interior may recommend, not exceeding $20,000 in any one year, interest to cease on the amount so paid.

Article V provides that "Out of the interest due to the Yankton tribe of Sioux Indians by the stipulations of Article III the United States may set aside and use for the benefit of the tribe, in such manner as the Secretary of the Interior shall determine, as follows: "For the care and maintenance of such orphans, aged, infirm, and other helpless persons of said tribe as may be unable to take care of themselves: for schools and educational purposes for said tribe; for courts of justice and other local institutions for the benefit of the tribe, "such sum of money annually as may be necessary for these purposes, with the help of Congress herein stipulated, which sum shall not exceed $6,000 in any one year: *Provided*, That Congress shall appropriate for the same purposes and during the same time, out of any money not belonging to the Yankton Indians, an amount equal to or greater than the

sum set aside from the interest due to the said Indians as above provided for."

Section 2 of said Article V provides that when the Yankton tribe shall have received from the United States a complete title to their allotted lands, and shall have assumed all the duties and responsibilities of citizenship, so that the fund provided for in section 1 of this article shall be no longer needed for the purposes therein stated, any balance on hand shall be disposed of for the benefit of the tribe as the Secretary of the Interior may determine. Article VI provides that the remainder of the interest accruing on the fund of $500,000 shall be paid to the Yankton Indians per capita semiannually, one half on the 30th of June and one-half on the 31st of January in each year.

Article VII provides that upon ratification of the agreement the United States shall pay to each member of the tribe whose name is signed to the agreement, and each other male member 18 years or older at the date of the agreement, $20 in one double eagle, struck in the year 1892, as a memorial of the agreement. If coins of said date are not in the Treasury, another date may be substituted. This payment shall not apply upon the principal sum nor upon the interest thereof.

By Article VIII it is stipulated that such part of the lands ceded as were then occupied by the United States for agency, schools, and other purposes shall be reserved from sale until no longer needed for such purposes, but that all other lands included in the cession shall, immediately after the ratification of the agreement, be offered for sale through the proper land office, to be disposed of

under the existing land laws of the United States to actual and bona fide settlers only.

Article IX provides that during the trust period of twenty-five years such part of the lands allotted to members of the tribe as the owner thereof can not cultivate or otherwise use advantageously may be leased for one or more years at a time, such leasing to be subject to the approval of the Yankton Indian agent and with the consent of the Commissioner of Indian Affairs: *Provided*, That such leasing shall not in any case interfere with the cultivation of the allotted lands by the owner thereof to the full extent of his ability.

The intent of this provision is to compel every owner of allotted lands to cultivate the same to the full extent of his ability to do so before he shall have the privilege of leasing any part thereof, and then he shall have the right to lease only such surplus of his holdings as he is wholly unable to cultivate or use advantageously.

This provision is to apply alike to both sexes and to all ages, parents acting for the children who are under their control and the Yankton Indian agent for minor orphans who have no guardians.

Article X stipulates that any religious society or other organization then occupying, under proper authority, for religious or educational work amount the Indians, any of the ceded lands, shall have the rights for two years from the date of ratification, within which to purchase the land so occupied, at a valuation to be fixed by the Secretary of the Interior, which shall not be less than the average price paid the Indians for the ceded lands.

Article XI provides that if any member of the tribe shall die within twenty-five years without heirs his property, real and personal, including allotted lands, shall be sold under the direction of the Secretary of the Interior and the proceeds added to the fund provided for in Article V for schools and other purposes. Article XII provides that no part of the principal or interest arising under the agreement shall be subject to the payment of debts, claims, judgments, or demands against said Indians for damages or depredations claimed to have been committed prior to the signing of the agreement.

Article XIII provides that all persons who have been allotted lands on the Yankton Reservation who were, at the date of the agreement, recognized as members of the tribe, including mixed bloods, whether of white blood on the paternal or maternal side, and the children born to them, shall enjoy the undisturbed and peaceable possession of their allotted lands, and shall be entitled to all the rights and privileges enjoyed by full-blood Indians.

By Article XIV it is stipulated that all allotments to members of the tribe not yet confirmed shall be confirmed as speedily as possible, subject to the correction of errors, and that Congress shall never pass any law alienating any part of the allotted lands.

Article XV recognizes as just the claim of 51 Yankton Sioux Indians who were employed as scouts by Gen. Alfred Sully in 1864, for additional compensation at the rate of $225 each, aggregating $11,475, and provides that within ninety days after the ratification of the agreement the same shall be paid to said scouts or their heirs.

Article XVI provides that if the United States shall question the ownership of the Pipestone Reservation (in Minnesota) by the Yankton tribe under the treaty of April 19, 1858, including the fee to the land as well as the right to work the quarries, the Secretary of the Interior shall as speedily as possible refer the matter to the Supreme Court of the United States, to be decided by that tribunal; and the United States shall furnish, without cost to said Indians, at least one competent attorney to represent the interests of the Indians before said court. It further provides that if the said Secretary shall not, within one year after the ratification of the agreement, refer the questions to the Supreme Court, such failure shall be construed as, and be, a waiver by the United States of all rights to the ownership of the said Pipestone Reservation, and the same shall thereafter be solely the property of the Yankton tribe of Sioux Indians, including the fee to the lands.

Article XVII provides that no intoxicating liquors or other intoxicants shall ever be sold or given away upon any of the ceded lands, nor upon any other land within the Yankton Reservation, the penalty to be such as Congress may prescribe in the act ratifying the agreement.

Article XVIII provides that nothing in the agreement shall be construed to abrogate the treaty of April 19, 1858, and that the Yankton Indians shall continue to receive their annuities under said treaty. Article XIX provides that when the agreement shall have been ratified by Congress an official copy of the act of ratification shall be engrossed in copying ink, etc., and sent to the Yankton Indian agent to be copied by letter press in the "Agreement Book" of the Yankton Indians.

Article XX provides that all young men of the Yankton tribe of Sioux Indians, 18 years of age or more, shall be considered adults, and that the agreement when signed by a majority of the male adults shall be binding upon said Yankton Indians, but shall not be binding upon the United States until ratified by Congress.

Refusal by Congress to ratify the agreement shall release the Indians under it.

The agreement purports to be made by J. C. Adams, John J. Cole, and I.W. French on the part of the United States. It is not, however, signed by the latter, in explanation of which Messrs. Adams and Cole state that Mr. French was appointed a member of the commission in place of Dr. W.L. Brown, resigned, but that he never qualified as such commissioner.

The agreement purports to be signed by 254 male adults, members of the tribe, 7 of whom signed by power of attorney. C. F. Picotte, U.S. interpreter, certifies that the agreement was freely signed by more than a majority of the adult male members of the tribe.

None of the names are signed to the agreement by mark, although it is evident that many of the signatures were not written by those purporting to sign. There appears to be no doubt, however, that the signatures were duly authorized.

The number of male adults belonging to the tribe is reported to be 458, 230 being a majority.

The Yankton Reservation was created by the first article of the treaty of April 19, 1858 (11 Stats., 743) by which the Yankton Sioux ceded to the United States all

the lands then owned, possessed, or claimed by them, except 400,000 acres described as follows:

Beginning at the mouth of the Naw izi wa koo pah or Choteau River and extending up the Missouri River thirty miles: thence due north to a point: thence easterly to a point on the said Choteau River; thence down said river to the place of beginning, so as to include the said quantity of four hundred thousand acres.

As actually surveyed it contains 430,495 acres. There has been allotted and patented to the Indians some 167,325 acres under the act of February 8, 1887 (24 Stats., 388).

The allotments under the act of February 28, 1891 (26 Stats., 594), have been made in the field, but have not yet been examined and approved. It is estimated that they will include about 95,000 acres, leaving a surplus of some 168,000 acres. The treaty makes no provision regarding the cession or relinquishment of the reservation or any portion thereof.

The price proposed to be paid for these lands ($600,000, and $20 to each male adult) is some $609,160, or $3.62 1/2 per acre.

In addition to this the Government is bound to appropriate a sum not exceeding $6,000 per annum. In fixing the price to be paid for settlers for lands, I do not think this somewhat indefinite agreement should be taken into account, and suggest that in the event of ratification such price be fixed at $3.75 per acre.

As to the reasonableness of the compensation, the commissioners, after stating that the Indians demanded $6 per acre, say:

Their reservation contains good lands, at least a fair average of South Dakota lands, if not better, and all things considered, what we allow them for their lands is all they are worth in their present condition, and though a liberal price for the Indians, it is as low as these lands could be purchased from them without coercion, and about what we think they should receive.

The disposition to be made of the funds is satisfactory to this office. As to the provision for the payment of the scouts, the commissioners remark:

This claim was called to our attention and its settlement was demanded in connection with this transaction. Upon an investigation we became satisfied that the claim is just. That these soldiers were employed by Gen. Sully, an officer of the U.S. Army, and that the service ordered by him was performed, and was most effective in protecting the lives and property of white people, there is no doubt. But because of irregularity no officer of the Government is authorized to pay their claim, and after twenty-eight years of patient waiting they appeal to us to include the settlement of their claim in our negotiations with the tribe.

The records of this office show that the sum of $3,825 was paid 51 Yankton scouts ($75 each) during the fall of 1878.

March 2, 1892, Senator Pettigrew, from the Committee on Indian Affairs, submitted a report (No. 302, Fifty-second Congress, first session) on Senate bill 696, which contains all of the correspondence on the subject. The committee says:

In the spring of 1864 Gen. Sully enrolled 51 of these Indians as scouts and issued to them some guns and condemned clothing, and promised them additional compensation at some future time. Gen. Sully says no specific sum was stated. The Indians say they were to receive $300 each and that they were in the service over nine months. In 1871 the War Department paid these scouts $75 each. At first the Indians refused to accept this sum, but were told that they had better take it, as receiving that amount would not in any way prevent them from getting the remainder of the $300 which they claimed was due.

This bill appears to have been reached in the Senate and "passed over without prejudice."

A bill for the payment of these scouts was also introduced in the House of Representatives (No. 10277) at the second session of the Fifty-second Congress, but aside from its reference to the Committee on Indian Affairs no action appears to have been taken.

It is also observed that by the act of February 25, 1869 (15 Stats., 275), the sum of $10,000 was appropriated "for the relief of the Yankton Sioux tribe of Indians, in Dakota Territory, in fulfilling treaty stipulations, where the money has been misappropriated, to be expended under the direction of the governor and acting superintendent of Indian affairs of Dakota Territory, and to be considered

as an offset against any claim these Indians may have against the Government for services during the late war," but I am unable to see how this can be regarded as a payment to the scouts in any sense.

With reference to Article XVI, relating to the Pipestone Reservation, it is remarked that this reservation was established by Article VIII of the treaty of April 19, 1858, which provides as follows:

The Yankton Indians shall be secured in the free and undisturbed use of the Red Pipestone quarry, or so much thereof as they have been accustomed to frequent and use for the purpose of procuring stone for pipes; and the United States hereby stipulates and agrees to cause to be surveyed and marked so much thereof as shall be necessary and proper for that purpose, and retain the same and keep it open and free to the Indians to visit and procure stone for pipes so long as they shall desire.

A reservation 1 mile square was surveyed under this provision.

In the case of the United States v. Carpenter (111 U.S. 317) the Supreme Court held that the action of the Government in causing the tract described to be marked on the official plats in the land offices as reserved from sale was clearly within the line of its duty under the stipulations of the treaty.

The act of March 2, 1889 (25 Stats., 1012), provided for the appraisement and sale of a portion of this reservation, the act to be of no force or effect unless the Yankton Indians should consent to its provisions. They refused to

consent to the sale of any of the lands except those occupied as a right of way for a railroad.

Although the title of these Indians in this reservation has not been regarded as a fee simple, their right to control and retain it so long as they may desire has been fully recognized.

Article XVII, prohibiting the sale or disposition of intoxicants upon any of the lands now within the Yankton Reservation, seems to be a desirable provision, and from the decision of the Supreme Court in United States v. Forty-three Gallons of Whisky (93 U.S., 188), the stipulation would appear to be valid if ratified by the United States. The penalty should be the same as that prescribed in section 2139 of the Revised Statutes.

I see no serious objection to any provisions of the agreement except, possibly, that binding the United States to appropriate an annual sum for the support of the indigent, etc., and have the honor to recommend that it be submitted for the consideration of Congress.

In this connection I have the honor to invite your attention to the fact that a bill was introduced in the Senate at its last session (S. 442) to ratify this agreement, upon which report was made by this office September 22, 1893, in which it was stated that if the result of the investigation ordered by the Department should warrant such action, the agreement would be prepared for transmission to Congress, accompanied by the draft of a bill to ratify the same. I have accordingly prepared the draft of a bill for that purpose, in the usual form and herewith transmit the same in duplicate.

Although it is probably not the duty of this office to draft a provision for the opening of the lands for settlement, I have for convenience incorporated a section for that purpose, in line with similar acts. A reference to the Commissioner of the General Land Office for his views upon this section is respectfully suggested.

I also transmit duplicate copies of this report, the agreement, report of commission, proceedings of councils, and of the report of Inspector Cadman.

Very respectfully, your obedient servant,

FRANK C. ARMSTRONG,
Acting Commissioner.

The Hon. SECRETARY OF THE INTERIOR.

REPORT OF THE YANKTON INDIAN COMMISSION.

WASHINGTON, D.C., *March 31, 1893.*

SIR: The commissioners appointed to negotiate with the Yankton Sioux Indians for the cession of their surplus lands have concluded their work with the Indians, and have the honor to submit herewith, as a part of this report, an agreement concluded with the Yankton Indians, dated December 31, 1892, for the sale and cession to the United States of all their surplus lands, amounting to about 168,000 acres, at a fixed price, and containing such provisions as were deemed wise and desirable for the Indians and for the Government.

Under our instructions we met at the Yankton Indian Agency on October 1, 1892, and proceeded to the work assigned to us. Upon looking over the field and inquiring into the conditions we found that the Yankton tribe was

divided into three factions, two large factions of nearly equal numbers known as the Selwyn faction and the Brunot faction, and a smaller one known as the Feather-in-ear faction. We were informed that at times the rivalry between these factions became very bitter, so that a measure proposed or favored by one would, for that very reason, be opposed by the other. As an illustration of this factional contention, we were informed that the Department sent for a delegation of the Yankton Indians to come to Washington and appropriated money to pay the expenses. The tribe desired to send the delegation and met in council for the purpose of appointing the delegate, but were unable to agree as to who should come, and after counciling all summer without coming to an agreement the effort was abandoned and the money was returned to Washington.

The Indians had been apprised of the appointment of this commission, and the factions had patched up a truce, and the tribe had appointed a committee of 24, consisting of 3 persons from each of the 8 bands, with 10 moderators, to confer with the commission on the part of the Indians. On October 8 a general council of the tribe was held, at which the commissioners fully laid their mission before the Indians and assured them of their intentions to deal fairly with them.

Proceedings of the council of October 8, and of all subsequent councils, to the close of the negotiations, were kept as fully and as accurately as possible without the aid of a stenographer, and are submitted herewith as a part of our report.

During the first week of our labors Dr. Brown was called away, and was absent about six days, covering the period of our first council.

On October 10 Commissioner Cole received a telegram announcing a fatal accident to his oldest son, a young man 22 years old, and this, with the serious illness of his wife, kept him away from the reservation till November 26.

On October 25 Colonel Adams returned home to till political appointments made before his appointment upon the commission, and was absent till November 10.

On December 17 Dr. Brown resigned from the commission and was relieved and left the reservation on January 5, 1893.

On February 2 Colonel Adams was again called away and was absent fourteen days, and on March 5, after the work of the commission on the reservation was nearly complete, he was again called away, and proceeded to Washington without returning to the reservation.

During the absence of a part of the commission, the remaining commissioners continued the work of negotiating with the Indians, but to those familiar with such negotiations, the great delay from such interruptions will be apparent.

On October 24 the commission met the committee of 24 representing the Indians, but were unable to secure from them any proposition. At this meeting it was evident that the factional spirit has again revived. There had been a disagreement on this committee and 7 of its members were absent from the meeting.

On the return of Commissioner Cole the work of the commission was earnestly taken up and vigorously pushed forward, and councils were held on December 2, 3, 5, 7, 9, 10, and 13. In these councils we urged the Indians to talk and fully lay before us their thoughts, feelings, and intentions. We were successful in getting a very free expression from them, and while they indicated quite fully the conclusion they had come to, it was evident that there was a serious clog in the wheels, the nature of which was not disclosed at these councils.

To show the temper and animus of the Indians at this time, we submit the following extracts from their speeches, under headings indicating their character.

FAVORING A SALE.

WILLIAM T. SELWYN (December 2). "For my part, I do not know whether the people want to sell their land or not, and I do not desire to influence any one in either way."

JOHN OMAHA (December 3). "Now, my friends, I want you to listen to me. I am in favor of disposing of the surplus lands."

ROBERT CLARKSON (December 5). Made a speech moderately favoring the sale.

JOHN OMAHA (December 10). Speaking of the committee of 24 said: "This was the 11th day of October it was decided by the committee that they would sell the land. They were discussing whether the (minimum) price should be five dollars or six dollars per acre when I entered. They asked me the question, and I said I was in

favor of six dollars per acre. I do not know of a final decision which the committee came to since that time. That is what I wish to be known."

TOM No. 1 (December 10). Spoke favorably for the treaty, but in an indifferent way, and concluded: "I desire to make this speech and do not care whether they sell the land or not."

JOHN OMAHA (December 13). "I desire to say that we ought to have our land sold under the appraisement; the lowest would be about six dollars per acre, and not to go any below that."

OPPOSING A SALE.

RUNNING BULL, *Chief* (December 2). "On my part I never extended an invitation to these commissioners to come out here. I did not say, "My friends, come out to us; we have some surplus lands we wish to sell to you."

PETER ST. PIERRE (December 3). "This land should not be sold and the commissioners should leave here without arranging for the sale of the land. [How!] If we answer them direct I think it would be best. [How!] I do not think, when we have already made up our minds not to sell, that we should keep these commissioners here longer by not making known the decision we have come to. * * * I am in favor of holding this land and not selling it for the coming sixteen years."

WILLIAM BEAN, *Chief* (December 3). "Now, I hope my friends, you will do all you can for these people, but at the same time you will have to go without making any treaty this time." [How!]

JANDRAN, *Chief* (December 3). "All these claims should be settled first before the commissioners negotiate for these lands. This does not depend on the commission, but desire that they be investigated first and then confer for selling our lands.

WHITE SWAN, *Chief* (December 3). "My friends, you came here to negotiate for the sale of these surplus lands, but it will be very hard to do so as we have all these matters to look up first. [How!]

* * * My friends, I hope you will go away without making any treaty." [How!]

FEATHER IN THE EAR, *Chief* (December 3). I illustrate his desire not to sell by saying: "If a boy as a home he is happy, and I want to feel like that boy."

JOHN GASSMAN (December 3). "The members of the committee remember that at that meeting we decided we should not sell these surplus lands, and we still hold to this decision."

IRON BULL (December 3). "Now, my friends, when you go back I wish you would tell the President that we do not care to dispose of our surplus lands."

FELIX BRUNOT, (December 10). "Speaking of the action of the committee of 24: "At a meeting yesterday this question was put, Whether we will sell our land or not, and asked them if they did not want to sell their land, and they answered and said, 'How'; but if the commission prefer to stay and talk more that is their own interest, but we have given our answer."

EUGENE BRUNOT (December 10). Speaking of the committee of 24, said: "They have decided and desire to

lay their answer before you. * * * They have come to a final conclusion that they do not want to sell their land, and they have come to this conclusion." [How!]

IRON BULL (December 10). Referring to the action of the committee in deciding against the sale, said: "We have come to a decision and desire that you respect it." [How! and clapping.]

PETER ST. PIERRE (December 10). "There is a large crowd here, and I move that all who do not desire to sell their land step out of this room and some one count them. [How! and applause.]

* * *

I desire that this business be settled now." [How!]

PETER ST. PIERRE (December 10). In speaking against the sale, said: "I wish to say one thing about our agent. He is here to help us on occasions of this kind. He should see that a majority vote of the people is respected. [How!] * * * I think it is only just, when we have given our final decision not to sell, that the commission should depart. [How!] * * * It has been decided on the part of the people that they have come to a final conclusion, and if our agent does not protect us in this we will see that some one else does." [How!]

FELIX BRUNOT (December 10). "It was declared by two parties that they desire to sell, and by two that they did not. Now, I think that it should be decided at this meeting here. If, by vote, they desire to sell the land they should go to the commission and say so; and if not, say so. * * * Do you want the people to decide the question now? [How!] I move all the people in favor of selling

their land keep their seats, and those who do not want to sell their land get up and go outside." [How!]

PETER ST. PIERRE (December 13). "I, you know, am opposed to sale, but we ought to meet these commissioners like men. I am against sale. * * * Now, if we appoint the committee of six asked. I shall make some propositions to the commissioners and the people."

DISTRUST AND OPPOSITION.

HENRY SELWYN (December 2). "In two previous treaties entire payment has not been made, and that is the way this would probably be. Until all things are carried out and straightened up this land should not be sold." [How!]

HENRY SELWYN (December 3). "If you deal with a man and find he is not truthful you do not wish to have any more dealing with him. We have made treaties with the Government and they have not kept all the stipulations in these treaties, and I fear to make any more."

JUMPING THUNDER, *Chief* (December 3). "As some others have stated, when these claims are looked up and satisfactorily settled, then we shall confer for the sale of our lands."

PETER ST. PIERRE (December 10). "It has been said that we had no right to the Pipestone Reservation. In the treaty of 1858 this Pipestone Reservation was made a condition of the treaty, and it was not signed until the Government bought it back and gave it to us, who owned it. If we make a treaty ever so binding, and send it on to

Washington, it is changed. I am opposed to negotiating at the present time."

DISTRUSTING THE GOVERNMENT.

WILLIAM T. SELWYN (December 2). "If we make a treaty can we go to a land office and have it recorded before it goes to Washington, that we may know that it is not changed? Sometimes commissioners have been sent out here to us to make propositions, and changes have been made in the words of the treaty."

EUGENE BRUNOT (December 2). " * * * I think the treaty will be made in about the same manner and sent on to Washington, and the propositions in this treaty will be subject to change."

RUNNING BULL, *Chief* (December 2). "I was a member of a committee once that made a treaty with the Government and the promises and stipulations made in this treaty were disregarded by the Government. * * * On account of this violation we fear any commission sent out by the Government."

HENRY SELWYN (December 3). "When the commission was sent out to negotiate in 1858, Struck by the Rees refused to sign the treaty to sell the land until the Pipestone quarry was returned to the tribe. When the Government promised to give this back to the Indians Struck by the Rees then signed the treaty so that the basis on which this treaty of 1858 was made was the return of the Pipestone quarry.

The speeches of the Indians were full of complaint against the Government, and we have not here made any

attempt to give a synopsis of their various charges, but by reference to the council proceedings it will be seen that the grievances of the Indians, real and imaginary, stood greatly in the way of treating with them. But, there was some greater obstacle for which we had to continue our search, and which we finally determined was factional contention more than anything else.

Of the four persons who in some measure favored a sale John Omaha was the strongest and most outspoken, but he was on the police force; and after Dr. Brown's resignation he joined with the other Government employ'es [sic] in working against the treaty, and opposed it to the end. On the other hand, William T. Selwyn, who spoke so moderately on the subject that it was difficult to determine whether his speech should be placed with those favoring or those opposing a sale, worked diligently for a sale, and was the first to sign the agreement.

Notwithstanding the discouraging tone of these councils we were fully satisfied that nearly all the Indians realized that it was decidedly to their interest to sell their surplus lands, and desired to do so if some real or imaginary objection could be removed. We therefore pressed forward as undaunted and with as much zeal and determination as though the Indians had been clamoring for a treaty.

RESIGNATION OF COMMISSIONER BROWN.

DR. BROWN (December 17). It seems that for a long time we have got farther and farther from this treaty, and it has been represented to my brother commissioner that Dr. Brown was in the way of this treaty. I believe that this

statement is absolutely false. I believe that is only an excuse urged by the men who wish to defeat this treaty. Still, it does not seem that we can make a treaty under present circumstances, and it may be that my judgment is wrong and that I am really in the way, and in order that there may be nothing in the way of your people and the making this treaty, I have sent my resignation to the Secretary of the Interior, and will leave the other two members alone to do this work.

We determined that it was best to proceed at once to draw up an agreement to submit to the Indians, without waiting first to agree with them upon the terms. We decided upon the price we were willing to pay them for their surplus lands, and on December 10 made them a definite offer to be considering while we were preparing the agreement. Before entering upon this part of our work we had studied the conditions and requirements of the Indians carefully and endeavored, as far as possible, to provide for them in the agreement. After this instrument was drawn out in full, we submitted it to the Department for criticism and suggestion, and then modified it accordingly.

We had asked the tribe to appoint a committee of six to confer with us in drawing the agreement, and the friends of the treaty appointed three members of this committee, leaving three to be appointed by the opposition, but that part of the tribe never took action and therefore the three members already appointed were not recognized by us; but we called together small parties of the chiefs, headmen, and leaders, and conferred with them in drawing the agreement, and after it was written, we continued to call such small councils, to whom we

read and explained the agreement for the benefit of the tribe. This work was continued from day to day until the 21st day of January, when we called a full council of the tribe, sending couriers to all parts of the reservation to notify the Indians that we would submit an agreement for their approval. The agreement was submitted, read, interpreted and explained to a full council, at the close of which we took between fifty and sixty signatures to it. Councils for signature were continued from day to day until March 8, when, having a safe majority, we closed up the work of the commission on the reservation.

PLAN OF PURCHASE.

Our letter of instructions contained the following paragraph:

"If they consent to the relinquishment of the whole or any portion of the surplus lands the terms and conditions of sale should then be agreed upon, which should be just and equitable to the Indians as well as to the United States. It is understood that some of these lands are very valuable and will be eagerly sought after. It is therefore suggested the agreement provide for their appraisement and sale to the highest bidder."

Under our instructions we felt at liberty to make a direct purchase of the land, or to secure cession in trust for appraisement and sale, as our judgment might dictate. But we inferred from the wording of our instructions that the preference of the Department was for cession in trust for appraisement and sale, and upon this point we asked for information as follows:

CHICAGO, ILL., *November 11*, 1892.

SIR: I have wind you suggesting that you delay instructions till this letter reaches you.

I suppose you will not want to make any changes in our commission or instructions, except what may be necessary to treat with the Indians successfully and secure a desirable agreement.

If other desirable action is taken I do not think that any change of the commission will be necessary.

Our instructions, as I understood them from the first, and as they were explained to me at the Indian Office, do not necessarily require any change. The instructions, taken together with the form of agreement submitted with them, indicate that a procedure on the basis of a cession of the lands to the United States, in trust, for appraisement and sale for the benefit of the Indians, is *preferred*, and I am informed that this is Gen. Morgan's desire, but I think we are still free under the instructions to make a straightout purchase, if that seems to be the best method of procedure.

It is essential that the commissioners should be made to clearly understand that they are to consider the full scope of the instructions and if a direct purchase is considered preferable by you, in case the lands can be purchased at a fair price, that should be clearly indicated.

Most respectfully yours,

JOHN J. COLE.

HON. JOHN W. NOBLE.
Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
Washington, November 16, 1862.

SIR: Referring to the instructions for the guidance of the commission to treat with the Indians of the Yankton Agency, S. Dak., for the cession and sale of their surplus lands, I deem it proper to further inform you that the commission are not necessarily confined in your negotiations to a purchase with the understanding that the lands are to be subsequently sold upon appraisement, but that you can fix the price of the lands to be paid the Indians outright, or the money to be deposited in the Treasury for their benefit. Both plans are available, but to prevent misappropriation it is to be understood that the plan for the purchase of lands to be afterwards sold on appraisement, is not alone available. * * * .

Very respectfully,

JOHN W. NOBLE, *Secretary.*

HON. J. J. COLE,
Yankton Commissioner, etc.

The minds of the Indians had been determined towards the appraisement plan by the commissioners appointed in 1881, who offered to treat with them for the cession of their surplus lands upon that plan, but fixed the minimum price so high that only the best of the land could have been disposed of under a treaty made upon that basis. While the Indians and their friends were favorable to the appraisement plan, the Indians had fixed in

their minds a minimum price so high that only the choicest of the lands could have been sold, leaving a very large amount of less desirable land upon their hands for the sale of which it would have been necessary to enter into a new agreement with them, reducing the minimum price. It was also a part of their plan that the Government should take, at the minimum price, all the lands not sold at a higher rate. It was evident that there were as many and as great obstacles in the way of a treaty on the appraisement plan, as upon the plan of direct sale, and that upon the former plan the commission would accomplish only about one-third of the work which the Government and the Indians desired to accomplish by this transaction, leaving two-thirds or more of the work to be done by future commissions. Under these conditions we decided to proceed upon the plan of direct sale to the United States and made an offer and formulated an agreement upon that plan.

PRICE OF THE SURPLUS LANDS.

The exact amount of the surplus lands could not be definitely determined, as the allotments made under the act of February 28, 1891, had not been approved. But our purchase covers all the lands not allotted to the Indians, and it is estimated that they will amount to 168,000 acres or more.

On the matter of price we encountered much difficulty. Two important factors in determining the value of these lands seem to have been wholly overlooked by both the Indians and their friends: First, That the Indians were

not selling their whole reservation, but less than two-fifths of it, and that more than three-fifths of it would remain in their possession for such cultivation and improvement as Indians will give to it, and free from taxation for twenty-five years; second, that the surplus lands are not in one body, but scattered over the reservation and mixed up with the allotted lands of the Indians. We think the value of these surplus lands per acre would be doubled if the whole reservation were being disposed of by the Indians, to be equally improved by white people and uniformly taxed.

None of the Indians had any well-defined opinion as to the value of their surplus lands, but their ideas varied from $6 per acre upward, many of them imagining that these lands were worth fabulous prices, such as they had heard about some choice improved farms selling for outside of the reservation. The statement in our instructions, which unfortunately had been placed in the hands of the Indians, "It is understood that some of these lands are very valuable and will be eagerly sought after," seemed to confirm in the minds of the Indians their ideas of a very high price for these lands. John Omaha, in his speech of December 13, probably voiced the opinion of the tribe upon this subject in the following words:

I desire to say that we ought to have our lands sold under the appraisement; the lowest would be about $6 per acre, and not to go any below that.

The commission who, in 1884, tried to treat with the Yanktons for the cession of their surplus lands, made a proposition on the appraisement plan and suggested that the minimum price at which any of these lands should be

sold should be $4 or $5 per acre, and encouraged the Indians to believe that they would receive an average of $6 per acre or more. They were proposing to buy from 305,000 acres to 355,000 acres of the best land on the reservation in a solid body.

A letter was received by the Indians from a member of this commission, dated January 25, 1893 – two days after we commenced taking signatures – stating that the writer "had hoped to secure for the Indians from $4 to $6 per acre for their surplus lands, and from this source to create for them a fund of near $1,500,000." The Indians did not take account of the fact that the above commission proposed to buy from them 305,000 or 355,000 acres of their choicest lands in one solid body. In fact, few, if any, of them knew this, and they saw in this letter only the $6 per acre and the $1,500,000 for their surplus lands, and as this princely sum of $1,500,000 was two and one-half times as much as the sum we were offering, it greatly confused our friends and immensely strengthened the opposition. The prices at which the lands around the reservation were being sold also led the Indians to believe that they should receive at least $6 per acre for their surplus lands. Unfortunately, members of this commission, when talking the appraisement plan with the Indians, had figured the results on the basis of $6 per acre. Everything seemed to conspire to fix in the minds of the Indians that their lands were very valuable and that $6 per acre was the smallest price they should think of. All this made it very difficult to convince them that their surplus lands, of about 168,000 acres, scattered about over the reservation mixed up with the Indian lands which will pay no taxes until the Indians get their patents

from the Government, were worth much less than similar lands outside of the reservation, where all lands are cultivated by white men and all pay taxes equally, and that the price we offered them was liberal. Under all these conditions the price became a very serious question and was hard to deal with, and we feel that its solution should be satisfactory to the Indians and to the Government. Their reservation contains good lands, at least a fair average of South Dakota lands, if not better, and all things considered, what we allow them for their lands is all they are worth in their present condition, and though a liberal price for the Indians, it is as low as these lands could be purchased from them without coercion, and about what they think they should receive.

CONDITION OF THE INDIANS.

The Yankton Indians are making satisfactory progress in civilization, and already many of them are wholly capable of taking care of themselves, and for such it would be better if all pecuniary aid of the Government were withdrawn, throwing them wholly upon their own resources, with such counsel and moral assistance as the agent and his assistants could render.

A larger per cent of these Indians could be made self-supporting by a change in their management and the attitude and relations of the Government toward them. Especially is this true of the younger Indians, most of whom have more or less school education and speak the English language. We think a systematic effort should be made to induce such to improve their allotted lands and devote themselves to systematic farming. At first some

aid might be necessary, but with so large a holding of allotted lands, as soon as the reservation is opened, enough should be realized from rentals to give them all needful pecuniary assistance. This change would be a saving to the Government, and a great benefit to the Indians.

There is a large per cent of these Indians who can never be made self-supporting, and will thereon always be a charge upon the Government or upon the tribe, and this contingent are in need of more care, better care, and a larger gratuity than they are now receiving or can receive under the present conditions and regulations of the Government. Under the treaty of 1858 the Yanktons are now drawing an annuity of $15,000, and this will continue until 1908. At present the Government is expending this money for clothing, bedding, etc., which is annually distributed to the families and individual members of the tribe. In addition to this annuity, the Government is now expending, for their benefit and as a gratuity, about $60,000 per annum. Of this sum, $35,000 is expended principally for subsistence, which is distributed in a weekly ration to all members of the tribe. About $5,000 is expended for the shops and farming interests, and about $20,000 for the maintenance of schools. Under the conditions which have existed, this appropriation was a necessity for the welfare of the Indians, and in the main its method of expenditure has been judicious; but whatever the past conditions may have required, under the present conditions the plan of issuing rations promiscuously to all members of the tribe is fraught with much evil, and the welfare of the Indians requires a change. This reservation is a parallelogram, 30 miles long and about 22½

miles wide, and as the most of the Indians are scattered over the reservation, many of them in going for their rations spend more time and effort than the rations are worth. In most cases those living farthest from the agency are Indians who do not need this assistance. With many this weekly ration fosters idleness and directly defeats the purposes of the Government. For the large class who are mainly or wholly dependent upon this ration, it is quite inadequate to their needs, and the same class are also deficient in clothing, housing, etc.

The rude and primitive court which has served the purposes of the Yankton Indians in their tribal condition is already inadequate to the proper administration of justice among them, and must give place to something more commensurate with the wants and demands of civilized life.

The religious training of these people is a factor which should not be overlooked. Under the ministration of the two missionaries, Rev. John P. Williamson, Presbyterian, and Rev. Joseph W. Cook, Protestant Episcopal, the most satisfactory progress has been made, and a very large per cent of the Indians have identified themselves with these churches. Each society maintains three churches on the reservation, the missionaries being assisted by native preachers. To the efforts of these two noble men, the Indians are indebted for much of both their moral and material progress, and in all provisions for the future advancement of the Yanktons, an effort should be made to secure the cooperation of this church influence.

POSSESSIONS OF THE INDIANS.

The Yankton Sioux Indians have an estate which should make them one of the richest communities in South Dakota. Every man, woman, and child of the tribe has an inalienable home in their own right, averaging 150 acres per capita. These homes, and all their tribal estate, are free from taxation for twenty-five years. Under the present contract for the purchase of their surplus lands, they will receive $100,000 in cash sixty days after the ratification of the agreement, and semiannually for twenty-five years $9,500 in cash, with an annual fund of $12,000, expended for schools, etc., and for fifteen years they will receive $15,000 per annum under the treaty of 1858. At the end of twenty-five years they will receive a patent to their homes, and will still have a fund of $500,000 in the United States Treasury to be divided among them per capita.

The possibilities of this vast estate in the hands of an intelligent thrifty people are very great, but what it will amount to in the hands of an ignorant half-civilized people will, depend largely upon the methods adopted by the Government in carrying out the present agreement with these Indians. By the treaty of 1858, the Yankton Indians ceded to the United States their claim to all lands excepting their Home Reservation of 400,000 acres and the Red Pipestone quarries. The Red Pipestone Reservation has been of no pecuniary value excepting as an abiding place. Advancing civilization and the improvement of the surrounding country have immensely increased the market value of the land in this reservation, but aside from this increased valuation from external causes the reservation is worth much less to-day than it

was when they made the treaty with the United States 35 years ago. While the farm improvements on the reservation are very meager, large bodies of timber have been almost wholly destroyed, leaving the reservation nearly denuded of tree life without any compensating improvement. During the 35 years of the Yankton Indians' residence on this reservation, they have received from the Government, under the stipulations of the treaty of 1858, $1,410,000. During the same period, and principally during the past 20 years, they have received from the Government gratuities amounting to about $1,410,000. The tribe has averaged less than 2,000 souls, and this princely sum of $2,820,000 in the hands of a community of industrious, self-helpful, thrifty people, of the same number, would certainly have transformed this reservation into a veritable garden spot, and raised its inhabitants high in the scale of wealth, moral worth, culture, and refinement. Upon a casual view, the Indians have nothing to show for this vast expenditure, and the most searching investigation fails to show an adequate result for this great effort in their behalf; but they have all assumed the form of civilization and live by civilized methods. Indeed, no other method of life is now open for them. The young Indians speak the English language and many of them have a fair common school education. Some have a higher education, and many have acquired considerable knowledge of farming and the mechanical arts. While this result seems to be quite inadequate for the vast effort and expenditure of the Government, it must be remembered that first steps in civilization are slow, and the progress already made furnishes a good foundation for the future

advancement of this people, under greatly improved conditions.

THE TRIBAL CONDITION.

One of the greatest hindrances to advancement in civilization of these people has been their tribal mode of life, and their ownership of land in common and receiving payments from the Government under treaty stipulations, and bounties of the Government for their education, civilization, etc., as a tribe. Under this condition individual effort amounted to very little, and there was even less to stimulate it. The allotment of lands in severalty, which gives to all members of the tribe a home in their individual right, will greatly promote the progress and welfare of this people and the sale of their surplus lands, removing the last great property bond which held them together in the tribal condition, will do much to stimulate individual effort and make progress much more rapid. We think that all proper means should be used to break up the tribal condition and tribal habits of life, and to stimulate individual effort and ambition.

THE SQUAW MEN.

The usual contempt of Indians for white men is intensified when the white man becomes identified with his tribe by marriage. It is not strange therefore that squaw men should be utterly ignored, and this has been a great drawback to the Yankton Indians. The squaw men on the Yankton Reservation certainly average well for their class. Many of them are intelligent enterprising

men, and with the usual incentives to thrift and prosperity they would have brought many valuable lessons to the Indians to help them forward in civilization. But they were not recognized by the tribe, and the status of their offspring was not fixed. Thus the main incentives to activity and progress were removed from them, and they were, for the most part, quite content to let their wives draw the rations and annual allowance of clothing, etc., which they were entitled to as members of the tribe, making but little effort themselves. The allotment of lands in severalty to the wives and children of these men will do much to cure this evil, but, seeing the desirability of a closer identity of these men with the tribe, in a dispatch to the Secretary of the Interior, dated January 23, we said: "Must squaw men be prevented from signing?" Under the same date the Secretary answered: "Squaw men better sign separate paper expressing consent." In compliance with the suggestion of the honorable Secretary, we prepared a paper, to which we took the signatures of about one-half of the Squaw Men, and attached it to the agreement.

PROVISIONS OF THE AGREEMENT.

By simply purchasing the surplus lands of the Yankton Indians we would have complied with the letter of our instructions, but the Government has labored for more than a quarter of a century to civilize these Indians and has expended large sums of money in this effort, and we well knew that we would be expected to take account of this fact and conduct our negotiations accordingly. Careful inquiry into the conditions and requirements of

these Indians soon revealed to us the fact that the purchase of the surplus lands was but a small part of our mission and of minor importance to both the Indians and the Government, the provisions connected therewith for the future welfare of the Indians being of greater importance to them and to the Government than the sale of their surplus lands.

For reasons elsewhere explained, we found it necessary to allow the Indians what we thought to be a very liberal price for their surplus lands, but as the Government is now expending, as a free gift, about $60,000 per annum for the benefit of this tribe, we thought other provisions of the treaty to be of more importance to the United States than the mere matter of price, as we believe that this agreement, if judiciously carried out, will result in a large saving to the Government, and at the same time greatly promote the welfare of the Indians.

But few of these Indians know the value of money or the money value of such useful articles as they desire to purchase. To learn the relative value of money and of other articles, they must have money to expend and thereby learn its judicious use. They have reached a point in civilization where the proper use of money is a necessary condition. In the process of this pecuniary education, some of the Indians must, of necessity, waste or unwisely use their money; but this is a most necessary part of their education, and if the money is paid to them in small amounts, this purpose will be accomplished with the smallest loss to them. For these reasons we have provided that all payments under this agreement shall be made in money, and that the interest payments shall be made semiannually. We at first proposed to make the cash

payment $30,000, and for some reasons it would have been desirable to make the cash payment small, but many of the young men wanted money enough to assist them in commencing farming operations on their allotted lands, and for this reason a cash payment of $100,000 was considered to be desirable.

Our instructions said: "If possible, a portion of the interest should be made available for the payment of local taxes on the allotted lands during the trust period." The question of taxes was a bugbear to these people, and under the great opposition we had to contend with it was deemed advisable to make a specific provision, as in Article V, instead of a general tax clause, as suggested. Up to the present time schools for the Indians have been maintained wholly at the Government expense, and rations, also a gift of the Government, have been issued promiscuously to all the members of the tribe. In this way the Indians were relieved of nearly all responsibility and have been maintained in comparative idleness, greatly to their detriment. Under the provisions of this agreement, judiciously carried out, an appropriation of $30,000 will accomplish much better results for these Indians than the $60,000 which is now being annually expended for their benefit, and we see no reason why even this smaller expenditure need be maintained more than one, two, or three years, as after that time the income from the allotted lands, from cultivation, from leasing, etc., should be ample to meet all the necessities of this people. Until such time as these Indians are able to be thrown wholly upon their own resources, we think the appropriation of $6,000 per annum, provided for in Article V, to supplement a like sum taken from the annual interest, should be made,

but when the provisions of this agreement have become fully operative, we do not deem that any pecuniary help of the Government, beyond the $6,000, will be necessary. Until the Indians are prepared for district schools, probably the present plan for their education is as good as can be devised, but as soon as possible they should be associated in the management and maintenance of these schools, and should be made to feel the interest and responsibility of proprietorship.

In the matter of caring for those needing help a most radical change is necessary to economize the expenditures of the Government and to accomplish the best results for the Indians. The tribe should be divided into at least three classes. Those who are wholly capable of taking care of themselves should have no pecuniary aid, except the general provisions of the Government for schools, etc. Those needing partial support should receive it in such manner as to give them this aid without crippling their energies. Under the present Government management and treatment of these Indians, assistance takes the place of thrift and personal effort and tends to make them a community of paupers and beggars. There are, however, a large number of old people and others who are almost wholly incapable of taking care of themselves, and for whom the present provisions are quite inadequate.

It is not exaggeration to say that some of these people suffer and even die for want of better care. They are not sufficiently housed, sufficiently clothed, or sufficiently fed, and ample provision should be made for all these conditions. To suggest a satisfactory plan in detail, would require a more thorough investigation of all the facts than

we are able to make, and such inquiry will be desirable in preparing to carry the provisions of this agreement into effect, as the prejudices and peculiarities of these people should be taken into account, as well as the many local conditions. A system of small cottages near the agency would probably be the best means of housing this class of people. There should also be a hospital for the care of such invalids as can not be properly nursed and cared for at their homes. One condition in admitting this helpless class to the enjoyment of this trust fund would properly be that the income from their allotted lands and their share in the annual interest should be applied for their maintenance. We think that after the first two or three years the most ample provision for this class may thus be made without any aid from the Government, except the management of the affair. In view of the fact that the settlement and improvement of the reservation by white people will greatly augment the value of the allotted lands, and that the inalienable allotted lands of the old people who will die during the next twenty-five years must of necessity be a valuable inheritance to their heirs living after them, it is worthy of consideration whether some arrangement may not be made by which at least a portion of the interest of these old people in the trust fund in the Treasury may be used for their benefit during their lifetime.

Already these people need a court of larger jurisdiction, and now that they have been allotted their lands in severalty and have sold their surplus lands – the last property bond which assisted to hold them together in their tribal interest and estate – their tribal interests may be considered a thing of the past, and under their rapidly

increasing individual interest, better methods for the administration of justice will be imperatively demanded. The settlement of the reservation by white people will, in a still larger degree, make demand for such courts, but courts established by and for the Indians will no longer answer their demands, and we suggest that such part of the fund for that purpose as may be necessary, shall be paid into the treasury of South Dakota, with a provision that the Yankton Indians shall have the same rights in the courts of the State as tax-paying citizens.

It has been usual in negotiating with the Indians to give a medal to the chiefs, but as the Yanktons are so far advanced toward individual citizenship, we thought it best to meet this requirement as in Article VII.

At present these Indians are receiving no benefit worthy of mention from any of their lands. Not only are their surplus lands lying waste and useless, but the same is true of their allotted lands, as but an exceedingly small portion of these lands is under cultivation. It is doubtful if there is an Indian on the reservation who could cultivate all his holdings of allotted lands. Old men and old women, who are not able to cultivate a single acre, have 160 acres each, and every babe at the breast has 80 acres. There are about 500 Yankton families, and to say that at any time in the near future there will be 500 Indian farms, averaging 125 acres each, is certainly taking an optimistic view of the situation, and yet this would leave them 200,000 acres of unused allotted lands. As none of these lands can be disposed of by the Indians for twenty-five years, the question of leasing becomes a very important one. Without this privilege the Indians must lose the use of at least four-fifths of their allotted lands, and with the

unrestricted right to lease their allotted lands they may easily become landlords only and live off the labor of white men who cultivate their holdings for them. Article IX, if judiciously carried out, will, we believe, meet both of these difficulties and will produce a large annual income. In a pecuniary sense, we think this is the most important provision of the agreement and should receive very careful consideration in carrying the agreement into effect.

Twenty per cent of the tribe are mixed-bloods, whose status has never been definitely fixed, and the consequent doubt and unrest have been a great drawback to the people. This drawback has been the greater as this is the English-speaking element of the people and most ready to take up all the civilized conditions of life. It was apparent to us that a clause in the agreement, fixing the status of mixed bloods, was most desirable, and we think that Article XIII will be a great benefit to the Yankton Indians as a whole, as well as a boon and source of comfort and satisfaction to the very large number who are directly interested.

The Yanktons have always been the friends of the white man, and have subjected themselves to claims for damages in their efforts to protect white settlers against hostile Indians. Such claims are evidently unjust, and we provide that they shall not be paid out of the proceeds of this sale.

The Indians freely expressed their fear that if they sold their lands before all their allotments were confirmed to them, the Government might fail to finish the confirmation – Article XIV was drawn to satisfy them

upon this point. We provide for the correction of errors in confirming these allotments, whether these corrections shall increase or diminish the amount of the surplus lands, but as our purchase covers all the unallotted lands at a liberal price, we do not think that any new allotments should be made for children born since the last allotment, as is desired by some of the Indians.

THE CLAIM OF THE YANKTON SCOUTS.

This claim was called to our attention and its settlement was demanded in connection with this transaction. Upon investigation we became satisfied that the claim is just; that these soldiers were employed by Gen. Sully, an officer of the U.S. Army, and that the service ordered by him was performed, and was most effective in protecting the lives and property of white people there is no doubt. But because of irregularity, no officer of the Government is authorized to pay their claim, and after twenty-eight years of patient waiting they appeal to us to include the settlement of their claim in our negotiations with the tribe. As this claim could not be paid, except by a special enactment of Congress, and as our work will be reviewed by Congress, we felt it to be our duty to comply with this reasonable demand.

THE RED PIPESTONE RESERVATION.

The Red Pipestone quarry was made the *sine qua non* of the treaty of 1858. Until this was assured to him, Struck by the Rees would not sign the treaty. Since that time this possession of the Yankton Indians has been a fruitful source of trouble to them, because of the encroachments

and depredations of white men and of other Indians, and now that their right to that possession is questioned by the Government, fills them with a feeling akin to awe and consternation.

Without evidence to that effect, it would not be thought that it was originally the intention of the Government to draw the line at the use of the quarries by the Indians, retaining the fee to the lands in the United States. The reservation for the home of the Yanktons was to be a parallelogram, with its southern side 30 miles long resting on the Missouri River from the mouth of Chouteau Creek northwestward, and of such width as to contain 400,000 acres. In fixing the points for the northern side, they were placed so far north that the reservation, when surveyed, was found to contain 430,405 acres. It would have been an easy matter to drop this northern side down so as to cut off the 30,405 acres of surplus lands, and the Government had the right to do this, but land in that region was then of so little value that it was not thought worth while to do this, though we are now paying the Indians more than $100,000 for this 30,405 acres of land which was simply thrown into the bargain in 1858. In the light of these facts it does not seem probable that the Government, at the same time, in surveying a section of land to cover and include the Red Pipestone quarry, intended to make the nice distinction between the use of the quarries and the fee to the land. If the language of the treaty of 1858 may be construed to give to the Yanktons the right to work the Red Pipestone quarries, while the fee to the land remains in the United States, we believe that these Indians will always feel that they were either deceived or misled in making the treaty

of 1858, or that the Government now seeks to take advantage of accidental wording in that treaty. We do not believe the Government can afford to place this construction on the treaty of 1858.

We think the Indians' title to this Red Pipestone Reservation can now be purchased for a reasonable sum, and we recommend that an agreement to this end be made with them, supplemental to the present agreement, purchasing this reservation and adding the stipulated amount to the trust fund placed in the Treasury after this agreement.

The Indians demanded that the absolute ownership of the Red Pipestone Reservation by them should be settled by this agreement, making that the condition of their negotiations with us, as Struck by the Rees had done in the treaty of 1858. We explained to them that this is a question which only the courts can decide, and that we could not do more than provide for its reference to the Supreme Court, which we do in Article XVI of the agreement.

THE EXCLUSION OF WHISKY.

The Indians very generally expressed their fear that upon the opening of the Yankton Reservation to settlement by white people, drinking saloons would be established in their midst, to the great injury of their people, and it was made an imperative condition of the sale, by the Indians, that whisky should be excluded. It is certainly to the credit of these people that they demand that this condition should be put into the agreement, and we hope that Congress will fix a penalty for the violation of

this provision which will make it most effective in preventing the introduction of intoxicants within the limits of the reservation.

We prepared a list of the adult male members of the Yankton tribe to use for purposes of comparison, etc., in taking signatures, which we submit herewith as a part of our report. After this list was prepared, it was discovered that Baptiste S. Bear Afraid of Him, opposite ticket No. 90, and John Cook, opposite ticket No. 124, were under age, and therefore these names are stricken out. On this list a red-ink check before the English name indicates the mixed bloods. The summary at the bottom of the list shows the whole number of full-blood Indians to be 370; mixed bloods, 88; total, 458. We secured the signatures of 255, a majority of 26 over one-half. A number of Indians have signified their desire to sign since we left the reservation. We recommend that an opportunity be given them to sign.

This list will serve for the distribution of the gold coin provided for in Article VII.

BASELESS CLAIMS.

The Indians, partly through ignorance and partly through craft, presented to us a long list of claims and grievances. They claim that they had not received their dues under the treaty of 1858; that they had a claim against the Government for land in Iowa and many such baseless and imaginary wrongs. We did not find it difficult to meet these charges to the satisfaction of most of the Indians, but the scout claim, which they pressed very strongly, and the Pipestone question and such matters as

had a basis in fact or in justice, we found more difficult to deal with, and we felt that it was to the interest of both the Indians and the Government that all such differences should be settled, as far as possible, in this transaction, as the Indians demanded.

OPPOSITION TO THE TREATY.

Your commissioners are unfortunate in encountering what at times seemed to be almost insurmountable difficulties. We have thought that the conditions could hardly have been more unfavorable for negotiating with these Indians, and at three different times the opposition felt that they had accomplished their purpose of defeating the negotiations, and most of the friends of the treaty gave up hope, so effectively did they work. The Yankton Indians are a hard people to deal with. They are sufficiently removed from the tribal condition to desire to act individually, and yet they lack the experience and self-confidence which are necessary for such action. The commission which endeavored to buy their surplus lands in 1884, and the commission appointed to negotiate with them for the Red Pipestone Reservation in 1889, both failed to accomplish their purpose. These Indians are unfortunate in being divided into factions, the jealousy of whose leaders makes transactions with the tribe very difficult as certain of the Indians will oppose a measure, simply and solely, because it is favored by others. Not only are the Indians divided among themselves, but there are also jealousy and bickerings among the white people on the reservation; in fact, they, too, are divided into factions, and to be in favor with one side is to be discredited by the other side. That ever present factor of

human nature, "if you are my friend, you must hate my enemy," was manifest among both the Indians and their white friends. To harmonize these factions and to work successfully with each without antagonizing the other was a difficult undertaking, but success in treating with the Indians required its accomplishment.

In the treaty of 1858 Charles F. Picotte received a very large bonus for his assistance in securing the assent of the Indians. This was known and remembered, and fully a dozen persons had looked forward to this treaty for similar benefits, and the leaders were slow to take hold of the matter without some special inducement. This also increased the rivalry between the leaders, and it was also impossible to convince those who were opposing the treaty that those who favored it were not receiving some pecuniary benefit, more than the other members of the tribe. This was a great drawback, and materially prolonged the work of the commission.

The change of administration, during our negotiations with the Indians, was most unfavorable for the work of the commission, and it was more unfortunate that this occurred at a time when there was a lull in the negotiations, because of the absence of one of the commissioners. Some of the people living around the reservation used their influence to keep the Indians from treating with this commission, hoping that they might gain some personal benefit if another commission came from the new administration. Those who were opposing the treaty used this fact to hold their followers back, and if possible to defeat the treaty under this commission.

A large faction of the Indians cherished animosity toward Commissioner Brown, and stubbornly refused to treat with us on this account. So successfully had the leaders of this faction worked with their followers, that after Dr. Brown had resigned and they came over to favor the treaty, they were wholly unable to influence a large number of their followers to come with them and sign the agreement.

The only real grounds for opposition, even to the minds of the Indians, was the price, and on this point we met with great difficulty, as elsewhere narrated. But this objection would have been much less difficult to meet and overcome if it had not been bolstered up by (unreadable) forms of opposition.

The most potent opposition with which we had to contend, was that of certain of the white employ'es of the Government at the agency. Their duties brought them into contact with nearly all the Indians on the reservation, and they found a ready and effective means of accomplishing their purpose, by working through the Indian employ'es of the Government. The two assistant clerks, who are mixed bloods, and whom they had won over to the opposition, were in the main office. One of these was the issue clerk, whose position gave him great power to influence ignorant and selfish Indians, and he was most zealous in his opposition.

Thus the opposition had at their command every means of hindrance which the office afforded, and with the guidance of the white employ'es above alluded to worked most effectively against the treaty. Couriers were sent all over the reservation to oppose the treaty and

spread stories discrediting the commission. These couriers secured all the signatures they could to a paper pledging the signers not to sign the agreement. Feasts were given and councils were held in opposition to the work of the commission. At these councils no person was permitted to speak in favor of the treaty. The leaders of the opposition thus worked day and night to defeat the efforts of the Government in treating with the Indians. Men who came to the agency to sign the agreement were met and influenced to return without presenting themselves to the commission. It is safe to say that all the charges of improper methods in making the treaty, and all distrust of the Indians for the commission, emanated from this source, and that the efforts of the Government were thereby greatly prolonged, and the character of the work injured. But for the opposition of these white employ'es we think that after we had drawn an agreement in every way so favorable to the Indians we could more easily have overcome the objection on account of price, and that no other form of opposition would have been interposed, and that we could have secured the assent of nearly all the tribe to the sale. Few, if any, of the Indians were opposed to the sale of the surplus lands. None were opposed to the terms and provisions of the treaty, and an almost unanimous agreement would speedily have rewarded our efforts if the Indians had been let alone. But for this opposition the large number of couriers sent out by the commission at a great expense to the Government would also have been unnecessary.

When it became evident to the opposition that a large majority of the tribe favored the treaty, they then resorted to running the Indians off the reservation, to keep them

from signing. We visited different parts of the reservation to hold councils and take signatures, and found many of the Indians gone. We issued a feast at White Swan, preparatory to taking signatures in that locality, but when the time came for the council for signatures, the Indians were nearly all gone off the reservation to Swift Bear Camp. We had a similar experience at Cold Spring, in an opposite part of the reservation. Red Gun, an old man nearly blind, wanted to sign the agreement and we went to his house, but were followed by an Indian of the opposition, Mah pi ye ska, we believe, to keep him from signing. He followed us from house to house and kept us from getting any signatures. At another time we went to Red Gun's house and took his signature, and took the signatures of others in the same locality who had expressed their desire to sign, but had been prevented from doing so by the presence of this man. These Indians can not be coaxed or coerced into anything. They yield very slowly to argument, so that in order to accomplish anything with them you literally must create around them an atmosphere which will finally move them. Considering the great difficulties we had to contend with, and that the Indians are so hard to start and so easy to stop in matters of this kind, we are almost surprised that we were successful in our negotiations.

VALUABLE ASSISTANCE.

We wish to state that our best efforts would have been wholly fruitless without more than the usual cooperation on the part of the Government. To what, in the nature of the service, must have been an almost unprecedented support from the Department of the Interior, your

commissioners are indebted for the ability to report the successful negotiation of an agreement, which we believe will be of lasting benefit to the Indians and therefore satisfactory to the Government, and it affords us the same pleasure to make this acknowledgment that it does to announce success in our difficult undertaking.

To Col. E. W. Foster, the agent, we are indebted for much valuable information, suggestion, and assistance in the work of our commission, and we think we can not commend too highly the interest manifested by him. From the time we reached the agency up to the time we completed the agreement ready for signature, he acted as the friend and attorney of the Indians, making requests and suggestions in their interest, but at the same time smoothing the way for us. Could we have had such sympathy and cooperation throughout our work by all the Government employ'es at the agency it would have relieved it from fully 90 per cent of its disagreeable features, and we think would have shortened it very materially.

To the missionaries, Rev. Joseph W. Cook and Rev. John P. Williamson, the Indians, the commissioners, and the Government are jointly indebted for the most valuable assistance in this work. They, better than any one else, understood the Indians and knew their needs and demands, and we felt that they, as the friends of the Indians, had a right to know just what we desired and proposed; and finding them both ready and willing to cooperate with us, we counseled with them freely and subjected all our proceedings to their criticism. They gave us such active sympathy and support that we feel that to

them we are very largely indebted for the success of our efforts.

CONCLUSION.

It has been our aim in these negotiations to make the Yankton Indians entirely self-supporting at as early a date as possible, and to advance them rapidly in civilization. We have endeavored to do this work in all respects in the interest of the Government and of the Indians, and to finish it to an entire completion in every detail. There will be no basis for misunderstanding or discontent in carrying out this agreement with the Yanktons, for everything was done openly and aboveboard, and they well understood every provision of the agreement which they signed, and they signed with the greatest possible deliberation. Chiefs Jandran and Jumping Thunder who, by misrepresentation, had been induced to sign a petition to the Commissioner of Indian Affairs requesting the recall of your commission, sent word to us that they wanted to sign the agreement, and on February 20 we went to their houses with the official interpreter and took their signatures.

We asked Jumping Thunder if he wanted to hear the agreement read. He said, "No; I understand it and am ready to sign." We asked Jandran if he wanted to hear the agreement read, and he said; "No; I am no child. I have heard the treaty read and I understand it. I am ready to sign and I want to tell you why I sign, and I want you to write it down. I sign the treaty because it contains the article about the Pipestone Reservation, the whisky clause, and the clause for the care of the poor, for schools,

etc." Standing Buffalo asked us, "If I sign the agreement and die before July 1, 1893, will my family get my part of the cash payment, or if one of my children dies will I get its part of the cash payment?" These statements and questions indicate the deliberation and understanding with which most of the Indians signed the agreement.

The work intrusted to us is not of great magnitude, yet it is of the utmost importance to the Yankton Indians, and we have felt that our duty as representatives of the Government required us to spare no pains in making this work as complete and perfect as the conditions would admit of. To this end we have spared neither time nor effort to finish our task to the utmost completion, and we trust that our work will meet with the approbation of the Department.

We have the honor to be, most respectfully, yours,

J. C. ADAMS,
JOHN J. COLE,
Commissioners.

THE SECRETARY OF THE INTERIOR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D.C.,

December 26, 1893.

SIR: I have had the honor to receive a letter from the Hon. William H. Sims, Acting Secretary, dated the 19th instant, which reads as follows, viz:

I transmit herewith a draft of a bill for the ratification of a certain agreement negotiated with the Yankton tribe of Dakota or Sioux Indians for your examination of that part relating to the disposal of the lands ceded by said agreement and such recommendations in the premises as you may see proper to make.

For your further information I transmit also a copy of said agreement, the report of the commission which negotiated the same and the letter of the Commissioner of Indian Affairs submitting said papers to the Department.

You will please return all papers accompanying this letter with your report. That part of said draft of a bill which relates to the disposal of the lands ceded, and as to which my examination and recommendation are requested, is embraced in the third section thereof, which provides as follows, viz:

That the lands by said agreement ceded, sold, and relinquished, and conveyed to the United States shall, upon proclamation by the President, be subject only to settlement and entry under the homestead and town-site laws of the United States (except section twenty-three hundred and one of the Revised Statutes, which shall not apply), excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common school purposes, and be subject to the laws of the State of South Dakota: *Provided*, That each settler on said lands shall, before making a final proof and receiving a certificate of entry paid to the United States for the land so taken by him, in addition to the fees provided by law, and within five years from the date of the first original entry, the sum of three dollars and

seventy-five cents per acre, one-half of which shall be paid within two years; but the rights of honorably discharged Union soldiers and sailors as defined and described in section twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States shall not be abridged except as to the sum to be paid as aforesaid.

In regard to this section, the Commissioner's report on its sixteenth page contains the following, viz:

Although it is probably not the duty of this office to draft a provision for the opening of the lands for settlement, I have for convenience incorporated a section for that purpose, in line with similar acts. A reference to the Commissioner of the General Land Office for his views upon this section is respectfully suggested.

I have examined the said section and find no objection thereto, except as to the requirement that the full amount of the purchase money shall be paid "within five years from the date of the first original entry," in addition to the requirement also contained therein that "the settler shall pay the money before making a final proof and receiving a certificate of entry," which under the general law may be done at any time after five years and before the expiration of seven years from the date of entry. I recommend that the section be amended by striking out the words "and within five years from the date of the first original entry," where they occur therein, and further amended by inserting the words "from the date of entry" immediately after the words "within two years," where they occur therein.

The said draft of a bill and accompanying papers are herewith returned.

Very respectfully,

S. W. LAMOREAUX,

Commissioner.

THE HON. SECRETARY OF THE INTERIOR.

A BILL to ratify and confirm an agreement with the Yankton tribe of Sioux or Dacotah Indians in South Dakota, and to make appropriations for carrying the same into effect.

Whereas J. C. Adams and John J. Cole, duly appointed commissioners on the part of the United States, did, on the thirty-first day of December, eighteen hundred and ninety-two, conclude an agreement with the chiefs, headmen, and other male adults of the Yankton tribe of Sioux or Dacotah Indians upon the Yankton Reservation, in the State of South Dakota, which said agreement is as follows:

Whereas a clause in the act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the fiscal year ending June thirtieth (30th), eighteen hundred and ninety-three (1893), and for other purposes, approved July 13th, 1892, authorizes the "Secretary of the Interior to negotiate with any Indians for the surrender of portions of their respective reservations, any agreement thus negotiated being subject to subsequent ratification by Congress;" and

Whereas the Yankton tribe of Dacotah – now spelled Dakota and so spelled in this agreement – or Sioux Indians is willing to dispose of a portion of the land set apart and reserved to said tribe, by the first article of the treaty of April (19th) nineteenth, eighteen hundred and fifty eight (1858), between said tribe and the United States, and situated in the State of South Dakota:

Now, therefore, this agreement made and entered into in pursuance of the provisions of the act of Congress approved July thirteenth (13th), eighteen hundred and ninety-two (1892), at the Yankton Indian Agency, South Dakota, by J. C. Adams of Webster, S.D., John J. Cole of St. Louis, Mo., and I. W. French of the State of Neb., on the part of the United States, duly authorized and empowered thereto, and the chiefs, headmen, and other male adult members of said Yankton tribe of Indians, witnesseth:

ARTICLE I.

The Yankton tribe of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said Indians as aforesaid.

ARTICLE II.

In consideration for the lands ceded, sold, relinquished, and conveyed to the United States as aforesaid, the United States stipulates and agrees to pay to the said

Yankton tribe of Sioux Indians the sum of six hundred thousand dollars ($600,000), as hereinbefore provided for.

ARTICLE III.

SECTION 1. Sixty days after the ratification of this agreement by Congress, or at the time of the first interest payment, the United States shall pay to the said Yankton tribe of Sioux Indians, in lawful money of the United States, out of the principal sum stipulated in Article II, the sum of one hundred thousand dollars ($100,000), to be divided among the members of the tribe per capita. No interest shall be paid by the United States on this one hundred thousand dollars ($100,000).

SECTION 2. The remainder of the purchase money or principal sum stipulated in Article II, amounting to five hundred thousand dollars ($500,000), shall constitute a fund for the benefit of the said tribe, which shall be placed in the Treasury of the United States to the credit of the said Yankton tribe of Sioux Indians, upon which the United States shall pay interest at the rate of five per centum (5) per annum from January first, eighteen hundred and ninety-three (January 1st, 1893), the interest to be paid and used as hereinafter provided for.

ARTICLE IV.

The fund of five hundred thousand dollars ($500,000) of the principal sum, placed to the credit of the Yankton tribe of Sioux Indians, as provided for in Article III, shall be payable at the pleasure of the United States after twenty-five years, in lawful money of the United States.

But during the trust period of twenty-five years, if the necessities of the Indians shall require it, the United States may pay such part of the principal sum as the Secretary of the Interior may recommend, not exceeding $20,000 in any one year. At the payment of such sum it shall be deducted from the principal sum in the Treasury, and the United States shall thereafter pay interest on the remainder.

ARTICLE V.

SECTION 1. Out of the interest due to the Yankton tribe of Sioux Indians by the stipulations of Article III, the United States may set aside and use for the benefit of the tribe, in such manner as the Secretary of the Interior shall determine, as follows: For the care and maintenance of such orphans, and aged, infirm, or other helpless persons of the Yankton tribe of Sioux Indians, as may be unable to take care of themselves; for schools and educational purposes for the said tribe; and for courts of justice and other local institutions for the benefit of said tribe, such sum of money annually as may be necessary for these purposes, with the help of Congress herein stipulated, which sum shall not exceed six thousand dollars ($6,000) in any one year: *Provided*, That Congress shall appropriate, for the same purposes and during the same time, out of money not belonging to the Yankton Indians, an amount equal to or greater than the sum set aside from the interest due to the Indians as above provided for.

SECTION 2. When the Yankton tribe of Sioux Indians shall have received from the United States a complete title to their allotted lands, and shall have

assumed all the duties and responsibilities of citizenship, so that the fund provided for in section 1 of this article is no longer needed for the purposes therein named, any balance on hand shall be disposed of for the benefit of the tribe as the Secretary of the Interior shall determine.

ARTICLE VI.

After disposing of the sum provided for in Article V, the remainder of the interest due on the purchase money as stipulated in Article III shall be paid to the Yankton tribe of Sioux Indians semiannually, one-half on the thirtieth day of June and one-half on the thirty-first day of December of each year, in lawful money of the United States, and divided among them per capita. The first interest payment being made on June 30th, 1893, if this agreement shall have been ratified.

ARTICLE VII.

In addition to the stipulations in the preceding articles upon the ratification of this agreement by Congress, the United States shall pay to the Yankton tribe of Sioux Indians as follows: To each person whose name is signed to this agreement, and to each other male member of the tribe who is eighteen years old or older at the date of this agreement, twenty dollars ($20) in one double eagle, struck in the year 1892 as a memorial of this agreement. If coins of the date named are not in the Treasury, coins of another date may be substituted therefor. The payment provided for in this article shall not apply upon the

principal sum stipulated in Article II, nor upon the interest thereon stipulated in Article III, but shall be in addition thereto.

ARTICLE VIII.

Such part of the surplus lands hereby ceded and sold to the United States as may now be occupied by the United States for agency, schools, and other purposes shall be reserved from sale to settlers until they are no longer required for such purposes. But all other lands included in this sale shall, immediately after the ratification of this agreement by Congress, be offered for sale through the proper land office, to be disposed of under the existing laws of the United States to actual and bona fide settlers only.

ARTICLE IX.

During the trust period of twenty-five years such part of the lands which have been allotted to members of the Yankton tribe of Indians in severalty as the owner thereof can not cultivate or otherwise use advantageously may be leased for one or more years at a time. But such leasing shall be subject to the approval of the Yankton Indian agent, by and with the consent of the Commissioner of Indian Affairs; and provided that such leasing shall not in any case interfere with the cultivation of the allotted lands by the owner to the full extent of the ability of such owner to improve and cultivate his holdings. The intent of this provision is to compel every owner of allotted lands to cultivate the same to the full extent of his ability to do so before he shall have the privilege of

leasing any part thereof, and then he shall have the right to lease only such surplus of his holdings as he is wholly unable to cultivate or use advantageously. This provision shall apply alike to both sexes and to all ages, parents acting for their children who are under their control, and the Yankton Indian agent acting for minor orphans who have no guardians.

ARTICLE X.

Any religious society or other organization now occupying, under proper authority, for religious or educational work among the Indians, any of the land in this agreement ceded to the United States, shall have the right for two years from the date of the ratification of this agreement within which to purchase the land so occupied, at a valuation fixed by the Secretary of the Interior, which shall not be less than the average price paid to the Indians for these surplus lands.

ARTICLE XI.

If any member of the Yankton tribe of Sioux Indians shall within twenty-five years die without heirs, his or her property, real and personal, including allotted lands, shall be sold under the direction of the Secretary of the Interior and the proceeds thereof shall be added to the fund provided for in Article V for schools and other purposes.

ARTICLE XII.

No part of the principal or interest stipulated to be paid to the Yankton tribe of Sioux Indians under the

provisions of this agreement shall be subject to the payment of debts, claims, judgments, or demands against said Indians for damages or depredations claimed to have been committed prior to the signing of this agreement.

ARTICLE XIII.

All persons who have been allotted lands on the reservation described in this agreement, and who are now recognized as members of the Yankton tribe of Sioux Indians, including mixed bloods, whether their white blood comes from the paternal or maternal side, and the children born to them, shall enjoy the undisturbed and peaceable possession of their allotted lands, and shall be entitled to all the rights and privileges of the tribe, enjoyed by full-blood Indians.

ARTICLE XIV.

All allotments of lands in severalty to members of the Yankton tribe of Sioux Indians not yet confirmed by the Government shall be confirmed as speedily as possible, correcting any errors in same, and Congress shall never pass any act alienating any part of these allotted lands from the Indians.

ARTICLE XV.

The claim of fifty-one Yankton Sioux Indians, who were employed as scouts by General Alf. Sully, in 1864, for additional compensation at the rate of two hundred and twenty-five dollars ($225) each, aggregating the sum of eleven thousand four hundred and seventy-five dollars

($11,475) is hereby recognized as just, and within ninety days (90) after the ratification of this agreement by Congress, the same shall be paid, in lawful money of the United States, to the said scouts or to their heirs.

ARTICLE XVI.

If the Government of the United States questions the ownership of the Pipe Stone Reservation by the Yankton tribe of Sioux Indians, under the treaty of April 19th, 1858, including the fee to the land as well as the right to work the quarries, the Secretary of the Interior shall as speedily as possible refer the matter to the Supreme Court of the United States, to be decided by that tribunal. And the United States shall furnish, without cost to the Yankton Indians, at least one competent attorney, to represent the interests of the tribe before the court. If the Secretary of the Interior shall not within one year after the ratification of this agreement by Congress refer the question of the ownership of the said Pipe Stone Reservation to the Supreme Court, as provided for above, such failure upon his part shall be construed as, and shall be, a waiver by the United States of all rights to the ownership of the said Pipe Stone Reservation, and the same shall thereafter be solely the property of the Yankton tribe of Sioux Indians, including the fee to the land.

ARTICLE XVII.

No intoxicating liquors nor other intoxicants shall ever be sold or given away upon any of the lands by this agreement ceded and sold to the United States, nor upon any of the lands within or comprising the reservations of

the Yankton Sioux or Da·ota Indians as described in the treaty between the said Indians and the United States, dated April 19th, 1858, and as afterwards surveyed and set off to the said Indians. The penalty for the violation of this provision shall be such as Congress may prescribe in the act ratifying this agreement.

ARTICLE XVIII.

Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement, and its ratification by Congress, all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858.

ARTICLE XIX.

When this agreement shall have been ratified by Congress, an official copy of the act of ratification shall be engrossed, in copying ink, on paper of the size this agreement is written upon, and sent to the Yankton Indian agent to be copied by letter press in the "Agreement Book" of the Yankton Indians.

ARTICLE XX.

For the purposes of this agreement, all young men of the Yankton tribe of Sioux Indians, eighteen years of age or older, shall be considered adults, and this agreement,

when signed by a majority of the adult male members of the said tribe, shall be binding upon the Yankton tribe of Sioux Indians. It shall not, however, be binding upon the United States until ratified by the Congress of the United States, but shall as soon as so ratified become fully operative from its date.

A refusal by Congress to ratify this agreement shall release the said Yankton Indians under it.

In witness whereof the said J. C. Adams, John J. Cole, and I. W. French, on the part of the United States, and the chiefs, head men, and other adult male Indians on the part of the said Yankton tribe of Sioux or Dakota (spelled also Dacotah) Indians, have hereunto set their hands and affixed their seals.

Done at the Yankton Indian Agency, Greenwood, South Dakota, this thirty-first day of December, eighteen hundred and ninety-two (Dec.31st, 1892).

JAMES C. ADAMS (seal).

JOHN J. COLE (seal).

The foregoing articles of agreement, having been read in open council and fully explained to us, we, the undersigned chiefs, head men, and other adult male members of the Yankton tribe of Sioux Indians, do hereby consent and agree to all the stipulations therein contained.

(Omitted power of attorney statements.)

(Omitted names attesting that the names signed to the agreement are correct and all right in every respect, and

that more than a majority of the adult male members of the tribe have signed the said agreement.)

I hereby certify that the foregoing agreement was read verbatim and carefully and correctly interpreted in an open council of the tribe. Four interpreters were present and on duty, all of whom were instructed by the commissioners to see that every part of the instrument was correctly and plainly interpreted. Myself and one other interpreter looked on while Commissioner Cole read the agreement and saw that every word was read correctly.

At the close of this council the agreement was sealed up and was kept constantly under seal – except in the presence of members of the tribe as witnesses – until it was copied by letter press into the "Agreement Book" of the Yankton Indians, so that it was not possible to make any changes or alterations in it.

The agreement was also read and interpreted to the chiefs and to various parties of the headmen, and all members of the tribe had a good understanding of the various provisions of the agreement before signing it. And the same was signed freely and without any coercion or undue influence.

I also certify that more than a majority of the adult male members of the Yankton tribe of Sioux Indians have signed the said agreement.

C. F. PICOTTE,
U. S. Interpreter.

YANKTON INDIAN AGENCY,
Greenwood, S. D., December 31st, 1892.

(Omitted certification that the statement of the U. S. interpreter is correct.)

(Omitted power of attorney and notary statement.)

(Omitted statement that Mr. W. I. French was appointed as a member of this commission in the place of Dr. W. L. Brown, who resigned.)

Therefore, be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That said agreement be, and the same hereby is, accepted, ratified, and confirmed.

SEC. 2. That for the purpose of carrying the provisions of this act into effect there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of six hundred thousand dollars, or so much thereof as may be necessary, of which amount the sum of five hundred thousand dollars shall be placed to the credit of said tribe in the Treasury of the United States, and shall bear interest at the rate of five per centum per annum from the first day of January, eighteen hundred and ninety-three, said interest to be paid and distributed to said tribe as provided in articles five and six of said agreement. Of the amount herein appropriated one hundred thousand dollars shall be immediately available to be paid to said tribe as provided in section one of article three of said agreement. There is also hereby appropriated the further sum of ten thousand dollars, or so much thereof as may be necessary, which sum shall be immediately available, to be paid to the adult male members of said tribe as provided in article seven of said agreement. There is also hereby appropriated the further sum of eleven thousand four hundred and seventy-five dollars, which sum shall be immediately available, to be

paid as provided in article fifteen of said agreement: *Provided,*

That none of the money to be paid to said Indians under the terms of said agreement, nor any of the interest thereon, shall be subject to the payment of any claims, judgments, or demands against said Indians for damages or depredations claimed to have been committed prior to the signing of said agreement.

SEC. 3. That the lands of said agreement ceded, sold, relinquished, and conveyed to the United States, shall, upon proclamation by the President, be opened to settlement, and shall be subject to disposal only under the homestead and townsite laws of the United States, (except section twenty-three hundred and one of the Revised Statutes, which shall not apply), excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common-school purposes and be subject to the laws of the State of South Dakota: *Provided*. That each settler on said lands shall, before making final proof and receiving a certificate of entry, pay to the United States, for the land so taken by him, in addition to the fees provided by law, the sum of three dollars and seventy-five cents per acre, one-half of which shall be paid within two years from the date of his original entry; but the rights of honorably discharged Union soldiers and sailors as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States, shall not be abridged except as to the sum to be paid as aforesaid.

SEC. 4. That every person who shall sell or give away any intoxicating liquors, or other intoxicants, upon any of the lands by said agreement ceded, or upon any of the lands included in the Yankton Sioux Indian Reservation as created by the treaty of April nineteenth, eighteen hundred and fifty-eight, shall be punishable by imprisonment for not more than two years and by a fine of not more than three hundred dollars.

GREENWOOD, YANKTON AGENCY, S. Dak
November 13, 1893

Sir: Under orders dated September 22, 1893, I proceeded to the Yankton (South Dakota) Agency to make a thorough investigation to ascertain whether any fraudulent methods were used or undue pressure exerted by the commission or any other persons to secure the assent of the Indians to the agreement dated December 31, 1892: whether they fully understand it, and if it was properly signed by a majority of the male adults of the tribe and represents their wishes in the matter.

November 2, 1893, word was sent out to the Indians to come in on Saturday and attend an open council called in the interest of the agreement of December 31, 1892. About 200 Indians attended and council was held in the street, between police station and agent's office, seats being prepared for them. Agent Foster and Inspector J. W. Cadman, present. Samuel De Fond, interpreter for us.

Council called to order at 10:30 a.m., November 4, 1893, and Agent Foster introduced me, and I told them I was sent here by the Secretary of the Interior to find out if there had been any improper methods used or undue pressure exerted to cause the Yankton Sioux to sign the

agreement of December 31, 1892, and if they understood it, and if it was the wish of the majority of the male adult members of this tribe that their surplus land be sold as stated in the agreement, etc.

I then asked them if they would like to hear the agreement read, they said they would. Henry Bonin (issue clerk) acting as interpreter. I then read the agreement to them, and at the close asked those present who had signed this agreement to step forward and answer to their names and answer the questions I should ask them. No one moved, and I then decided to call their names in the order they were signed on the agreement.

Each one present as their name was called responded to it, and I asked them if any undue pressure was brought to bear on them that caused them to sign it; if they did sign it, and if it represents their wishes still in the matter, and were anxious to have the treaty go through. Seventy-nine answered to their names. Many of them said I signed it and it's all right. Some said I signed it because I wanted the money; others said they signed to help the poor and old and infirm and sick. One said I signed it not to help me so much as others. I am all right but so many others are not.

Those that answered, giving consent, I checked off on the rolls with a "*;" those that wanted to talk marked them with a "t."

Padani James, No. 60 said: "I signed it; was promised the money last July and it did not come, and now I don't want to stick to it."

Edwin Garfield, No. 219, said: "They invited me to dinner and asked me to sign and I did; now I don't want it."

Mato Eli, No. 68, signed it after frequent urging by the runners, and now he thinks they ought to get more.

Sam Packard, No. 61, says: "I signed, but understood from Mr. Pecalt that I better sign before noon, and supposed he meant or lose my job." He being employed in the carpenter shop.

Peter, No. 215, says: "Was bribed to sign it by telling him they would see that he got his tree claim back if he signed it."

(No. 215 has been arranged satisfactorily by Col. Foster and was before this man made this statement.)

Joshua Packard, No. 98, signed it all right, but now he thinks they ought to have more, as did not get it last July.

Blue Tomahawk, No. 213, says: "A bargain is a bargain; they told me I was to get the money last July, and I did not."

Charles Sticker, No. 113, says he signed because they told him the treaty was made, and it was not.

Brown Owl, No. 181, signed it and afterwards decided not a good thing: not enough for land.

I then called the roll again; a few answered to their names and were checked.

I then told them that as several had expressed a desire to sign the agreement I would not give them an opportunity.

The sheet they signed was attached to back of the treaty and read as follows:

GREENWOOD, YANKTON AGENCY, S. DAK.
November 1, 1893

The undersigned members of the Yankton Sioux tribe of Indians having had the agreement for sale of surplus lands made under date of December 31, 1892, read and explained to us in open council and not having previously signed the same, now sign our names hereto as freely consenting and agreeing to all the provisions therein.

As it was the voice of the people I was after, I thought best to do this.

One man signed it and three or four said they would sign the first of the week. I then asked them when they wished me to meet them again and hear what the opposition had to say. They decided at once the following Saturday, as that was the day they had to be here to get their rations, and wished in the meantime I would ride over their fine reservation and let them know what I thought of it. I told them I would do so and that council was adjourned till Saturday, November 11, and I hoped they would get here as early in the morning as possible.

Monday was court day: a number answered to their names.

Tuesday I went out to see William Bean, a chief on the side of the opposition. He speaks English fairly well.

He said he wanted everything good – no crooked work – that he hoped the agreement would go through and be ratified by Congress.

The following day Mr. Bean (chief) called the agency for me and said he wished to talk with me a moment, and we went in the agent's private office, where Mr. Bean told me again he wanted no bad work, that he hoped it would go through and be ratified by Congress. I suppose he did not dare to say so in open council, as he and his followers had opposed it from the start – simply, I think, because the names of the chiefs did not head the list.

The opposition were very quiet and orderly in both councils, and it was remarked by several Indians that the last council was more to the point, with less bad blood than any they had ever had on the subject.

Running Bull (chief), Many Arrows, and three or four others, asked me to meet them at Rev. Williamson's house Thursday evening, as they wanted to talk to me.

They said as they looked around and saw how poor their people were, how much they wanted to make them even comfortable, and how few machines they had to cut their hay, it made them feel bad. That they all did hope this treaty would go through, as it had many friends in the tribe, and the number was on the increase.

Saturday, November 11, 1892, council called to order at 10:30 a. m. in council room; 150 Indians present.

Agent Foster and J. W. Cadman, inspector, present; Henry Bonin, interpreter, Peter St. Pierre relieving him for dinner and council in session till 3:30 p. m.

After calling the names of those that had not responded and checking off those that answered, I told the chiefs sitting close behind me – William Bean, Medicine Cow, White Swan, and Feather in the Ear – that I should be pleased to hear what they had to say and how long they would like to talk. William Bean, chief, answered at once, two hours and a half. I told them all right.

William Bean (chief), then said: The white man run as thick as grass on the prairie, and that I was chosen the one among that great number to come and see them; that he hoped I was a good, clean man: that the majority of the men sent out were not; that he did not think I ought to take signatures to ascertain what the majority of the tribe wanted; that some of the commissioners were bad men; that one of them threatened to cut off the rations and amenity goods if they did not sign, and that he thought undue pressure had been used.

White Swan (chief), said the three men sent by the Father from Washington were liars, and that they did many things which were all wrong. After talking a short time, he said as this man tell us to-day, and others that know more than we do have told us before, that it would be so much better for this tribe if they would be as one, not be pulling and hauling so all the time; all pull together and it would be so much better.

Running Bull (chief) said: When I look around and see how poor my people are and how much they need machines to cut the great amount of grass on the river bottom as well as the upland, that when the grass is ready to cut all want to cut at once, it made me feel the

this treaty should be carried through and all of us receive the benefit.

Medicine Cow (chief) said: Those commissioners that were here last winter did not do the fair thing; they paid blind men, poor men, money to come up and sign the treaty and he thought was not a fair thing at all. That Commissioner Adams was all right; that Commissioner Cole used to go out and take a drink before we had our councils. I do not like the commissioners: they did not treat me right. I got up to talk three times and they made me sit down.

I am glad you say the United States Government are good paymasters, for they owe us vast sums of money on the Fort Laramie treaty and I hope they will pay us. They will if they are good paymasters, as you say they are, but the price they pay or offer us for our surplus land is not enough. They moved the boundary line a while ago and beat us out of quite a tract of land, moved it three miles on the reservation.

Feather-in-the-Ear (chief), the most bitter of the opposition, did not speak: why, I do not know.

Isaac Stinger said: "If this treaty goes through, will the families of those that signed it and are now dead get their share?"

I told him I could not answer this, but would refer it to the Department.

Commissioner Cole did tell him, Medicine Cow, to sit down three times in one council, but Mr. Cole was asking for signatures and told him not to interrupt him with

their speeches as they had had plenty of time given them to make speeches.

I saw Thomas Arconge, the Indian that brought the blind men, and he said they might have paid for their dinners, but did not pay them money to sign or to come to agency.

One man, Joseph H. Cook, No. 191, was 18 years old last winter and for fear he might be considered too young, he wished to sign it again, and did so.

During the first council a quail flew from over the Missouri River and lit on the window sill where Joseph Connoyer sat: he held it through the council and then let it go. On Saturday, November 11, he came in and unsolicited signed the agreement; before this he had been a strong worker for the opposition.

All of those checked off with a (*) I have seen, with four or six exceptions, these having sent in word by their neighbors that they signed and it was all right. Twenty of the signers are soldiers, 5 are dead, 14 absent, and 6 temporarily absent. Four of the signers – Charles La Plante, No. 65, Isaac H. Tuttle, Joseph Nimrod, and Louis Archambeau – are members of other tribes.

Joseph Nimrod is a Yankton Sioux Indian, but married a Crow woman.

Felix Brunot and Charles Picotte, United States interpreter, would like very much to get some recognition from the Government for their services in aiding the commissioners in securing the majority of the male members of this tribe to sign this agreement.

They would also like to have an acre or two of the land at the agency reserve given to them to put their buildings on – buildings they have owned for many years. Mr. Picotte lives in his house, and has many years.

I have checked off with a (*) three names that the father or son or near relative have stated. They had recently talked with them and knew it was all right.

I tried hard to see them all, but could not do so.

Many Arrows said: "Many of these men say that they did not hear the agreement read enough and do not understand it, when the truth of the matter is it was read over and over again and we heard it so often that I can almost repeat it."

Several have said: "I am in favor of it and want to see it go through, but have not signed it because it makes feeling, and, knowing you have the majority of the male members and that those that do not sign will fare the same as those that do, we prefer not to sign."

No. 51, "Brings Many," an old man, says "he did not sign and that his old friends did not, and he wants more money for the land."

He is the only man that denies thus far having signed it.

Great interest is manifested now by nearly all that have signed the agreement to have it go through and be ratified by Congress and they be benefited by it.

Little Elk, No. 16, says: "Please tell the Secretary of the Interior that my daughter had 80 acres of land allotted to her and 40 acres of it was taken away afterwards,

and that I would like to have the 40 acres restored to her; also that I signed the treaty early and the opposition were at that time very bitter, and they killed one of my horses, so my team was broken up and I could not break up land which I calculated to do. If they can assist me, wish they would do so." (See Exhibit A.)

Felix Brunot also had a cow killed by them on account of the active part he took.

The opposition have asked me if there will be another commission sent here after my report is received to make a new treaty.

William Bean tells them he thinks there will be and that he will lead in the new treaty, and he told William Selwyn that he would have signed the treaty if his name could have headed the list.

William Selwyn says: "My father, 'Medicine Cow' (chief) made a mistake in the council the other day: that it was Adams instead of Cole that he thought was in habit of taking a drink, or at least acted that way before and during the council, and it was Adams that made him sit down."

An Indian wished me to ask you if you would please fix it so parents of children in the school here could be allowed to see them occasionally. That now they are obliged to visit them through the wire fence, and both take cold doing so. If they could talk with them in the laundry or somewhere it would please them, and also be allowed to see them when they are sick.

Some of the old and blind near agency would like to pick up what is left from the table at the schoolhouse if

the employees would put it in a dish at the door for them. Some of them have nothing to eat but corn and their rations.

Peter La Grand, No. 28: Elisha Dillon, No. 311: Henry Stricker, No. 95, have changed their minds since they signed and wished me to so state to the Secretary of the Interior.

No. 115, Not Afraid of the Pawnees, made no reply when asked if he signed it, but went out.

No. 91, John Cook, says: "As we did not get the payment last July, I am not in favor of it now."

Twenty-two new names are added to the number and the treaty is gaining friends every day, and so far I find (except in the case of Samuel Packard, and it is very doubtful if it was there) that no undue pressure was used or improper methods resorted to by the commissioners or any other persons last winter to secure signers. Please see Exhibit B.

Yours respectfully,

JOHN W. CADMAN,
United States Indian Inspector.

The Honorable SECRETARY OF THE INTERIOR

Articles of agreement between the United States of America and the Yankton Sioux Indians for the sale of their surplus lands, Yankton Indian Agency, Greenwood, S. Dak., December 31, 1892.

Whereas a clause in the act making appropriations for the current and contingent expenses of the Indian

Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth (30th), eighteen hundred and ninety-three (1893), and for other purposes, approved July 13, 1892, authorizes the "Secretary of the Interior to negotiate with any Indians for the surrender of portions of their respective reservations, any agreement thus negotiated being subject to subsequent ratification by Congress:" and

Whereas the Yankton tribe of Dacotah – not spelled Dakota and so spelled in this agreement – or Sioux Indians, is willing to dispose of a portion of the land set apart and reserved to said tribe by the first article of the treaty of April (19th) nineteenth, eighteen hundred and fifty-eight (1858), between said tribe and the United States, and situated in the State of South Dakota:

Now, therefore, this agreement, made and entered into in pursuance of the provisions of the act of Congress approved July thirteenth (13th), eighteen hundred and ninety-two (1892), at the Yankton Indian Agency, South Dakota, by J. C. Adams, of Webster, S. D., John J. Cole, of St. Louis, Mo., and I. W. French, of the State of Neb., on the part of the United States, duly authorized and empowered thereto, and the chiefs, headman, and other male adult members of said Yankton tribe of Indians, witnesseth:

ARTICLE I.

The Yankton tribe of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the

unallotted lands within the limits of the reservation set apart to said Indians, as aforesaid.

ARTICLE II.

In consideration for the lands ceded, sold, relinquished, and conveyed to the United States, as aforesaid, the United States stipulates and agrees to pay to the said Yankton tribe of Sioux Indians the sum of six hundred thousand dollars ($600,000) as hereinafter provided for.

ARTICLE III.

SEC. 1. Sixty days after the ratification of this agreement by Congress or at the time of the first interest payment, the United States shall pay to the said Yankton tribe of Sioux Indians, in lawful money of the United States, out of the principal sum stipulated in Article II, the sum of one hundred thousand dollars ($100,000) to be divided among the members of the tribe per capita. No interest shall be paid by the United States on this one hundred thousand dollars ($100,000).

SEC. 2. The remainder of the purchase money or principal sum stipulated in Article II, amounting to five hundred thousand dollars ($500,000), shall constitute a fund for the benefit of the said tribe, which shall be placed in the Treasury of the United States to the credit of the said Yankton tribe of Sioux Indians, upon which the United States shall pay interest at the rate of five per centum (5%) per annum from January first, eighteen hundred and ninety-three (Jan. 1st, 1893), the interest to be paid and used as hereinafter provided for.

ARTICLE IV.

The fund of five hundred thousand dollars ($500,000) of the principal sum placed to the credit of the Yankton tribe of Sioux Indians, as provided for in Article III, shall be payable at the pleasure of the United States after twenty-five years, in lawful money of the United States. But during the trust period of twenty-five years, if the necessities of the Indians shall require it, the United States may pay such part of the principal sum as the Secretary of the Interior may recommend, not exceeding twenty thousand dollars ($20,000) in any one year. At the payment of such sum it shall be deducted from the principal sum in the Treasury, and the United States shall thereafter pay interest on the remainder.

ARTICLE V.

SEC. 1. Out of the interest due to the Yankton tribe of Sioux Indians, by the stipulations of Article III, the United States may set aside and use for the benefit of the tribe, in such manner as the Secretary of the Interior shall determine, as follows: For the care and maintenance of such orphans and aged, infirm, or other helpless persons of the Yankton tribe of Sioux Indians as may be unable to take care of themselves; for schools and educational purposes for the said tribe, and for courts of justice and other local institutions for the benefit of the said tribe, such sum of money annually as may be necessary for these purposes, with the help of Congress herein stipulated, which sum shall not exceed six thousand dollars ($6,000) in any one year: *Provided*, That Congress shall appropriate for the same purposes and during the same time, out of

money not belonging to the Yankton Indians, an amount equal to or greater than the sum set aside from the interest due to the Indians, as above provided for.

SEC. 2. When the Yankton tribe of Sioux Indians shall have received from the United States a complete title to their allotted lands and shall have assumed all the duties and responsibilities of citizenship, so that the fund provided for in section 1 of this article is no longer needed for the purposes therein named, any balance on hand shall be disposed of for the benefit of the tribe as the Secretary of the Interior shall determine.

ARTICLE VI.

After disposing of the sum provided for in Article V the remainder of the interest due on the purchase money as stipulated in Article III shall be paid to the Yankton tribe of Sioux Indians semiannually, one-half on the thirtieth day of June and one-half on the thirty-first day of December of each year, in lawful money of the United States, and divided among them per capita. The first interest payment being made on June 30th 1893, if this agreement shall have been ratified.

ARTICLE VII.

In addition to the stipulations in the preceding articles, upon the ratification of this agreement by Congress, the United States shall pay to the Yankton tribe of Sioux Indians as follows: To each person whose name is signed to this agreement and to each other male member of the tribe who is eighteen years old or older at the date of this

agreement, twenty dollars ($20) in one double eagle, struck in the year 1892 as a memorial of this agreement. If coins of the date named are not in the Treasury coins of another date may be substituted therefor. The payment provided for in this article shall not apply upon the principal sum stipulated in Article II, nor upon the interest thereon stipulated in Article III, but shall be in addition thereto.

ARTICLE VIII.

Such part of the surplus lands hereby ceded and sold to the United States, as may now be occupied by the United States for agency, schools, and other purposes, shall be reserved from sale to settlers until they are no longer required for such purposes. But all other lands included in this sale shall, immediately after the ratification of this agreement by Congress, be offered for sale through the proper land office, to be disposed of under the existing land laws of the United States, to actual and bona fide settlers only.

ARTICLE IX.

During the trust period of twenty-five years, such part of the lands which have been allotted to members of the Yankton tribe of Indians in severalty, as the owner thereof can not cultivate or otherwise use advantageously, may be leased for one or more years at a time. But such leasing shall be subject to the approval of the Yankton Indian agent by and with the consent of the Commissioner of Indian Affairs: and provided that such leasing shall not in any case interfere with the cultivation

of the allotted lands by the owner thereof to the full extent of the ability of such owner to improve and cultivate his holdings. The intent of this provision is to compel every owner of allotted lands to cultivate the same to the full extent of his ability to do so, before he shall have the privilege of leasing any part thereof, and then he shall have the right to lease any such surplus of his holdings as he is wholly unable to cultivate or use advantageously. This provision shall apply alike to both sexes, and to all ages, parents acting for their children who are under their control, and the Yankton Indian agent acting for minor orphans who have no guardians.

ARTICLE X.

Any religious society, or other organization now occupying under proper authority for religious or educational work among the Indians any of the land under this agreement ceded to the United States shall have the right for two years from the date of the ratification of this agreement within which to purchase the land so occupied at a valuation fixed by the Secretary of the Interior, which shall not be less than the average price paid to the Indians for these surplus lands.

ARTICLE XI.

If any member of the Yankton tribe of the Sioux Indians shall within twenty-five years die without heirs, his or her property, real and personal, including allotted lands, shall be sold under the direction of the Secretary of the Interior, and the proceeds thereof shall be added to

the fund provided for in Article V for schools and other purposes.

ARTICLE XII.

No part of the principal or interest stipulated to be paid to the Yankton tribe of Sioux Indians, under the provisions of this agreement, shall be subject to the payments of debts, claims, judgments, or demands against said Indians for damages or depredations claimed to have been committed prior to the signing of this agreement.

ARTICLE XIII.

All persons who have been allotted lands on the reservation described in this agreement and who are now recognized as members of the Yankton tribe of Sioux Indians, including mixed-bloods, whether their white blood comes from the paternal or maternal side, and the children born to them, shall enjoy the undisturbed and peaceable possession of their allotted lands, and shall be entitled to all the rights and privileges of the tribe enjoyed by full-blood Indians.

ARTICLE XIV.

All allotments of lands in severalty to members of the Yankton tribe of Sioux Indians, not yet confirmed by the Government, shall be confirmed as speedily as possible, correcting any errors in same, and Congress shall never pass any act alienating any part of these allotted lands from the Indians.

ARTICLE XV.

The claim of fifty-one Yankton Sioux Indians, who were employed as scouts by General Alf. Sully in 1864, for additional compensation at the rate of two hundred and twenty-five dollars ($225) each, aggregating the sum of eleven thousand four hundred and seventy-five dollars ($11,475) is hereby recognized as just, and within ninety days (90) after the ratification of this agreement by Congress the same shall be paid in lawful money of the United States to the said scouts or to their heirs.

ARTICLE XVI.

If the Government of the United States questions the ownership of the Pipestone Reservation by the Yankton Tribe of Sioux Indians, under the treaty of April 19th, 1858, including the fee to the land as well as the right to work the quarries, the Secretary of the Interior shall as speedily as possible refer the matter to the Supreme Court of the United States, to be decided by that tribunal. And the United States shall furnish, without cost to the Yankton Indians, a least one competent attorney to represent the interests of the tribe before the court.

If the Secretary of the Interior shall not, within one year after the ratification of this agreement by Congress, refer the question of the ownership of the said Pipestone Reservation to the Supreme Court, as provided for above, such failure upon his part shall be construed as, and shall be, a waiver by the United States of all rights to the ownership of the said Pipestone Reservation, and the

same shall thereafter be solely the property of the Yankton tribe of the Sioux Indians, including the fee to the land.

ARTICLE XVII.

No intoxicating liquors nor other intoxicants shall ever be sold or given away upon any of the lands by this agreement ceded and sold to the United States, nor upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the treaty between the said Indians and the United States, dated April 19th, 1858, and as afterwards surveyed and set off to the said Indians. The penalty for the violation of this provision shall be such as Congress may prescribe in the act ratifying this agreement.

ARTICLE XVIII.

Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States And after the signing of this agreement, and its ratification by Congress, all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858.

ARTICLE XIX.

When this agreement shall have been ratified by Congress, an official copy of the act of ratification shall be

engrossed, in copying ink, on paper the size this agreement is written upon, and sent to the Yankton Indian agent to be copied by letter press in the "Agreement Book" of the Yankton Indians.

ARTICLE XX.

For the purpose of this agreement, all young men of the Yankton tribe of Sioux Indians, eighteen years of age or older, shall be considered adults, and this agreement, when signed by a majority of the male adult members of the said tribe, shall be binding upon the Yankton tribe of Sioux Indians. It shall not, however, be binding upon the United States until ratified by the Congress of the United States, but shall as soon as so ratified become fully operative from its date. A refusal by Congress to ratify this agreement shall release the said Yankton Indians under it.

In witness whereof, the said J. C. Adams, John J. Cole, and J. W. French, on the part of the United States, and the chiefs, headmen, and other adult male Indians, on the part of the said Yankton tribe of Sioux or Dakota – spelled also Dacotah – Indians, have hereunto set their hands and affixed their seals.

Done at the Yankton Indian agency, Greenwood, South Dakota, this thirty-first day of December, eighteen hundred and ninety-two (Dec. 31st, 1892)

JAMES C. ADAMS, (seal)
JOHN J. COLE. (seal)

The foregoing articles of agreement having been read in open council, and fully explained to us, we, the undersigned, chiefs, headmen, and other adult male members

of the Yankton tribe of Sioux Indians, do hereby consent and agree to all the stipulations therein contained.

Witness our hands and seals of date as above.

(Omitted chart of names of Indian signers and corresponding English names and witnesses signatures.)

(Omitted chart of names of Indian signers and corresponding English names.)

(Omitted power of attorney.)

YANKTON INDIAN AGENCY,
Greenwood, S. Dak., December 31, 1892.

We, the undersigned white men married to women of the Yankton tribe of Sioux Indians and thereby interested in the affairs of the tribe, have carefully examined the agreement of this date, prepared by the Yankton Indian Commissioners, for the sale of the surplus lands – that is, of all the unallotted lands, about 168,000 acres – of the Yankton Indians to the United States, and we are well satisfied with the said agreement in all respects. We freely consent to the sale of these surplus lands at the price offered, and upon the terms proposed, and we also fully assent to all other provisions and stipulations of the said agreement.

Witness our hands and seals.

(12 names omitted)

YANKTON INDIAN AGENCY, *March 4, 1893.*

We, the undersigned, a committee appointed by the persons whose names are signed to the agreement

between the United States and the Yankton Indians, dated December 31, 1892, for the purpose of examining the signatures thereto, wish to submit the following report:

We have carefully examined the list of names signed to the said agreement and we find the same to be regular, correct, and all right in every respect, and that more than a majority of the adult male members of the tribe have signed the said agreement.

ISAAC H. TUTTLE.
HENRY T. STRICKER.
ELISHA DILLON.
CETANKIYA.
JOHN RANDELL.
THOMAS CANKUWANYAKA.
PETER LA GRANT.
JOHN MASKETO.

I hereby certify that the foregoing agreement was read verbatim and carefully and correctly interpreted in an open council of the tribe. Four interpreters were present and on duty, all of whom were instructed by the commissioners to see that every part of the instrument was correctly and plainly interpreted. Myself and one other interpreter looked on while Commissioner Cole read the agreement and saw that every word was read correctly.

At the close of this council the agreement was sealed up, and was kept constantly under seal – except in the presence of members of the tribe as witnesses – until it was copied by letter press into the Agreement Book of the Yankton Indians, so that it was not possible to make any changes or alterations in it.

(10)

No. 96-1581

Supreme Court, U.S.
FILED
AUG 7 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

STATE OF SOUTH DAKOTA,

Petitioner,

v.

YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,

Respondents,

and

SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX
VOLUME II, PAGES 203-488

MARK W. BARNETT*
Attorney General
State of South Dakota
JOHN PATRICK GUHIN
Deputy Attorney General
500 East Capitol Avenue
Pierre, SD 57501-5070
Telephone: (605) 773-3215
Counsel for Petitioner
State of South Dakota

JAMES G. ABOUREZK*
BOBBIE J. RASMUSSON
ABOUREZK LAW OFFICES, P.C.
P.O. Box 1164
Sioux Falls, SD 57101-1164
Telephone: (605) 334-8402
Counsel for Respondents
Yankton Sioux Tribe and
Darrell E. Drapeau

KENNETH W. COTTON*
WIPF & COTTON
P.O. Box 370
Wagner, SD 57380-0370
Telephone: (605) 384-5471
Counsel for Respondent
Southern Missouri Waste
Management District

Counsel of Record

Petition For Certiorari Filed April 4, 1997
Certiorari Granted June 9, 1997

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

293 PP

TABLE OF CONTENTS

Page

United States District Court Docketing Statement .. 1

Eighth Circuit Court of Appeals Docketing Statement 14

Verified Complaint (September 28, 1994) 21

Answer by Southern Missouri Recycling & Waste Management District (October 4, 1994)..... 38

Third Party Complaint (October 20, 1994)..... 76

Answer to Third Party Complaint (November 4, 1994)..... 81

Answer of State of South Dakota (November 4, 1994) 84

District Court Judgment (June 14, 1995)..... 95

Instructions to Commissioners (July 27, 1892) 98

Report of the Commissioner of Indian Affairs (September 16, 1893) (EXH 10)..... 102

Report on Indians Taxed & Indians not Taxed in United States – Eleventh Census 1890 (Government Printing Office 1894) (EXH 610) 105

Senate Document 27, 53rd Congress, 2nd Session, Letters from Indian Commissioner concerning treaties with Yankton and Dakota or Sioux Indians, negotiations, and other papers (January 18, 1894) (EXH 605)..... 108

1. Letter from the Secretary of the Interior, Hoke K. Smith, transmitting Letter from Indian Commissioner concerning treaties with Yankton and Dakota or Sioux Indians, January 18, 1894.... 108

2. Letter from the Acting Commissioner, Frank C. Armstrong, concerning the Report to the Department of Interior, December 9, 1893 109

TABLE OF CONTENTS - Continued

Page

3. Report of the Yankton Indian Commission, March 31, 1893 122

4. Letter of Commissioner S.W. Lamoreaux, December 26, 1893..... 163

5. Draft of a Bill to ratify and confirm an agreement with Yankton tribe 166

6. Ratification of agreement by Congress..... 178

7. Report of John W. Cadman, United States Indian Inspector, regarding investigation into fraudulent methods or undue pressure against the Indians to sign the agreement, November 13, 1893 180

8. Articles of Agreement between the United States and the Yankton Sioux Indians, December 31, 1892 190

9. Report and testimony of Indians and Commissioners at the Council of the Yankton Indians to consider the question of selling their surplus lands, various dates, from October 8, 1892, through January 21, 1893 203

10. Letters from Missionaries John P. Williamson and Joseph W. Cook, to the Commissioners, January 3, 1893..... 317

11. Telegram sent to the Secretary of Interior from a Committee of Yankton Indians requesting recall of the Commissioners, December 27, 1892..... 319

12. Telegram sent from the Secretary of Interior, John W. Noble, responding to request for a recall of Commissioners, December 28, 1892..... 319

TABLE OF CONTENTS - Continued

Page

13. Report of meeting of Commissioners at the Council of the Yankton Indians to consider the question of selling their surplus lands, January and February 1893..... 321

14. Report and testimony of Commissioner Cole regarding obtaining the signatures of Yankton Indian soldiers..... 343

15. Report and testimony of meeting of Commissioners at the Council of the Yankton Indians to announce the completion of the treaty, March 2, 1893 343

16. Telegrams regarding Commissioner Cole's questions regarding signing and squaw men and Secretary Noble's response, January 23, 1893..... 352

17. Report of Commissioner Cole regarding agreement..... 352

18. Report on Council to examine signatures to the agreement, March 4, 1893..... 356

Letter to Chairman, Committee Indian Affairs, from Yankton Agency (March 2, 1894) (EXH 606)..... 359

Congressional Record 1894 (EXH 669)..... 362

Annual Report of the Commissioner of Indian Affairs (September 14, 1894) (EXH 11) 450

Letter to Secretary of the Interior from T.P. Smith, Acting Commissioner (March 29, 1895) (EXH 27)..... 451

Presidential Proclamation Yankton Sioux Lands (May 16, 1895) (EXH 602) 453

TABLE OF CONTENTS – Continued

Page

The State of South Dakota v. Andrew War, Information for Rape (September 21, 1895) (EXH 638) 458

House of Representatives report re: Homestead Settlers upon Yankton Indian Reservation (January 21, 1896) (EXH 611) 460

29 Stat. 16 (1896) (February 26, 1896) (EXH 18) 465

Twelfth Census of the United States (February 1, 1901) (EXH 612) 466

Letter to Secretary of the Interior (November 28, 1903) (EXH 29) 468

Historical Atlas of South Dakota 1904 (EXH 630) ... 469

Report of the Commissioner of Indian Affairs to the Secretary of the Interior 1907 (EXH 43) 471

Letter to William Bean, et al, Yankton Indians (May 13, 1910) (EXH 664) 473

Inspection Report of Albert H. Kneale, Supervisor (October 7, 1913) (EXH 22) 475

Hearings before the Joint Commission of the Congress of the United States to Investigate Indian Affairs (January 31 and March 9, 1914) (EXH 623) 477

Letter to Chairman, Committee on Indian Affairs from Secretary, Department of Interior (February 1, 1921) (EXH 665) 480

Letter to Joseph V. King, Yankton Agency, from Commissioner C.J. Rhoads (August 20, 1930) (EXH 667) 481

Constitution and Bylaws of the Yankton Sioux Tribal Business and Claims Committee (October 5, 1932) (EXH 651) 483

TABLE OF CONTENTS – Continued

Page

Petition to the Chairman, Senate Investigating Committee, from Yankton Agency (December 3, 1932) (EXH 23) 489

M-27671 Letter to Department of the Interior from Nathan R. Margold, Solicitor (March 1, 1934) (EXH 627) 492

Amended Constitution and Bylaws of the Yankton Sioux Tribal Business and Claims Committee (July 2, 1962) (EXH 652) 493

M-36783 Authority of Yankton Sioux Tribe of South Dakota to Establish a Tribal Court (September 10, 1969) (EXH 628) 518

1990 Census of Population and Housing (EXH 614) ... 527

58 Federal Register No. 194 (October 8, 1993) (EXH 661) 530

59 Federal Register No. 67 (April 7, 1994) (EXH 662) 532

A History of Yankton Tribal Governance (1995) (EXH 78) 534

Yankton Sioux Tribal Land History (1995) (EXH 31) ... 545

Trial Transcript Excerpts (April 1995) 563

MAPS:

General Land Office map, Ex. 615 (1889) 712

Bureau of Indian Affairs map, Ex. 33 (1889) 713

Bureau of Indian Affairs map, Ex. 35 (1896) 714

Bureau of Indian Affairs map, Ex. 36 (1897) 715

Bureau of Indian Affairs map, Ex. 37 (1898) 716

General Land Office map, Ex. 620 (1901) 717

TABLE OF CONTENTS – Continued

Page

Bureau of Indian Affairs map, Ex. 39 (1901) 718

State map, County Atlas, Ex. 631 (1906)..... 719

Charles Mix County map, County Atlas, Ex. 631 (1906)..... 720

Bureau of Indian Affairs map, Ex. 43 (1907) 721

General Land Office map, Ex. 621 (1910)..... 722

Bureau of Indian Affairs map, Ex. 46 (1912) 723

State map, County Atlas, Ex. 632 (1912)..... 724

Charles Mix County map, County Atlas, Ex. 632 (1912)..... 725

TABLE OF CONTENTS – Continued

Page

The following Documents are printed in the Petitioner's Appendix and not reprinted in the Joint Appendix.

United States Court of Appeals for the Eighth Circuit; Opinion (October 24, 1996) .....App. 1

United States District Court, District of South Dakota, Southern Division; Memorandum Opinion and Order (June 14, 1995) .....App. 66

United States Court of Appeals for the Eighth Circuit; Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc (January 6, 1997) .....App. 98

Treaty with the Yankton Sioux, 1858 .....App. 99

Agreement with the Yankton Sioux or Dakota Indians, in South Dakota, 1894 .....App. 111

Opinion of the Supreme Court of South Dakota in *State v. Greger,* February 19, 1997 .....App. 125

The following Documents are printed in the Respondents' Appendix and are not reprinted in the Joint Appendix.

South Dakota Enabling Act § 10, 25 Stat. 676 (February 22, 1889) .....Resp. App. 1

Constitution of South Dakota, art. XXVVI, § 18 (Adopted October 1, 1889).....Resp. App. 2

The agreement was also read and interpreted to the chiefs and to various parties of the headmen, and all members of the tribe had a good understanding of the various provisions of the agreement before signing it. And the same was signed freely and without any coercion or undue influence.

I also certify that more than a majority of the adult male members of the Yankton tribe of Sioux Indians have signed the said agreement.

Yankton Indian Agency, Greenwood, S. Dak., December 31, 1892.

C. F. PICOTTE,
U.S. Interpreter.

We hereby certify that the above statement of the U.S. interpreter is correct in every respect.

WILLIAM T. SELWYN,
Special Interpreter.
BAPTISTE P. LAMBERT,
Witness.

(Omitted power of attorney.)

(Omitted names of twenty-three Indian signers, dated December 31, 1892, and names of witnesses.)

Council of the Yankton Indians to consider the question of selling their surplus lands.

YANKTON INDIAN AGENCY,
Greenwood, S. Dak., October 8, 1892

Council met at 1 o'clock p. m.

Present, Col. E. W. Foster, the agent: Commissioners John J. Cole, of St. Louis, Mo., and J. C. Adams, of Webster, S. Dak., the Indian committee of 24 and 10

moderators: the chiefs, head men, and members of the tribe, to the number of about 180 Indians.

Commissioner W. L. Brown, of Lake Preston, S. Dak., was temporarily absent from the reservation.

William T. Selwyn, interpreter, and Peter St. Pierre, assistant interpreter.

Col. E. W. Foster, the agent, spoke at some length, introducing the commissioners to the Indians. In substance he said:

"The Government has sent a commission to you to negotiate with you for your surplus lands. Dr. Brown, whom you all know, was called away, but will return soon. Col. Adams, of South Dakota, and Mr. Cole, of St. Louis, are now before you, and these gentlemen will tell you something about their mission. You have had your homes allotted to you, and it is now for you to say if you will sell your surplus lands to the United States, and these men are here to discuss that question with you. This is an important matter for you to decide and you should consider it carefully.

"I believe that each band has appointed three of its members to constitute a committee of 24 to represent the tribe before this commission. Is this committee satisfactory to all of you?"

There was a general response of "How," and it was explained that there were also ten other men appointed to act with the committee as moderators. Agent Foster continued:

"Now, I hope you will take hold of this matter earnestly and come to some conclusion about it. You do not

have to sell your surplus lands if you do not want to, and it is for you to consider whether it is to your interest to do so or not. But if you want to sell, tell these men so and tell them what you want. I have no doubt that these men will deal fairly with you, but you have a right to look out for your own side in this transaction, and I hope you will stand together and act for the best interests of the tribe. The commissioners will now address you and tell you something about their mission."

COL. ADAMS spoke as follows: My friends, we are glad to meet you here to-day. We called you here that you might see what we are like as white men, and that we might see what you are like as Indians. We were sent here by the Great Father to see about a big matter. We understand that you each received an allotment of land on which to make a home. For the first time in the history of the western tribes all of the Indians who will may have a home they can call their own. Hearing this, we also understand that you own, outside of your allotment, a large quantity of land in common. It is this land that you own in common that we were appointed by the Great Father to talk to you about. In talking about this, as a business matter, we want you to remember we are appointed by the United States Government to negotiate with you for the purchase of this land for the Government. As these lands are now situated, the members of the tribe are receiving absolutely no benefit from them. If you conclude to sell your lands, then the older people will receive some benefit from them before they die. Under the law passed by Congress, as soon as you sell your surplus land you become citizens of the United States: in becoming citizens, your young men will become

politicians and fill offices as do the white men, and both your young and your old men who are called to citizenship under the law will assist in making the laws which will govern you as citizens of the State and nation; therefore, for the benefit of the old as well as the young – for the old to receive a benefit before they die, and for the young to sooner learn the ways, the details of citizenship. The Government does not want to speculate in these lands, but to benefit the Indians from the proceeds of their sale. We want to deal honestly and fairly with you, to do you good.

We have still some instructions to come from Washington, and hope in a few days to give you further light upon the subject of our mission to you.

With the 24 men appointed by the tribe we shall always be glad to meet. We shall be glad to have them come to us at any time for any information they desire, and which we will cheerfully give.

The Great Father desires and seeks in this transaction the benefit of the tribe, and what you may receive in this matter will be for this tribe alone, to help elevate you to citizenship, and as soon as you become the equals and assistants of the white man in making the laws, to be near him and learn his ways, you will learn to farm, to do all kinds of business, to be citizens in the true sense of the word. It might be, after you sold your land, you could have this reservation organized as a separate county. If this could be done – I do not say it can – you could govern your own people in your own way, so long as you obeyed the laws of the State. I do not say this can be done, but see no good reason why it might not be done.

We seek to do you justice as well as the United States in making a treaty with you for your lands. I am aware you have changed wonderfully for the better: that you know more of civilization and are growing more into its ways: that you are improving morally and religiously and we feel gratified to note that the missionaries we sent among you have done a great work, have fitted you to become citizens and to honor yourselves in the discharge of the duties that we hope will soon devolve upon you. I shall be glad to see you citizens and independent men, who can learn to support yourselves.

When a treaty is made it can not become a treaty unless ratified by Congress, so what we do here will have to go to Washington and be ratified by the Senate and House of Representatives of the United States before it becomes operative, before you can enjoy its benefits. It is, therefore, necessary that we should act prudently, like men, and make an agreement that will be so fair to you as well as the Government that Congress will at once recognize its fairness and approve it as a work that will result in good to this tribe of Yankton Indians. In a word, the Government seeks only your good in asking you to dispose of this property that is not doing you a single cent's worth of good.

I close, saying that we ask you to come to us at any time and tell us what you want in this connection. Col. Cole will speak a few words to you.

JOHN J. COLE. My Dakota friends: I am glad to meet you. I am glad the Great Father has sent me here, and I hope I shall be able to serve you and so serve the

Government acceptably in the business which has brought us together.

Your agent has spoken right. He is a good man. He is your friend. He has told us that we must make this treaty in the interest of the Indians. He will watch everything we do and protect you. He will counsel with your chiefs and head men and with your committee and find out what you want and try to get it for you.

The Great White Father has sent us here to treat with you. He wants to give you a chance to sell your surplus lands, because he thinks it will be for your good. But he does not want your lands for nothing. He has told us to pay you for your lands all they are worth, but you must not set too high a price on your lands or he will not buy them. He has told us to tell you that you will not be forced to part with our lands unless you want to. (How!) He does not want you to sell you homes that he has allotted to you. He wants you to keep your homes forever. (How!) He only wants you to sell your surplus lands for which you have no use. If you want to sell these surplus lands we will buy them and pay you all they are worth, and the Government will sell them to men who will make homes on them and will build good houses and make good farms, and this will make your other lands – your homes – more valuable, so that the lands you have left will be worth more than all your lands are now worth, and what you get from the Government for the surplus lands will be a clear gain to you.

The buffalo is gone, the antelope is gone, you can no longer live by hunting. You must plow like the white man: you must raise cattle to take the place of the buffalo:

you must raise sheep to take the place of the antelope. You must raise wheat and corn and oats to make bread and to feed your stock. You must raise everything which the white man raises and have plenty to eat and plenty to sell. Then you can build good houses where you can keep warm and dry, and be comfortable. You can wear good warm clothes and have many comforts that will make you happy. (How!)

The antelope was shy and hard to get. The buffalo sometimes wandered far away and you had a long chase to get meat, and your women and children nearly starved while you were trying to provide food, but now you can always have plenty. The cattle will plow your lands, they will give you milk and butter and cheese, and will give you plenty of meat: their skins will make you boots and shoes that will keep your feet warm and dryer than moccasins. The sheep will furnish you wool to make good warm clothes; they will also furnish plenty of meat that is as nice as the antelope.

In the old times you could not always have enough to eat: you could not have enough clothes to keep you warm. You were afraid the white man would come and kill you or drive you away. You were afraid hostile bands of Indians would make war upon you and you had always to be ready to go on the warpath. Now you can live in peace with your women and children and have plenty. (How!) Peace is strong: plenty is strong. They make a great people that nobody can hurt. The Great Father – President Harrison – is very strong. He is the greatest and strongest chief on earth. His great people make him strong, and the Great Spirit makes him strong, for he is a good man. His great Secretary – Mr. Noble – is

a great man and a good man and a strong man, and President Harrison and Secretary Noble are your friends and will always be your friends if you do right, and they want to protect you and benefit you. (How!) They have sent us here to meet you and shake hands with you and talk to you and counsel you what is best for you to do. (How!)

They sent us to tell you that the Government would buy your surplus lands if you want to sell them. But they also told us to tell you that you would not be compelled to sell these lands if you do not want to. (How!)

You not only have a home as a tribe, but every man, woman, and child among you each now has a home which no one can take away from you and the Great White Father wants you to always keep these homes and live on them in peace and comfort like white men, and be citizens and have plenty. (How!) The Government has dealt liberally with you and you are a rich people. You are richer than the same number of white people. If you cultivate your farms you can become very rich and powerful and you and your children will be comfortable and happy. (How!)

Now tell us if you want to sell these lands. Tell us how much you want us to pay you for them. Tell us what promised you want from the Government. Counsel among yourselves and do what you think will protect your interests. Do not be deceived by selfish or bad men who will counsel you against your best interests. Come and talk with us freely. Send your chiefs to talk with us. Send your committees to talk with us. And each one of you come and talk with us when you want to.

In your old life the tribal condition was a necessity. It united you and protected you and made you strong. But you are now living under new conditions and you must drop your old forms which are not suited to these conditions and take up new forms suited to your new mode of life. The Government seeing this sent an allotting agent to you to help you divide your land and select your homes. This has been done and you have been made citizens of the United States, the proudest title that any man can bear.

Now that you have your homes and that your allotted lands are more than you can make use of, you have sent word to Secretary Noble that you desire to sell your surplus lands and get money to help you to improve your farms and build good houses and buy stock. The Great Father and his Great Secretary, Mr. Noble, think you have acted wisely in selecting your homes in severalty, and in offering to sell your surplus lands, and in answer to your request they have sent us here to treat with you. (How!) They have sent us here to buy these surplus lands for homes for white men who will settle among you; who will live peaceably and neighborly with you; who will cultivate these surplus lands and make your allotted lands much more valuable. (How!) I thank you for listening so attentively.

HENRY STRICKER shook hands with the commissioners, and said: You have spoken very nice of us and we have all felt very glad for what you have said. My two friends, what you have said we have all heard it and we feel very glad. You see us that we are like human nature. So we would want to know if the President will do what we ask him and help us what we want of him. And if that

is the case, if the Government will help us, we will raise our little boys up to be good men, so if you will help us, we hope we will make a treaty that will be beneficial to us as a tribe. You told us whatever we, the members of the tribe, decide to do we can do. We will hear from you and you will hear from us. So we will just wait for the Yankton tribe alone to decide.

WILLIAM BEAN (chief), shook hands with the commissioners, and said: We know who you are and that you have come to see us about our land. You have told us what you are here for, and this we all know. At present I have not much to say. And what you have come for we shall not bother ourselves too much about it this time.

I want you to shake hands for us. If you agree with us whatever we judge, if you will grant us what we ask, I will shake hands with you. (Shook hands with the commissioners and concluded.) That is all I have to say.

JOHN J. COLE. I wish to add a few words to what I have already said to you. This meeting has been very interesting to me. I am greatly pleased to see you so far advanced in civilization and so well prepared for the new conditions that now surround you. When I looked over this assemblage and saw your large heads and noted how attentively you listened to what we said, I knew that you were a people who could take care of yourselves. Brains give power, and a people with large heads are stronger than a people with small heads, and I am satisfied that you can take care of your interests in your transactions with this commission. I am glad of this, for the Government has no desire to take any advantage of you and your ability to look after your own interests will facilitate

our work. I have nothing more to say to you to-day unless you have some questions to ask. I want you to feel free to question us and to come to us and talk about this business.

COL. ADAMS. I was very much surprised, when I arrived here, to see how well you were prepared to enter upon your duties as citizens of this great nation, and when we have said you would become rich it was in recognition of the fact that if this negotiation was successful you would receive from the Government the money that would enable you to fix up your farms and to start out fairly in your new life, and that you would, before many moons become a prosperous and happy people. Come and see us at any time, we will always be ready to talk with you. I have finished.

Council then adjourned.

OCTOBER 21, 1892.

The contract was then read article by article and orally translated into the Dakota language as read.

It was then requested that a written form of the agreement be translated into the Dakota language for the use and consideration of the tribe's committee, which request was acceded to by the commission.

Council adjourned.

FRIDAY, December 2, 1892.

Council of the tribe of Yankton Sioux Indians to confer with the commission in regard to the sale of their surplus lands, the council having been convened on a general call.

Present, Commissioners John J. Cole, J. C. Adams and W. L. Brown on the part of the United States; the Indian committee of 24, with 10 moderators, chiefs, head men and members of the tribe to the number of about 185 Indians.

William T. Selwyn, interpreter, Henry Lyman, assistant interpreter, Miss Bessie M. Johnston, Stenographer.

Council called to order at 2:30 p.m. by the chairman of the commission.

Col. E. W. FOSTER stated the purpose of the meeting to be for the committee of 24, appointed by the several bands, to confer with the commission in regard to the selling of their lands; that he wanted all to express themselves fully, those who wanted to sell, and also those who did not want to sell. He then said, "I leave the council in the hands of the chairman."

EUGENE BRUNOT. My friends, in the beginning I want to make some general remarks. It is my opinion that whatever is done here should be done according to law. It is not the purpose of this meeting to talk outside of this business. It is like a box; if there is no label on it, you do no know what is in it until it is opened. To find out the feeling of this meeting, it must be opened. I want everything in this council stated openly, so it will be understood by all, so that the people will be prepared, and to state anything they may have in their mind. Of all the treaties made with the different Indian tribes the treaties made with this tribe are the poorest in my mind. Three commissioners have been sent out to negotiate with us for our surplus lands, and I want them to state the price so we can confer with them.

(The council was then interrupted by a parley in regard to getting an immediate answer from the commission in regard to Eugene Brunot's question.)

EUGENE BRUNOT. The question that I put, I asked it that I might be answered.

COL. E. W. FOSTER. I would urge you to go on talking, and would like to hear from others. This is a matter in which you are all interested, and you can talk of it with perfect freedom.

EUGENE BRUNOT. It is the desire of the committee of 24, and the others of the tribe outside of them, that this question be answered.

JOHN J. COLE. When the commission came to you in the first place we laid before you the object of our mission and told you what we had come for, and did not then ask you for an immediate answer. I have been away for several weeks, and do not know what has been going one and done on this reservation for some weeks past. Your people have not told me even whether you desire to sell the land at all or not, nor have they told my fellow commissioners. Now your first speaker asks a question and wants an immediate answer. That question involves the entire work of the commission. I have not been here to go over your lands and value them, nor have my fellow commissioners done so. It is impossible to answer so important a question without consultation together. As Col. Foster has expressed it, we want the council to be free and open, all of you to express yourselves freely, and ask all of the questions you want; so we may have the whole matter before us. Then we can meet you again in

council and confer with you, but it is impossible to answer you today.

WILLIAM T. SELWYN. Mr. President, I have three questions to put to the commissioners. I think if anybody is going to make any remarks on this subject at this meeting or at any other time, I would like to hear from them now. I mean you men, old men, and everybody.

I think there are people here who desire to have a statement made or make it. This proposition refers to the clause in the Dawes bill which provided that a majority of the people must vote to govern in any transaction affecting the tribe. For my part I do not know whether the people want to sell their land or not, and I do not desire to influence anyone in either way. I want to ask a second question. If we make a treaty, can we go to a land office and have it recorded before it goes to Washington that we may know that it is not changed? Sometimes commissioners have been sent out to us to make treaties, and changed have been made in the words of the treaty. I have a third question. The commissioners are wiser than our people. They are only Indians and ignorant. But I want to ask if the commissioners will listen to their propositions and embody them in the treaty. I desire that everything be done fairly and openly.

HENRY SELWYN. Mr. President, we have put a question and desire it answered. I do not think this talk is worth anything. When the question is answered then we will have something to talk about. As my brother, Mr. William Selwyn, has said, everyone, chiefs and all, should get up and speak, but the committee first.

WILLIAM T. SELWYN. There are no kings or emperors in this country. The power to make treaties and laws prior to the Revolutionary war and the Declaration of Independence, rested with a few men, but now it is different. Every citizen has a right to free speech and can exercise that right, and this is in effect at this agency. Everyone should have this privilege at this time and no one should hinder him in it.

EUGENE BRUNOT. There are people gathered here, people from outside and the committee to talk with the commissioners. We know that these people do not know much and can not depend on the shrewdness of any one man. We do not want to compete with the commissioners in intellectual power, but will reduce the subject to one proposition. We hear the white people talk of a fact and we know that it is a fact. They say that the earth is round like a ball: that a man came across the ocean, and that man's name was Columbus. They say, too, that the first people he met on this new land were in features like an Indian and also like them in dress. Ever since the landing of this man, they have called this people, and especially this tribe, Sioux. Apples have seeds in them which we call "Sioux," and I think this is very appropriate to these people. You can cut the apple open and take out the seeds: prepare the ground and plant the seeds and they will grow; but it will not help the apple from which the seeds were taken.

A commission of three persons are selected by the President and sent out here to buy our surplus lands. I think the one thing that we want to-day, is to have this question that we put answered. We can then answer any

questions you want to ask, and meet to consider the question and give you an answer in this matter.

WILLIAM T. SELWYN. When anything is to be done the best thing is to understand how it is to be done. My friend who just sat down says that we are ready to talk of the subject, and I want to know if he refers to the propositions. I have them in my pocket, but want to know the opinion of the people. If it is the desire of the tribe to have them read I am willing to read them now.

HENRY SELWYN. The commissioners must have in their possession the answer to the question put to them, and if they have, want them to answer it now, and then there will be something to talk about. Now there is nothing to say.

COL. FOSTER. I want you to keep on talking. From the expressions of these people it is evident that they are ready to sell. When a man meets another with a horse and asks him if he will sell, if he replies, "What will you give for him?" it is evident that he is ready to sell.

COL. ADAMS. I understand that you have twelve propositions or questions to ask this commission. We would like to have you give us these questions that we may have the whole subject before us, so far as you have taken action on the subject. We can then take them under consideration, and decide upon them, so far as this commission can do so under its instructions from Washington.

WILLIAM T. SELWYN. Mr. President, I think the reading of these twelve propositions should be put off, and if a meeting is to be held to-morrow, read then, as it

is getting late, and I have to put some questions which I desire answered.

COL. ADAMS. Mr. President, in answer to Mr. Selwyn's question, "Can this treaty be recorded in some land office, I would say: If we can agree on the terms of a contract for the sale of this land to the Government, we will take a copy of the contract or treaty to the recorder of this (Charles Mix) county. You appoint some member of you tribe that can speak English to go with us and we will have a copy of this treaty put on the records of this county. Any members of your tribe can go there at any time and satisfy themselves whether or not the treaty is being properly carried out. We will have a certificate of the auditor of the county attached to the copy going to Washington, certifying that this is a true copy of the treaty as made. We will do this to avoid any possibility of change in the treaty, and so that you can go to the records and if any change is made it will render the treaty void. To the second question, "Can propositions of this tribe be incorporated in the treaty," I say yes, if we can agree upon them; but we can not agree until we know what these propositions are.

WILLIAM T. SELWYN. As there are propositions and questions on both sides, I move that we adjourn until to-morrow. (How!)

EUGENE BRUNOT. I think when the Indians gave their consent by saying "How" to William Selwyn, they did not understand it or were not thinking of it at the time.

We have an agent here, and the ag[illegible]t has farmers going out among the Indians making reports. When the

farmers have them prepared they send them to the agent. The agent takes these reports of the farmers, and from them makes a report of his own which he sends to Washington. I think the treaty will be made in about the same manner and sent on to Washington, and the propositions contained in this treaty will be subject to change.

WILLIAM T. SELWYN. Mr. President, I said not long ago that when any important business is to be transacted it is best to know the business. I have noticed that certain propositions in this treaty are to be subject to the approval of the Commissioner of Indian Affairs, and I therefore asked if it were possible to record the treaty, if one were made, and the chairman of the commission answered yes; that it should be recorded, and that should any change be made here or at Washington the treaty would be null and void. There are very few people here, hardly over a hundred, and I think it would be best on both sides to adjourn until to-morrow.

COL. ADAMS. Mr. President, Mr. Eugene Brunot asked this question at the beginning of the council. "What will you give us for our lands?" Now there are two ways for you to sell your land. These two ways have been explained to many of you. I want to ask which one of these two ways do you want to adopt if a treaty is made. One way is by appraisement and setting as the Omaha Indians sold their land. The other is by direct sale at a fixed price, and all of the price you will get. I want to know which of these two ways you want to adopt.

COL. FOSTER. Do you Indians understand these two ways mentioned by the commissioners sufficiently well to consider them?

BIG STINGER. I understand it.

EUGENE BRUNOT. Mr. President, at the beginning of this council we asked a question and now the commissioners have also asked a question. Now the committee appointed by the people have also a question to put to the people. I now move that we adjourn this meeting, and go to where we will gather for the feast and put this question to them there.

RUNNING BULL. On my part I never extended an invitation to these commissioners to come out here. I did not say, "My friends, come out to us; we have some surplus land we wish to sell to you." Probably the President desired to purchase this land, and has therefore appointed you three men to come out here for that purpose, and these young men have put a question to you. I was a member of a committee once that made a treaty with the Government, and the promises and stipulations made in this treaty were disregarded by the Government. There are two other members of that committee here now, Mr. Charles Picotte and Jumping Thunder. On account of this violation, we fear any commission sent out by the Government. That according to the treaty stipulations the Government issues annuities to us and that the Government has sent Col. Foster as our agent. It is his duty to issue these annuities when they come, but this is an entirely different matter, and Col. Foster should not issue instructions to this commission.

IRON BULL. It is always best to do things in the light, and the one sun we have to work in is about to set. After dark most people do to work well, and as the commission that is here will likely stay here some time, I

think it is best to adjourn. I do not myself like night work. I think it is like going into a store at night. You buy something and afterwards find that it is very cheap looking and very poor and you have paid a big price for it.

HENRY SELWYN. Mr. President, I think we ought to adjourn until tomorrow, and I think you should state the time we will then meet. I would suggest 10 o'clock, or in the afternoon. We have a question we wish to put to the people.

FELIX BRUNOT, chairman of the committee. The council will adjourn until 10 o'clock to-morrow morning. The people will now go to their feast on the hillside.

SATURDAY, *December 3, 1892*

The council met and was called to order at 10:00 a.m. pursuant to adjournment.

Present, the full commission, the Indian committee of 24, with 10 moderators, chiefs, headmen, and members of the tribe to the number of about 212 Indians. Felix Brunot, chairman of the Indian committee, (unreadable), William T. Selwyn, interpreter, Henry Lyman and George Stricker, assistant interpreter, Miss Bessie M. Johnston, stenographer.

COL. ADAMS. Mr. President, in opening this council today, we want to ask every member of the tribe that feels like saying anything to speak freely. We do not want to confine it to two or three members, but have everyone express some opinion. We want as full an expression of your opinions as possible, for the guidance of the commissioners and your own good.

FELIX BRUNOT (chairman). It is the desire of the commissioners that you express your opinions, and I think you should do so.

HENRY SELWYN. When the commissioners first came here and had a council I understood that one of the commissioners said that this Yankton tribe of Sioux Indians made a certain treaty, from which the Indians derived no benefit whatever. I have been thinking of the words of the commissioner.

The Yanktons at one time owned a very large tract of land. I have thought it over and questioned myself whether having so large a tract of land benefited them or was a burden, and I have compared their condition as it was then and as it is to-day. I think that the Indians then were physically stronger and better off in every way. I think the reason they were better off and more prosperous was that they never stayed for any length of time in any one place, and in changing from place to place they avoided diseases. While they roamed about as heathens they had more to eat and they could search for a greater variety. Probably the commissioners know that game abounded everywhere at that time, and the Indians had all the food they wanted. Now the commissioner says we have sheep and cattle instead of deer and game, but these are not in abundance. So this large tract of land was not lying useless.

The Creator supplied these people while they were heathen with an abundance of food, so they were well and strong. People died in those days, but not so fast as they do now. There were but three common diseases, and the deaths did not compare with those of to-day. Now in

one year 40 or 50 die. In those days a man could raise a family of 10 or even 15 children. Forty years ago there were many old men and women among the Yanktons. We are dying out very fast. To-day the people suffer very much from scrofula, lung troubles, and sore eyes. One of them is particularly fatal – that is lung trouble. It seems as if these troubles came from our settling down on a reservation. When they gave up their former habits of life and began living more like whites I think they brought on these diseases by their ignorance of habits of civilized life. Since living on a reservation we have lived in poor houses. They are log houses with dirt roofs and the sides plastered with mud. When we have heavy rains the roof and sides leak and the ground beneath becomes wet and does not dry off for nearly a month. Everything in the house smells musty. (How!) I think if one of the commissioners would go and live in one of these houses for a month his health would not be improved. Former treaties should have provided for the building of suitable houses. (How!) I heard a story about three years ago of a man and his son taking refuge in a haystack. The son took the inner side and the old man the outside. Furthermore the old man took off his overcoat and put it on his son and slept beside him without it. The father was frozen to death, So it seems to me with the Indians when they sell their land to the Government.

They are on the outer side and take off their overcoat for the other. On this land the Indians sold, there are now many stores, many towns, and several railways. Then look at the Indians. They are poor and wretched. It is like the man taking off his overcoat. The amount for the payment of the land purchased by the treaty of 1831 is as

follows: The first stipulation was that we should receive a steamboat load of clothing, winter and summer for ten years. Instead of a boat load there were a few boxes. I have known many of the women to go home without anything at the issues, and cry over it. Then there were other stipulations that were never carried out. One was that they were to give us schools: another that they would issue us cows and oxen; another that they would give us houses. Horses would be issued to us that we might raise stock. None of these were carried out. One stipulation was partly carried out in this way. They took two boys East to school. One of them died East and the other came home as ignorant as when he went away. This is how the Government has treated the Indians when it has made treaties with us. I would like to put the question to these commissioners here – which derived most benefit from this treaty, the Indians or the whites? (How!) The benefit we derived is very small indeed compared with the benefit the Government derived from the sale of that land. (How!) We are as poor as when we sold the land. (How!)

I will now refer to the treaty of 1858. This is the second time we sold land to the Government. I think they should be very grateful to us for selling our land. We do not know how many acres we sold at that time, but know it was many thousands of acres. I have traveled over it and know that it takes a man six days to go to the eastern line and six days to go to the western boundary. I have made inquiries regarding the price we sold this land for. I asked a certain party and his reply was, I think one-half cent per acre. I asked another party and they said not

more than one cent per acre. If the Sissetons and Titonwan had sold their land at the same price at which we sold ours in 1858 per acre, they would have given the Government their lands for nothing. All the Indians have sold land at times to the Government, but we have given them the best land, especially that along the James River. In two previous treaties entire payment has not been made, and that is the way this would probably be. Until all things are carried out and straightened up this land should not be sold. (How!) Our people are anxious to have the Government investigate these charges. (How!) The first clause of the treaty of 1858 tells us we are to be assigned to a reservation containing 400,000 acres and we should own and occupy this so long as we remain at peace with the United States. (How!) Our people have remained peaceable, and though whites have molested Indians our people have not spilled white blood. (How!) When the Government had a war with the Santees I heard that a general said they would exterminate the Santees and then march west and exterminate the other tribes. When a portion of this army went farther west, on their way back they broke the window glass in our houses as they passed through here. A party of Indians went on a hunting trip and passed Fort Randall. When they started on the soldiers asked where they were going, what territory they were to roam over, and how long they were going to stay. They told them to return, and when they consented to they were all killed but one.

Our land was sold for	$1,600,000
A cash payment of	50,000
First ten years, per annum	65,000
Second ten years, per annum	40,000
Third ten years, per annum	25,000
Fourth, twenty years, per annum	15,000

One hundred and fifty thousand dollars paid to half-breeds at that time.

I desire to ask the chairman of the commission here if, in expending these large sums from the beginning of this treaty, there were any surplus at times?

Commissioner COLE. The commission can not answer your question in regard to this treaty of 1858. The answer to this question would involve an examination of all the records in the Indian Office from 1858 to the present time. If your people have any doubts on the question, if you will send representatives to Washington they will show them the records – just how it was carried out, what goods were issued, and in what quantities.

HENRY SELWYN. We have not seen any of this money promised in this treaty. Cash payments were to be made the Indians. The first payment was $5, the second $4, the third $4, and the last $2.50. That is all the cash payments made. I think some individual parties profited. So if this land is sold it will be the same way. Our share will be very small. I thought when we sold our surplus land we would have the benefit of the entire sum, but it appears that this must not be. The interest on the money is to be divided into three parts and only one of these parts come to the Indians. I do not like that. One of the treaty stipulations is as follows: That positions on the agency be given Indians if competent to fill them. (How!) There are no Indians who have good paying positions. These are all given to whites, though there are Indians competent of holding them. By these treaties the salaries and benefits should come to the Indians, but are given to

the whites. The Indians are not acquainted with business nor the value of money.

I want to speak of the Pipe-Stone Reservation. By the treaty of 1858 it seems that the present Pipe-Stone Reservation was sold the Government by the Santees. Before the Santees made this sale we owned the Pipe-Stone quarry, and the Santees virtually stole it and sold it. When the commission was sent out to negotiate in 1858 Struck by the Rees refused to sign the treaty to sell the land until the Pipe-Stone quarry was returned to the Yankton tribe. When the Government promised to give this back to the Yanktons, Struck by the Rees then signed the treaty. So the basis on which this treaty of 1858 was made was the return of the Pipe-Stone quarry. The United States bought back this land and gave it back to the Yanktons. It was said at this time that this should belong to us generation after generation, even should it descend to one man. This has been violated. We heard that a railway was to be run across the Pipe-Stone Reservation, but we thought, the land being ours, they would consult us before it was done: but instead of coming to us they went on to Washington and there got action passed authorizing this railway to cross the reservation, for a certain amount of money. After this we heard that a school building was to be built there. This was done in the same manner. There are also two white people living on this agency. Both have claims and are paying taxes. I have been at Pipe-Stone and have talked with the Santees there, and they claim that the Pipe-Stone quarry belongs to them. We have lost so much of our land that I am afraid the Santees will get possession of this. I met two

Santee clergymen and they told me that the Pipe-Stone was to be taken by the Government of the United States.

A man with a family does not usually love his oldest child most, but the youngest and most helpless. So it is with the Government with the Indians. Some are more advanced than others. Some are very weak and low. The Government as their father, has charge of them. If you deal with a man and find he is not truthful you do not wish to have any more dealings with him. We have made treaties with the Government and they have not kept all of the stipulations in these treaties, and I fear to make any more.

The council adjourned one hour for dinner. The council again convened at call of the crier and proceeded to discuss the subject under consideration.

FELIX BRUNOT. (President) This meeting must now come to order. Whichever way you want to talk get up now and say it.

COL. ADAMS. We have had this morning a talk from Mr. Henry Selwyn, and now I want to hear from others, and want you to talk freely.

FEATHER IN THE EAR. There are 20 men here of the committee of 24 appointed by our tribe, and beside them 10 men appointed to keep order. My friends, these inquiries you have been making, are you really in earnest? (People, "Yes,") I am glad to hear it. I think there is always too much speaking. We get confused when there is so much talking. Whatever our committee say, we Indians are willing to follow. Mr. Felix Brunot has been appointed chairman of this committee to represent the

tribe, but has not spoken. Yesterday an old man got up and began to speak and he was not wanted. To-day we have two old men whom we want to hear from.

CHARLES MORGAN. There has been appointed a committee who are to receive any instructions from the commissioners on the subject. It is their duty to do this as the people wish. It was said at the time this committee was appointed that they should confer with the commissioners, and when they reached any understanding they would then consult the people. If the people were pleased with this contract or treaty, the committee should return to the commissioners and the treaty should be signed. (How!) I think there may be a member of this committee who is not of the same mind as the others. There may be difference of opinion among the members. I heard that one of the members originally appointed has been dismissed, and so there seemed to be some such trouble. I think any man who has a home and is the head of a family should have a right to talk on this floor. There is a man appointed to speak this afternoon on this subject, and I want him to come forward. The members of this tribe, outside of the committee, held a meeting the other night and I was invited there. They decided to look into this matter. They have done so and appointed a man to speak. I do not like the way they have been conducting this meeting. A question would be put and the Indians gave their consent by saying "how," and that is the end of it. It seems that parties have refused to have others than the members of the committee speak.

PETE ST. PIERRE. My friends, there are three commissioners here asking for the sale of your land. They

have been here nearly two months. Whatever propositions they had to talk of you have heard. They have put two questions to you: Will you sell your land or will you not sell your land? We have been thinking about these two questions, and I think the people ought to give their answer to-day. I think we have studied over this question many days and nights now. I think the people here have some confidence in me or else they would not have appointed me a member of the committee. (How!) This land should not be sold and the commissioners should leave here without arranging for the sale of the land. (How!) If we answer them direct I think it would be best. (How!) I do not think when we have already made up our minds not to sell, that we should keep these commissioners here longer by not making known the decision we have come to. Another commission will probably be sent out to confer for the purchase of our land. This will not be the only one sent to us.

We have already sold a large tract of land and received a very small amount for it. For the sale of this small tract, we will not get enough to make us rich. (How!) I am in favor of holding this land and not selling it for the coming sixteen years. Probably after this commission returns to Washington, they will send another at some future time. If these should fail, others will follow them. I think we ought to come to some conclusion to-day; for, although we may call a meeting of the entire tribe, we will not get them here. (How!) I am in favor of having those parties who are in favor of selling this land rise and step out. (How!)

WILLIAM T. SELWYN. The man who spoke before this last, Mr. Charles Morgan, referred to a person who

was to speak in behalf of the parties outside. There have come to me 40 or 50 young men outside of this committee and desired me to speak.

This is an important affair and we should not go at it as children would. We should think about it first and come to a conclusion afterwards. I desire to state that I have nothing in particular to say in favor of the committee or those outside of it. I wish to make these remarks as general as possible. If we come to a conclusion that we will, or will not, gain by making this sale I will say so. Seven hundred dollars was appropriated last fall to pay the expenses of a party from here to Washington. It was stated by the people here that it was not the right time to go just then, as the allotments had not been completed; but if they waited until the completion of the allotments then they could treat for the sale of the surplus land. I think these three commissioners have not come out here simply because the Government wanted, but because you asked them to come.

It was stated well this morning that we gained nothing by the treaty of 1858. The reason of this is because there were not enough young men educated at that time to prevent it. I think we should not in any way charge the violation of that treaty to these commissioners. I think that treaty has no connection whatever with this matter. Some will probably remember the words of this treaty. There are three of you here who were present at that council. We have Mr. Charles Picotte here who was chairman of the committee who signed the treaty. When the chiefs and chairman went on to Washington to sign the treaty, they put in these words that the land should be

surveyed, and allotted in severalty, but we have overlooked this clause until quite recently. This same law is also incorporated in the Dawes bill, which was passed February 8, 1887. I have been to their agencies where they have been negotiating for the sale of lands, and noticed that they gave entire freedom to all the members of the tribe to speak. If I wanted to shut the mouths of several people and keep them shut, I would not have the power and do not desire it. I say this on account of some remarks made yesterday. I understand some of the laws by which treaties are made, and I can also see if certain propositions or laws would injure me or any other member of the tribe. When the commission came, the people appointed this committee. When this committee was appointed by the tribe and had a meeting, they set about gathering matter which they wished incorporated in the treaty should one be made. I do not know that the committee had the power to act in any way as others have done by going to Washington. The committee has had meetings and in many cases sat up all night, and gone home in daylight, and whatever we have thought and considered, incorporated in propositions. I have one copy of them in my pocket, being one of the secretaries, and Henry Lyman has another copy of them. We called a meeting of the tribe on the 11th of October. There we read over these propositions to the people, which we had written out for the commissioners, and the people gave their consent to them and also the authority to the committee to change any of these propositions if they desired to. I should not stand here and speak in favor of coming to any conclusion where there are so few members of the tribe here: but the young men have asked me to – those

outside of the committee – and now will speak of some general things.

Is there anyone here knows if this tribe is self-supporting and not in direct charge of the United States? You all know almost all of you here are owing debts either here on the agency or off. As I said, you are all owing so many debts. Why is it we come and stand around the agency office and beg for farm implements: and whenever a man comes from Washington are ready to bow down and worship him. It is it on account of the poor and miserable condition we are in? One thing we should be grateful and thankful for, and that is the schools. There are some very kind superintendents who are excellent teachers. But the outside wants of the tribe are very many. I will make just one more statement. I desire that this form submitted to the committee be read here before the people, that they may understand it. It was read to the people down below here, but think it should be read here again. Often laws affecting Indians are made without their knowledge or consent at Washington and are sent out here for them to be governed by. Of course we know there are some white people interested in the Indians: but when I was in Washington I went into the visitors' gallery at the House of Representatives, and while I was there they lead a discussion regarding the Indians and used very severe language regarding them; and in my observation I have found their friends far less in number than their enemies. If at any future time laws are made at Washington affecting the Indians, without their knowledge or consent and are sent out for them to be governed by, they should be disregarded; and if anyone is opposed to these laws I am one of them. The fact

that we can incorporate certain propositions in this treaty I think is a great advantage. I think these propositions and the form should be read at this time before the people. Furthermore we have the price which we have decided on – the lowest price at which we should sell. If I should engage in any affair that would afterwards show that I tried to deceive or defraud the people, they will lay it against me as long as I live in the tribe. I think this form of treaty should be read to the people and also the propositions. Then put the question to the people and demand an answer at some future meeting. I want to say more, but this is enough.

WILLIAM BEAN, SR. I have risen to speak, but before rising I felt very sad. All the white people know who created the earth. I believe the Creator made this earth. Maybe if He made the earth then no one but Himself should inherit it. Many years ago when the whites first came across the ocean and landed there were not many, but increased in numbers and soon surpassed our people in numbers. When there were a great many white people they elected a President. Ever since the Government was established our lands have been taken from us step by step. You have taken lands from other Indians and have now reached us again. You have asked us to sell our lands, but it might be like the treaty of 1831 when we sold land extending from the Big Sioux to the Otto rivers. We have never been fully compensated for this. The land between the Des Moines River and the Sioux has been sold. We have been treated in the same manner as many other Indians. When all their lands are taken from them they are sent to Indian territory. Two years ago, at Rosebud Agency, there were some old men

starved to death. By this starvation, you white people have caused many deaths. Now the Creator has given you white people education whereby you have gained much: the Creator has not given the Indians any wisdom so they can not accomplish anything. I spoke before about the boundaries, I would like to have you commissioners consider what there is that you can see in which we are better off, although we have given a great portion of our lands to the Great Father. A great many of you white people are seeking positions and on account of this the Indians are getting poorer.

I am going to refer to a certain thing. Struck by the Rees has sold a great portion of our reservation. On part of this land was built the town of Sioux Falls, and that city is now worth about $10,000,000. They get their coal oil, which they ship all over the State. The Yanktons were not benefited by the making of this treaty of 1858. I do not know what my people will depend upon, although in past times no old claims have been looked up. Now, you white people have settled all over this country. When Congress made any laws or treaties it seemed as if ours were not to be depended upon, and so our people are getting poorer. The name of the Yanktons is not a bad name; they have done no bad thing to make it so, so I can stand up and talk like a man. I hope the President will try and help these people. In past times we have served the Government just as a favor, and I hope the Government will favor us, too. On account of these people doing good and behaving, you do not help them, and so they are going down all the time.

We have sent a man, who was here to do business, with authority to take care of certain claims, on to Washington, and I hope you commissioners will help him all you can to get those claims. Now, I hope, my friends, you will do all you can for these people: but, at the same time, you will have to go without making any treaty this time. (How!)

JANDRAN. We all know that the young people gathered here are poor. Whenever I have occasion to speak to young men gathered here I generally advise them to go and start on lands and farm. I have a few words to say. I will refer to those lands Mr. William Bean spoke of in Iowa, and to those unceded lands, and then to the Pipestone Reservation. All these claims should be settled first before the commissioners negotiate for these lands. This does not depend on the commission, but desire that they be investigated first and then confer for selling our lands.

WHITE SWAN. My friends, before going any further, I should like to point one thing for you to see. Sometime ago I went to Washington and shook hands with the President. Shortly after that our agent, Mr. Conger, had a friend who has informed us of something about this land down in Iowa, and I have put that in my care and kept it there ever since. My friends, I wish you would look up this old book which this friend read to us from. He told us this: When your treaty expires then you still have to depend on this certain tract of land down here. This tract lies between the Big Sioux and Des Moines rivers. The length of a long mile is just as far as you can see a horse with the naked eye, and that is about 27 miles. Now the white people have taken possession of

this tract of land without having bought it. What I refer to is this land in Iowa. We will depend upon it hereafter.

I am going to tell you now what I mean by looking up this old book. At the time when the father of the speaker before the last (William Bean, Sr.) was here as agent, he seemed to feel with us. Also at that time there was a man who was supposed to be a farmer. I do not know his English name: his Indian name was "Flat Foot." When that land deal was made is about sixty-three years ago. We would like to have you see to it. We had an old chief then whose name was "Mosquito," who had a copy of the treaty, but that copy was lost. Ever since, up to the present time, the Great Father has deceived us in many payments. I would like to have you inform the Commissioner of Indian Affairs to have him look this matter up, whether you succeed in accomplishing anything or not. My friends, you come here to negotiate for the sale of these surplus land, but it will be very hard to do so, as we have all these matters to be looked up first. (How!) My friends, I feel like laying many important matters before you, but as you are here only to ask certain questions, I will not do so. My friends, I hope you will go away without making any treaty.

FEATHER IN THE EAR. I have a few remarks to make and would then move to adjourn as the sun is getting low. The last treaty was made by half-bloods and they had special consideration. I do not wish in future any half-bloods to make anything by having their lands set apart separately from the Indians. (How!) When a rich man can not claim any place as home he is really very poor: but a man who has a home is rich although he has

no riches. If a boy has a home he is happy, and I want to feel like that boy.

JOHN OMAHA. I am one of the members of the committee, and I have, therefore, a right to speak like the others. I have faithfully listened to all of these wise men talk to-day. It strikes me that they have made a few mistakes in what they have said. Everyone has made reference to the treaty of 1858. I can answer that myself. At the time the treaty was made in 1858 the people who went to Washington were perfectly ignorant and were likely to make things like that. Now in regard to things. Now you people who are seated here in this crowd know that if I knew anything by which you would be benefited, I would never attempt to push you away from it. (How!) Now you old people here, whenever we young men come to anything good, and you see anything by which we would be benefited, you seem to be always binding our mouths and holding them tight. When I said I was wondering at your speeches today, I meant there are many in favor of disposing of the land; but you old people are always trying to hold us back. Now if you would do it, I consider it would be much of a gain. I know you all and have been in all of your houses. When I go to them, I see you have hardly any furniture in them. My friends, therefore, I wish you would consider for yourselves. These people who have spoken have expressed their wishes. I have a right to and wish you to do the same.

Now, the young men of my age and a little older than myself know this as I do, that if we do make this treaty, we will be benefited by it, but they simply want to say they do not wish to make it. If you, my friends, would not say this it would go better. When the commissioners first

came here and put the question whether we wanted to sell the land or not, we should have then said no, if we did not want to, and they would have gone home. It is simply because you want to make a treaty that you have put it off from time to time. Now, my friends, I want you to listen to me. I am in favor of disposing of the surplus lands. Now, sometime ago we had a general council on the hill-side, where we talked of this business. There was a certain young man by the name of Noisy Cloud, and he was the only young man who favored the selling of the land, but they all laughed at him; and you can laugh at me now. This is what I want and I wished to say so plainly and I have done so. Some time ago these old people said we had sold some of our land, and Running Bull in particular said this, and that we had no benefit from it. I am going to make another remark this way and this is the last. Now, in those days these old people could not even count their fingers as high as five. Now, we young men can take a pencil and put some figures down and do some little sums; and the treaty we would make would be better than the one made by these old people.

JOHN GASSMAN. I am standing here in the center, the Indians on one side and the commissioners on the other, and I think they can all hear me. We have heard Mr. Henry Selwyn, and he compared these people and the Government to a certain man who took off his overcoat and gave it to his son and froze to death. A member of the commission has been on the floor and spoke to us. Mr. William Selywn has also spoken. These last two speakers, I wonder why it is that they virtually slap themselves in the face. I have no great knowledge by which to be guided, but I am guided by my conscience

and will be guided by it to my death. It is not morally right to deceive ourselves; when they do so they take their fists and beat themselves on the head. We have certainly delayed this matter, but it was because these young and old men could not get certain answers to consider; and also one of the commissioners was away for a long time. One of the speakers spoke of certain propositions. These were talked over and decided upon at a meeting at William Bean's and reconsidered at a meeting at Eugene Brunot's. I think you remember what these were and have them in your head. It is because these people are peaceable that the whites have imposed upon them. The members of the committee remember that at that meeting we decided we should not sell the surplus land; and we still hold to this decision although several have gotten up and spoken in favor of selling.

JUMPING THUNDER. Young people, I desire to state here before you something I have done in my life. This committee appointed by the tribe have certain propositions which they have submitted to you. Among these propositions are many claims. When these claims are settled, then it will be time to consider the sale of the lands. You have heard what these young men have said, and their propositions. I went with "Struck by the Rees: and in this treaty it was stated payment should be made in gold. These payments are appropriated for school purposes, maintaining the agency, the blacksmith shop, and other expenses at the agency. Some is used for these purposes and some for annuities. It was stipulated in this treaty that so long as it lasted you should maintain schools. I see the benefit derived from schools. I notice the young people that can talk English, and it makes my

heart glad to hear them. As some others have stated, when these claims are looked up and satisfactorily settled, then we will confer for the sale of our lands.

IRON BULL. It is pretty near sundown, and time to go to bed. That this business has been going on for nearly two months is owing to the absence of Col. Cole. I am standing here and think I have just as much right to say things as the rest of them. I consider myself almost dead. Last Wednesday I had hemorrhage. There were 24 men appointed as a committee, and another 10 men appointed to keep order and look after them, and as I am one of them will speak of several things. You people had better keep your seats, for if you do not look out these commissioners will try and tramp you down. I want to say something. I hope you commissioners will not take it as an offense. It is in connection with the Government, not with you. My friends, commissions appointed to different tribes to make treaties and also members of Congress making laws do not do much, only sit with open mouths and thereby get fat. I want to state what I mean by getting fat. They swallow the land and the money does not come to the Indian, but goes to themselves. In doing this many times the Indians have no more land, and then they are sent to the Indian Territory where the bullfrogs are so bad. I have wondered after looking into this matter what these children who are at school will do if we sell this land. I sent my children to school and they took sick and died there. Now my friends, when you go back I wish you would tell the President that we do not care to dispose of our surplus land; and as it is growing late I am in favor of adjourning until some other time.

FELIX BRUNOT (chairman). I want you to all listen now. We will adjourn until next Monday when we will decide which way we will do. Many are not in favor now, and two are in favor of selling.

COMMISSIONER COLE. Before we separate tonight I want to say a word to you. It is unfortunate that the work of this commission was interrupted by that most terrible accident which happened to one of my family. But while I was absent I was not idle, but was interesting myself in the business of this treaty. Now, instead of complaining of the ills which you have borne in the past, let us come up like men and consider the business in hand. Let us take hold of this treaty matter in a business way. Let your wisest and best men give their attention with the commissioners to a treaty which will be for the very best interest of the Indians. We will give just as much attention to these old matters as our instruction will allow us to do in connection with this treaty. For many reasons which we can lay before you, now is the opportune time for you to make the sale of these lands. Now, I think, my friends, there is a clog in the wheels. I think the clog is lack of confidence in the commission which the Great Father has sent to you. I want to say to you that if this is the fact, let it be known.

If you do not have confidence in me tell me so, and I will immediately resign, that another man may be sent to treat with you. If you do not want any of these commissioners, tell them so, and let the Great Father send another commission to you at once. We, as a commission, do not want to stand in the way of your progress and if we are not satisfactory to you we will gladly get out of the way. While I was away I visited the Capital City, the

Indian Office, and other offices in the Department of the Interior. Your agent, who is a good man and works night and day in your interest, night and day, as I know myself, wrote me a long letter giving me all the facts he could, that I might work while in Washington in your interest. I there obtained information on many of the subjects which you discussed yesterday and to-day, and at the proper time will lay them before you.

Now, if I am your friend, I want to work for your interest, and want to work for your interest in this treaty we are trying to make. I think I am your friend. I feel that way; but if you do not think I am your friend, then I want you to send me away. Now, in conclusion, let us take hold of this matter as business men and push it to a final conclusion. I bid you good night.

The council then adjourned.

MONDAY, *December* 5, 1892

The council met pursuant to adjournment and was called to order at 2:30 p.m.

Commissioners all present: also the Indian committee of 24 with 10 moderators and chiefs, headmen, and members of the tribe to the number of about 112.

COL. ADAMS. There are some parties who expected to be here. I will call upon some of the young men to express their views while waiting for the other parties to arrive. We would like to hear from Mr. Robert Clarkson.

ROBERT CLARKSON. Five days ago last Saturday I listened to all the men at that time that made speeches. What they talked about was the sale of this land; that is,

whether they would sell it or not sell it. I have made up my mind not to listen to anything else, but use my own mind. I do not propose to use anyone else's mind, for that would not be just. I use my own mind. That is the reason why when I see anything which I do not think is right, I am right to say it. And when I see anything and it is not right, I will speak about it also. When this commission came sometime ago, they selected 24 men, and so they held a meeting and council. There was no one to speak before me. I spoke first, and this is what I said. I spoke of a treaty which was made with the United States Government

Then I spoke concerning this treaty. They were all my own ideas. I said we should not give away this land without considering it, but we must understand it and understand it thoroughly before we do it. That is why it would be right to sell the land, and I told the people so at that time. I thought so is the reason why I said so. All the young men now days understand about things. This is why they should consider this matter, and find out thoroughly whether we are right or wrong in selling. They thought of this in two ways. The way they said is this: We should sell this land to the United States. I said we should sell the land to the highest bidder. I have made up my mind in this way. I am looking toward all these young men and all the other young men belonging to other tribes. I said these young men were generally married but had no horses, no implements to work with. Even the old people were all hard up, poor, and had nothing. I said we must not do as they did when they made the treaty before. I said at that time when commissioners came to any tribe they generally had beer. The reason why I think

so, was because there were changes in certain things. This is why I think this is right. I said at that time when they made the old treaty they did not consider the matter, and did not know what they were doing at that time. They have come to these Indians to make a treaty and I tell them there should be certain clauses in the treaty which we should make ourselves, so as to make it binding.

I said at that time it was worth so much per acre. I said at that time if the land was sold to the highest bidder it would be best. Before the committee of 24 I got up and talked at that time and got up again a second time. There was a good deal of talk, but still we carried it. So, my friends, I will say it again. As to myself, if I thought there would be any trouble in it, or anything wrong, I would not get up and speak as I do. Mr. Adams got up here and gave consent to having it registered in a land office. I approve of it and like it. We should all think this way. If I wanted to be like other young men I would get up and want to be friendly to others outside. And if I wanted to be friendly to them I would get up and join those who do not approve of this. I would have lots of friends by doing that. It would be wrong for me to go and do something that would not benefit me. Saturday there was a minister got up and talked and said the Indians all lived in log houses, and that was why they were all sick with diseases and scrofula. That is why I think we should get up here and consider this matter thoroughly; so if by selling our surplus land we would be benefited by it. He said the other old treaty we did not see the money with our own eyes. That is why we should consider this matter and get cash money. He said this way again:

This pipestone quarry was ours; the President built a railway across without our consent. They had a chance to do it was the reason why they did it. The white man is always looking to make something, even though it is very small. That is the reason why I am afraid. White men see our surplus lands every day traveling through it. They have a lawyer sent to Congress to open up this reservation and surplus land. He is a rascal, that is why they did it. That is why the commission have come here, and have told you to do get up and name a price for your surplus land. This is a very small tract of land we have here, a young man, Mr. St. Pierre, says that is the reason why he wants to do keep it for sixteen years. I would not to do anything that would not benefit us. Mr. Bean got up and made a speech, and said this way that we would not gain anything by it. Mr. Frank Jandran got up and spoke in this way: He said that our tribe was very poor: I think he was right. That is why we should consider this matter and to do it right. So my friends and relations that is why I speak in this way. There are not many of us here. As for myself, I am able to do support myself whatever happened. I could get up and say I did not want to do sell this land for twenty or thirty years, for I am able to support myself. I know all of you here. Many of you have no horses and cattle. You have sometimes to borrow my horses and implements to do work with. This is why I know we should consider this matter, and to do what will benefit our tribe.

LOUIS ST. PIERRE. This is not the way to talk of this thing. There is not enough to consider it. There are not many here and it is for all the tribe to hear it. We should wait until more come.

COL. ADAMS. We would like to hear from Medicine Cow.

MEDICINE COW. If I make up my mind to say anything, I go there and say it. When I have anything to say I go to Washington to the Great Father and say it. I believe you are selected by Congress and sent out here to hold a council and make a treaty. That is why we employed a man who was sent out here to look after our interests. You have come here on purpose to say something, but you have not said it yet. I have always advised the tribe to work together, but there are three divisions. There are 3 young men about the same age. These young men are educated and I want them to talk with the commissioners. Near the Great Water there are many smart men and they have a great council. I advise my tribe to listen to them for they are smart. I see our agent has come in. That puts me in mind of the money he has in hand and I advised him to keep it, so if our tribe want to go to Washington they can go. He told me he had sent it to Washington. But I shall write to the Department and have them send it back again, $700.

On the Laramy treaty five years were due us. The land is still there. We claim a piece of land in Iowa. This was taken by the whites without payment. The Great Father sent for me to come to Washington and I did not go. They sent me a trunk full of clothes. They came here with a paper for me to sign, and I would not sign it. They promised 100 horses and 100 cattle. Where are they? I have not seen them. Here are the 3 commissioners. Dr. Brown I will make president, Col. Cole, secretary of the interior, and Col. Adams, commissioner of Indian affairs. He is a good man, and we should do what he wishes.

This is a very important matter, and the President should know all about it. I can not go to Washington. That is why I want you to go and do all that is right. There are others to talk and you should talk too.

COL. ADAMS. You would like to hear from Mr. Charles Morgan.

CHARLES MORGAN. My friends, here is a question to be answered. I have been listening and will now say what I think. I was born and brought up here. I have made up my mind and will tell you. There are only a few here, and they are not ready to listen to it. I always like to listen, so I will know what they are talking about. I think some of my friends should get up and ready to talk of this subject. I think that is right. So I get up here before the whole tribe. I think we should adjourn. It is getting late. It is this way. I know I am one of the tribe. When I get up and make a speech in the tribe, some men get up and talk to me as if I was a foolish man. When I get up to speak a young man gets up and talks against me. I think we should adjourn, and I will not say anything more.

BAPTISTE LAMBERT. I second the motion of this young man to adjourn, and would say, too, that this is an important thing and the whole tribe should be here. It seems as if there was only one of us here. The only way we could do it right is to have the whole tribe here and decide what is best. The commissioners say they are ready to listen to anyone, and many of the tribe are making very poor speeches. It is being taken on paper, and if these are taken to Washington and looked over there, some will look very foolish. So I think they should wait until more come and have all the tribe here, and get

a few wiser men to get up and make speeches. We Indians know that take all of the brains of all the people here and they are not as much as these 3 commissioners.

COL. ADAMS. Before we adjourn Dr. Brown and Col. Cole will say something to you. I want to know when will be the best time to hold the next council?

BAPTISTE LAMBERT. Next Friday and Saturday, when all are here.

MEDICINE COW. We talk of something important. Some of these people come away from the western boundary. It is different from the white men. They get paid when they council. It is different with us Indians.

DR. BROWN. My friends, I want to talk to you for a few minutes. It has been said here several times that the commissioners have done no talking. The reason that the commissioners have not talked is not because they are not interested, but because they thought it best to let you people talk it over first. It was arranged that the commission should talk some to-day , but on account of there being very few here to-day thought it best to wait. We think if we went to work and explained it to you, we would have to do it all over again next Friday or whenever the council is set. The commission has a great many things to talk to you about. There have been a great many things said here which are wrong, and we want to show you why they are wrong. We have many things to tell you of the benefits to be derived by this people from the sale of the land. Now, my friends, I am not going to touch any of these points to-day, as you have asked the council to be adjourned on account of so few being here today. Now, when this council is adjourned, we want you to use all of

your interest to get all of your neighbors out. We want you all here. When you do come we promise to tell you something of interest. We want to meet you as our friends: and want to talk over and make everything plain. We want you then to consider and we will then do whatever you decide. Remember, in making your decision, that you must not expect of this commission things that are impossible for us to do, or that it would not be right for us to do. Now, my friends, we want you to stay right here until we decide when we want to see you again.

JOHN J. COLE. My Dakota friends, I am like the young man who went to see his girl. He said: "I did not come to see you this time but just came to say that I was coming to see you sometime." That is all of the story I heard; but will tell you what I think it meant. That he wanted his girl to be expecting him, and to meet him with a sweet smile. I have been trying to get you people to this way of thinking that we commissioners have not been sent to you to spy around or take advantage of you, but to make a fair deal. We have not been sent to you as enemies to try and take your land from you, but to negotiate for the purchase of your land. Now try and get yourselves in a frame of mind to come face to face with the question of selling your land. We can not take one step, and we can not do one thing unless all of your people agree to it. So do not be afraid. If we trade with you, you have to do half the trading. You have to do your part. We can do only our part, the part the Government instructed us to do. As my fellow commissioner has told you, we wish to do everything that is reasonable and right. I have promised to tell you at some future council

concerning these matters at Washington. Just as soon as there is an opportunity for me to do so, I will tell you what I have promised to tell you. Dr. Brown was to have talked to you to-day, but will next time. We will meet on Wednesday at 10 o'clock.

WILLIAM T. SELWYN. I second the motion of Mr. Baptiste Lambert to have the next council on Friday. That is the only time we could get a good meeting. They have been here two days. I think next Friday is the best day.

JOHN J. COLE. We have come a great distance to do this work and we must push and get through. We want to go home. Congress must ratify this treaty if we make it. I think it is very unwise to wait this whole week. I think we should meet next Wednesday morning.

COL. ADAMS. I have a word to say before adjourning. As my fellow commissioners have justly remarked the Government does not want to take any advantage of you in this trade. The Government is not like the boy with the coon. An old man went in the woods to cut down a tree. As the tree fell a coon jumped out. He caught it and wondered what he would do with it, kill it or take it home. Just then he saw 3 boys coming down the road. One was a white boy, 1 was an Indian, and 1 was a negro boy. The old man concluded to ask each a question, and the one whose answer was the best should have the coon. When they came up he asked the Indian boy if he was a Christian. The boy replied yes. He asked him why. The boy said because I want to go to the happy hunting grounds and live with the Great Father. He asked the negro boy if his father was a lawyer. The boy said no. He asked him why. The boy said his father did not want to

lie, because he wanted to go to Heaven. He turned to the white boy, and said: "The boy who gives the best answer to my questions shall have this coon. The old man was a great politician and Democrat. He said: "My boy, are you a Democrat or not?" The boy stuck his toe in the ground, and looked up a the old man and said: "I am anything in the world to get that coon." Now, I want you to understand that this is not the position of this Government in this matter. We want this coon, which is your surplus lands, but we want to get it honorably. We want to get it to your satisfaction and to the satisfaction of the Government which we represent. Now, my friends, on Wednesday at 10 o'clock we will hold a council and ask you to come; on Friday we will hold another council and want you to come; and on Saturday another and we want you to come; and by that time we hope to come to some understanding.

Council adjourned.

WILLIAM T. SELWAY, *Interpreter,*
MISS BESSIE M. JOHNSTON, *Stenographer*

WEDNESDAY, *December 7, 1892*

Council met pursuant to adjournment and was called to order by Col. Adams at 2:30 p.m., there not being enough Indians present earlier. Commissioners all present. Indians present, 56.

COL. ADAMS. My friends, the bad weather I see has kept very many of your people away. Notwithstanding this we hold this council, because we want you to understand that when we appoint a council it will surely be held, if there is not more than a dozen to hear and

confer with us. I advised all your people to be here every time we hold a council. Col. Cole has a word to say.

JOHN J. COLE. My friends, this is a very important business which we have been sent here to transact with you, but it looks to me as if you were not treating it so, and I fear you do not realize how much your future welfare depends upon what we are trying to do here. I want you to understand that we commissioners have left our homes and friends to come here and help you to do this business, and when we appoint a council we want you all to attend it. We appointed a council for to-day, and we have a warm room in which to hold it, and after announcing this meeting in our last council we sent couriers to all parts of the reservation to notify the people; and these couriers came back and told us that some of the people say they are busy fixing up their sheds, etc., and can not come, hence we have only a small part of your people here to-day. I want you to understand that we commissioners are making great sacrifices to come here to help you on this business. Dr. Brown is urgently asked to go where there is a large practice awaiting him, and while you are keeping him here some other doctor may step in and take the practice. Col. Adams has large business interests and a newspaper to attend to, and he is losing much money by being away. I have large business interests for myself and for others which demand my personal attention all the time, but particularly at this season of the year and my clerks inform me that I am losing heavily by being away from my business just at this time, and think that $100 per day would not justify me to stay away. But I have undertaken this work and I will stay here till it is finished regardless of my loss. Now,

will you not all unite and take hold of this business and push it through? When a council is called we want everybody to come and give it their whole attention. Shall we have a big council on Friday? I want everyone who is here to come and bring everybody else with him. I want everyone who will come at 10 o'clock Friday, and who will try to bring as many as possible with him, to say "how." (General response of "How!")

DR. BROWN. I want to say a word to you before we adjourn. I hold some sticks in my hands. You see that I can break one of those sticks easily. I will call these three sticks commissioners. If Col. Cole works against Col. Adams and myself, or if I work against Col. Cole and Col. Adams, we are very weak, but if we all work together we are very strong. Now I will call these sticks the tribe. If you are all united, you are very strong; but one of you alone is very weak, and if you are divided into factions you are weak. You want to be all united.

JOHN J. COLE. It is strange how two minds run in the same channel and think the same thoughts. I worked out the same illustration which Dr. Brown has just given you, though he knew nothing about what I had done. I have two objects in saying what I do now. One is to call attention to the fact that this shows that Dr. Brown and Commissioner Cole are working shoulder to shoulder in this matter. The other reason is that I want to give you my illustration when I speak to you, and I do not want you to think that it was suggested to me by Dr. Brown's illustration, and I want you to know, too, that his illustration is also wholly original with him.

COL. ADAMS. I want you to understand that this whole commission wants to do something for our good, if you will let us do so. I, too, have some illustrations to make from nature, and hope to make it clear to you that you will be better off to sell your lands.

PETER ST. PIERRE. We have been sitting here listening to your talk, and we are very well pleased, but I think we had better adjourn, and I move we adjourn.

COL. ADAMS. Now I want to say to you that this council was called for to-day at 10 o'clock. I want it understood that when we call a council we will call it to order, and if we promise you a feast we will give it to you. We will keep our word in what we promise you, and you can rely upon that. This council, when adjourned, will be to 10 o'clock Friday morning. We want everyone to be here. There will be a feast for the tribe.

JOHN OMAHA seconded St. Pierre's motion and council adjourned.

WILLIAM T. SELWYN, *Interpreter*

FRIDAY, *December 9, 1892*

The council met pursuant to adjournment, but there being but small attendance of Indians, owing to stormy weather, it was postponed till afternoon, when it was called to order at 1:30 p.m. by Col. Adams.

The commissioners were all present, and the chiefs, headmen, and members of the tribe to the number of about 178.

The Indian committee of 24 having disagreed among themselves were present only as members of the tribe.

William T. Selwyn, interpreter: Miss Bessie M. Johnston, stenographer.

JOHN J. COLE. I want to say a word to you about the feast which has been promised you. We asked the Government to give us an appropriation to give you a reasonable number of feasts while counciling with you regarding the sale of the surplus land. When you have a feast it is to be understood that it is for the whole tribe as represented in this council. We expect to give enough for the people in attendance at the council; if two dozen, for two dozen; if two hundred, for two hundred, and the women and children you want to eat with you. There is another matter in connection with this feast. Commissioner Brown is responsible to the Government for the beef, coffee, and sugar issued for these feasts, and he is under heavy bond on account of everything used in this way. He must have the receipt of several people, representing the tribe, that it has been used for feasting. For that reason, he wishes you to appoint some one to receive it, and give him a receipt for it. Now, that there may be no more misunderstanding regarding the feasts, we want you to appoint some one to receive the supplies from Dr. Brown.

DR. BROWN. Tell me who is to represent you and I can see him about the receipts after the council.

WILLIAM BEAN, SR. We have only one sun, and it is nearly down, and then it will be night. I do not think it is best to have this feast to-night, but keep it until to-morrow. (How!)

DR. BROWN. My friends, I am glad to see so many of you out to this council. When I got up and saw the

snow flying in every direction and that it was so cloudy, I made up my mind we would not have a council. I am glad it has not been so. I am glad for two reasons: First, that I believe that such a turnout as we have to-day means that you are interested in what I have to say. I believe that this storm clearing away so is indicative of a better feeling. Up to this time you have done most all of the talking. Now the commissioners propose to talk to you. My brother commissioners have given me the honor of opening this council to-day. When you people realize that there are only three of us, and that we have to answer all the things brought up by you all, you must know we will have to talk to you for a long time. Consequently, if I talk to you for a long time you must be patient with me. I will not keep you longer than possible. I lived with you people for a long time. There is not a man in this room but knows me. You know that I know of no half way of doing things. It becomes necessary in my answers to absolutely deny some statements made in some speeches as false. I am not going to say a statement is false because you made them. I want you to understand, if one of my brother commissioners got up and made a statement that was not true, I would just as quickly get up and denounce his statement as false. So I want you to understand that I do not say so because I dislike you, but because some statements have been made which are not right.

On Friday and Saturday there was a great deal of talk that I do not propose to answer, because it has nothing to do with this question. You might just as well try to shoot a deer with a crooked stick as make a treaty by referring to things that are past. There is one thing a good way

back which I want to refer to, and that is what you people call your Iowa land. I find in the records of the Department the following regarding the treaty of the Sac and Fox and other people that made a treaty regarding your Iowa land. I find two places where the Yankton Indians are mentioned and I will read them to you. Article 4 is the first place where the Yankton Sioux are mentioned in this treaty. (This article was read.) The next place is article 6, which the interpreter will read to you. (Article 6 is read). Now, my friends, I have nothing to say to you about the treaty of 1831: that is, so far as what you received from it. I have no records here which will give me any light on the subject whatever. But I want to speak to you of the treaty of 1858. Now, I will give you the language of that treaty as it is given in this book, and have it interpreted: "That the Yankton Indians by that treaty relinquish to the United States all the lands owned or claimed by them, except this reservation, which is described there as consisting of 400,000 acres; that they also relinquish the United States from all claims growing out of any treaty made by themselves or any other Indians prior to that treaty." Now, my friends, that clause in the treaty of 1858 absolutely settles the treaty of 1831 and your Iowa claim.

Now I want to talk to you about the treaty of 1858. It has been said here that the treaty of 1858 has never been fulfilled to you people. I want to show you people that this treaty has been fulfilled, and more then fulfilled. There also seems to be a disposition on the part of the people here to reflect on the men who made this treaty, and I want to say to you, my friends, that while it may seem to you that you get a very small amount for it as you look back now, still you may search through all the

treaties on record and you will find that was the best treaty that had been made up to that time. I do not think it is right for you to take these old people, who have grown old and gray, and blame them for a treaty that was at the time it was made the best one ever made with an Indian. It was said here that it took six days to go across it with horses each way, but that you did not know just how much. If you had good horses you could go 50 miles a day. That would make it 300 miles. If your horses were poor you could not go over 25 miles a day: that would make it 150 miles. I simply want you to see that this is a very poor way of measuring land. The United States to-day is trying to take you and educate you so you can take a pencil and paper and estimate by using a geography how many acres there are in it. My friends, that you may have some idea how many acres there were in it, I will tell you. There were about 12,000,000 acres. This land was ceded by that treaty. You received in compensation $1,650,000. Now, it is said here that, with the exception of four cash payments of $5, $4, and $3 a head, you had had no cash payments from that treaty. Now I say that this treaty up to the present has been fulfilled. I am going to give you the figures to show you. The first article says it will protect you in peaceable possession of this reservation. Now my friends have you not always been protected?

The next article says you shall be paid $1,650,000 which should be paid to you part in cash and part in annuities, as the President of the United States shall think best for you. You have had cash payments made to you,

and annuities. This year you receive your fourth installment of the $15,000 a year which is the last clause of the treaty.

But, my friend, I want to ask you if this is all you received. I want to ask you if the Government gave you nothing but that $15,000, which is what the treaty calls for. I want to ask you how you would be off to-day if this was all. Here is an appropriation of $35,000, which is for sustenance, which is really given to you. This the treaty does not call for. It takes from $18,000 to $20,000 to maintain your schools, which is not mentioned in your treaty. The treaty for 1858 calls for schoolhouses, but does not provide for maintaining them. That is a gift of the people. All the wages paid your police, judges, farmers, is a gift and not a part of the treaty. Now, my friends, you get about $60,000 not mentioned in your treaty at all. Now, my friends, I believe since you understand you will thank the Government for it. If one of your neighbors should borrow your horses and to-morrow should curse you for loaning them to him, you would not feel like loaning them to him again. Now, my friends, the Government would feel better if you thanked her for what you get and it is right for you to do so. Now it was said here that the treaty of 1831 said you would receive a steamboat load of goods every year. Now I want to say that the man who made that statement is a man for whom I have the warmest personal feeling. Now I do not believe that man lied. I think some one told him wrong. There is no such promise. I do not think any Indian would be such a fool as to make such a treaty. For the Government might get a very small steamboat that would not hold much more than a wagon full, and it might send a very large

steamboat that would hold more than all of your houses could.

That treaty set aside for your people a reservation with certain boundaries which it was supposed to contain 400,000 acres. When they came to survey it, they found it had 430,405 acres in it. It had 30,405 acres more than the Government agreed to let you have. Now it was said that a railway was run across the Pipestone Reservation, and that the company went to Washington and settled with them instead of coming to you. I was here when the money paid by that company was paid to you, $1,700 – 99 cents a piece. I want to say to you, my friends, that this was the biggest price ever paid by a railroad for crossing one section of South Dakota. The government got more money for you than you could have gotten for yourselves. I have a quarter section in South Dakota, and I let the railroad go across it for nothing. The reason why was that it made a town a few miles from my place, and that made my place worth more. That railroad which crossed Pipestone Reservation made Pipestone City, and that makes the reservation worth more money. I say this to you, my friends, because the Government is always doing something for your good, and I want you to understand it. Now, in reference to this treaty, I want to say one thing more. What would you do if the Government gave you only that $15,000? A good deal was said of the land sold by the treaty of 1858. It was said that there were lots of cities and railways on it. Now I want to say to you, my friends, that if that land had not been sold to the Government, if it had remained in the possession of you Indians, it would have no towns and railways on it. It would not be worth more than it was then. I was in a town in

Michigan and saw a lot rattled off for 50 cents. Before night the men who got it had sold it for $1 and gotten gloriously drunk. I have lived long enough to see that lot sold for $1,500. The reason it was worth so much more is because other people built large buildings all around it and at last some one wanted that lot very much. It is so with your land. If the white man had not bought it and built towns upon it, it would not be worth 25 cents per acre.

Now, my friends, there is another point which I wish to make. There is no government in the United States but the people. Every citizen in this country is a part of the Government. I am just as much a part of the Government as any other man. Now, just as soon as you sell your lands you will be a citizen and a part of this Government. Whatever will benefit us will benefit you.

My friend here, Mr. Henry Selwyn, said in his speech last Saturday that the Indian was better off before this treaty was made than he is now. Now, my friends, I know that he did not mean that. He could not mean it, and I will tell you why. The first time I ever saw you people here was when I came down from Armour with my horses on the 4th of July. When I got a few miles from here I saw miles and miles of the land white with your tepees. When I got a little closer I saw men racing horses. The men had on no clothing except the breechcloth and the r bodies were painted; even their faces were painted. I saw you at your dance and all of your wild games. I said to myself, is it possible after all that has been done for them that they are only naked savages? After a little while your agent invited me to a little bower or booth, where you were to have your Fourth of July celebration.

There your agent introduced this same gentleman to me, Mr. Henry Selwyn. Your agent then introduced him as a gentleman who could speak to the people in the Dakota tongue.

Walter Arconge sat by me and interpreted his speech. And to say to you, my friends, that I was surprised when it was interpreted to me would be to say it very poorly. There that man stood before the people in citizens clothes, suitable to have worn in Congress, and in eloquent language told the people how Columbus discovered America; told them of the Declaration of Independence; the Revolutionary war, that freed us from the mother country. He took these people down little by little from the Declaration of Independence to the present time and showed them the progress made. He called their attention to the flag of our country as the emblem of freedom. In fact, he displayed a knowledge of the history of our country that would have put many a white man to shame. He told these people of Christ and the missionaries. I said to myself, these people are not savages. They are like boys playing horse. They have thrown off their civilization for one day and gone to their wild games, and to-morrow they will put on their civilized dress and ways. I was told Mr. Selwyn was a missionary and preacher here, and I thought he was the right man in the right place, and I want to say I think so now. I think he has been misinformed on many things he spoke of the other day. Before this treaty your people were uncivilized, and only lived to eat and ate to live. At night you did not know but before morning some enemy might rush down on you and kill many of your people Now, I

ask, what is your condition to-day? I want you to think if this treaty has not done you good.

I want to ask you, my friends, if it has not learned you to write and read, and many of your younger men to do for yourselves and farm. I want to ask if it was not taught you a religion that is of some value to you. It has made you people homes and taught you to take care of them. It has taught you how to take care of your children. It is easy for us to look back over the past and see only the bright side of things. We can look forward to the future and see only the bright side of things. Most of us when we look at the present see only the dark side. In looking back you see the excitement of the chase, the excitement and fascination of the wild life you led then. You forget that sometimes it was very cold and the snow was very deep, and you could not get out after the game you lived on and many starved. You forget how you were constantly on the move and that some of the old people had to be left behind because they could not keep up. You forget how many times your enemies came down upon you and took many of your lives. You forget these dark points. I want you people when you look at your condition to-day to see both sides. It was said in old times you had less disease and sickness, and that you were dying off very fast now. The first time the Yanktons were mentioned in history there were only 2,000 of them, but now you can keep records of the death and so do not forget them, and it seems to you to be greater on that account.

There are 262,000 acres of land allotted to you people. That averages about 500 acres to each family, some a little more and some less, according to the size of the family. One hundred acres is all any of you can work, and that

leaves 400 acres to rent. If you sell your surplus land no person can buy over 160 acres, so they will be glad to rent it of you. At only 25 cents that will give your tribe $52,500 a year. Then you will have the interest money on that paid for your land. Not only that, my friends, but schoolhouses will be put up all over the agency, and your children can come home at night. They will be in school with white children and will learn more of the language and ways of the white man than in any other way.

I want to say to you, my friends, that it is just as impossible to stop the march of civilization as it is to stop a wave when it comes to the land. If all of the men on the earth combined together they could not stop it. They could delay it only a little while. The Government of the United States does not want you to stay out until it marches over you, but to join in it. One speaker said all the Indians together did not know as much nor have as many brains as the three commissioners. I want to say to you, my friends, that this statement is wrong. I see many men here who have just as good brains as any of these commissioners. If this commission, or any member of it, knows more than you it is because they have had better opportunities, and have made better use of these opportunities.

My friends, it is only a few hundred years ago that the white man was as uncivilized as you. Only a few centuries ago and one nation warred with another, and took what each other had. Only a few hundred years ago and a nation would not try to buy this land, but would go to war and take it from you. But we know now that this is wrong. Now, my friends, this commission stands between you and the Government. If you want to sell we want to

buy, and if you do not want to sell we do not want to buy. Now, my friends, if two members of this tribe should come to us with a piece of beef and you asked us to divide it for you, if we looked at the two men and saw one a great strong, well-looking man, and the other very poor and sick and looking as if half starved, it would be natural and right to give the one who was sick more than the other. Now, these commissioners realize that the Government is strong and well and your people are poor, and if we make this treaty we want to give you the biggest half. You must remember that you must not ask for us to give it all to you. That would not be right, and the Government would not let us do that. I believe if you make this treaty you will be able to build better houses, you can have better clothes and better horses, and be in every way better off. The time is past when you could stay in your present condition. I think I shall live to see many Indian men occupy prominent places, not only in the State, but in the nation. I want you people to come together as one people on the land question, forget factional interests, and decide whether you want to sell or not. The other day I gave you an illustration by a bundle of sticks. Col. Cole told you the same thought had come to him the night before and he had put it down. He took me to his room and showed it to me, and I hope he will give it to you as he had it.

There is no Indian on this reservation I have any hard feeling for. There may be possibly some of you that do not like me. If so, I am sorry, but I can not help it. Whether we ever make this treaty or not, I expect to come down every year and see you and shake hands with you. I am now going to stop and let Col. Cole talk to you.

JOHN J. COLE. My Dakota friends, I want to speak to you, and I want you to listen attentively to what I say and give it due consideration. I was not expecting to talk to you this afternoon, as Col. Adams expected to talk to you after Dr. Brown. But Col. Adams is suffering from a wound he received in the war, and is not able to talk to you.

Now, I see you people face to face, but somehow I do not seem to quite get at you. When I hold my handkerchief up before my face you can not see my features, and when you talk to me I seem a great way off. Now, I feel as if there was something between us when I talk to you. If I could get face to face with you I think I could convince you that I would do you a great good by helping to make this treaty between you and the Government. My friends, will you not remove this something which keeps us apart? Will you not come direct to me and let me come direct to you? Then let us sit down together and see which is the best way to do the business.

In talking to you this afternoon I can not follow out the course I had marked out. It would take too long. Therefore I must take up only one or two little matters and talk to you another day. In one of my talks to you I mentioned the illustration of a bundle of sticks, to which Dr. Brown has referred. I will give it to you some time.

I do not propose at this time to discuss the plan of sale; but as I suppose the tribe is not considering the question as to whether it is better to make a direct out-and-out sale of the whole of your surplus lands, at such fixed price as the Government may be willing to pay, or to cede these surplus lands to the Government in trust, to

be appraised and sold for your benefit. I deem it to be my duty to say to you that I think it would be better for you to make a direct sale, at a very low price, than to put them into the hands of the Government to be appraised and sold for you. My only object or interest in this matter is to make a treaty with you which will be worth more to you in its collateral advantages than all your surplus lands are worth. A treaty can be drawn that will be worth more than $500,000 in money to this tribe, independent of the value of your surplus land, and I think that Congress will ratify such a treaty. Bear in mind that in this statement I do not include a price you may get for your surplus lands, and that whatever price may be agreed upon for these lands will be in addition to these advantages, which I think will be worth more than $500,000 to you.

Your ideas are altogether too high in regard to the value of your surplus lands. We propose to buy all these lands, good, bad and indifferent, just as they come, and you know that some of them are of but little value, and you must take this into account in fixing the price on all of them. Some of these lands are beautiful, and sometime they will be very valuable; but they are not so valuable now as you may imagine them to be. You forget that the value of lands is determined by conditions, and that the conditions do not exist to make these lands valuable. The principal object of this treaty is to make all these lands valuable, both the allotted lands and the surplus lands.

The committee appointed to confer with the Cherokee Indians for ceding their lands has just made its report. I think their lands to be very valuable, more valuable than your land. Here is a clipping from Senator Perkiton's report: The Indians agree to sell their Strip for

$1.50 per acre, or $9,000,000 for 6,000,000 acres. Here is another commission which has just finished their work and sent in their report. They have reported that four bands of Pawnee Indians will sell their land for $1.25 per acre. The Sisseton Reservation was purchased by the Government at $2.50 per acre. This is the highest price which has ever been given. So you see your ideas of price are away up. Now, in dividing the piece of beef between you and the United States, as Dr. Brown has illustrated it to you, we will give you your choice. You can take hold of the horns and we of the tail, and we will cut it very close to the tail; or we will take hold of the horns and you of the tail and we will cut very close to the horns, and give you the biggest piece. We propose to do the very best Congress will allow us to do for you. But remember, as Dr. Brown said, you must not expect us to give you all.

The price you may get for your surplus lands is the smallest part of the benefit which you will derive from this treaty. I have said that the treaty itself, independent of the price of your surplus lands, will be worth more than $500,000 to you. Let me see if I can not prove this to you. If some one would give you $500,000 to keep you from making his treaty, you would have the $500,000 in money and you would have all your lands, but you would not have the treaty. I will suppose that you can put the money in the United States Treasury and get 5 per cent interest on it. This would give you $25,000 per year in interest. You sometimes rent your vacant lands at $2 per 40 acres, or 5 cents per acre. Sometimes you get $4 per 40 acres or 10 cents per acre. I want to make this just as fair as I can, so I will suppose that you can rent all your land, except what you want to cultivate, and that

you can get 10 cents per acre for it. I will suppose that your people open up 500 farms, averaging 124 acres each. That will take 62,000 acres, and will leave you 200,000 acres of allotted lands unused, which you can rent. You also have your 168,000 acres of surplus land, making 368,000 acres of unused lands to rent. This large body of land rented at 10 cents per acre would bring you $36,800 per annum. Certainly you will all agree that this is the very best that you can possibly hope to do with these lands, and this with the interest on the $500,000 given you to keep you from making this treaty would give you an annual income of $61,800.

We will now suppose that you come to an agreement with the commission in regard to the value of your surplus lands and make the treaty. You have 262,000 acres of allotted lands, which we will suppose to be worth $2.50 per acre in their present condition. Just as soon as a treaty is signed and ratified by Congress every acre of this land will be worth 20 per cent or one-fifth more. This, on 262,000 acres, makes an increase of $131,000 as a clear gain to you. As this will be in the value of your lands, we will not count on getting any annual income from it. But when white settlers come in and buy these surplus lands, they can get only 160 acres for each family, and they will want more land to cultivate, and your 200,000 acres of unused allotted lands would then rent more readily for 50 cents per acre for cultivation than they will now at 10 cents per acre for grazing. Two hundred thousand acres of land, rented at 50 cents per acre, will bring you $100,000 yearly.

The income from all your lands and from the $500,000 was only $61,800, which is $38,200 less than the

annual income from your 200,000 acres of unused allotted lands after the surplus lands have been occupied by white people. So that if anyone wanted to keep you from making this treaty they would have to give you $1,264,000 to put into the Treasury to make your annual income as large as it would be under the treaty, even if you got no pay for your surplus lands. This is but one item, and there are many other advantages of great value to you that would come from the treaty. I will not detain you longer now, but talk to you again some other time.

COL. ADAMS. You know I am not much of a hand to talk. I am going to tell you to-morrow what I think of it. The council will meet to-morrow at 10 o'clock. Have your committee appointed to come to Dr. Brown early to-morrow morning to get the beef to kill. So while we are in the council getting something for your heads, the people who are preparing your feast outside will get something ready for your stomach. This will be so you can stand what we say to you. The council is adjourned until 10 o'clock to-morrow morning.

SATURDAY, *December 10, 1892.*

The council met, pursuant to adjournment, though, owing to the limited attendance of Indians in the morning, the council was not called to order until 1:30 p.m., Commissioner Adams in the chair.

The commissioners were all present, and Indians were present to the number of about 195, the Indian committee of 24 being present as members of the tribe, William T. Selwyn, interpreter; David Zephier, assistant interpreter; Miss Bessie M. Johnston, stenographer.

Col. Foster opened the council with a few remarks, urging frankness of expression and harmony of action among the Indians.

JOHN J. COLE. My Dakota friends, I want, if possible, to come close to you this afternoon. I have come to you for a purpose, and I shall be very much disappointed if I do not accomplish successfully this purpose before I return. I have always been connected, more or less, with large business interests, in which others were interested as well as myself, and I am used to doing business where I have to look at both sides of the question. I once had a little piece of business to settle up which took much time and a great deal of hard work. After I got through with it I sat down to figure out how much interest I had in it. I, myself, had one-thirty-second part and the others had the other thirty-one parts: but while I was at it I worked as though the business were all mine. In my business there is a very strong rivalry. There is as much rivalry and contention as there can possibly be between men of business.

We will suppose, for instance, that this tribe of Indians have an interest in something in connection with another tribe; of course all this tribe will watch the other tribe very closely and endeavor to keep them from getting more than their just part. Now if any man among you could stand up and mediate between these two tribes and deal so justly with the other tribe and so fairly with his own that all would be satisfied you would be proud, would you not!

Now, in my business there are two parties contending with each other with might and main. I became the

mediator between the two parties, and at first both watched me very closely. The other party who were contending with ours for the business distrusted me at first, and kept a man at my elbow to watch me every minute. I could not write a sentence but what they scrutinized it very carefully to see if there was a word in it that would injure them. I was in this position for five years, and at the end of that time we had a council. One of the men in the faction opposed to us came in with this cane and said: "We have watched this man for five years, and have never found that he wrote one word which was not as fair to our side as to his own, and we want to present him with this cane to show our appreciation of his impartiality and fairness." Right here, on this side of the cane, are written the names of men who are engaged in the largest works of its kind in the world. I am proud of that cane, because it is a memento of the fact that the shrewdest men in that business recognized the fact that I could be as fair to the other side as to my own. On my way from Washington to this reservation we had a council with these same parties in Chicago. Now, I want you to bear in mind that our competitors in business are wise men, and men well skilled in looking after their business, and if I should seek to take any advantage of them it would be an easy matter for them to discover it and cast me down. I have said I was proud of that cane for what it represents, but I am prouder of this paper which I show to you for what it represents. Again, in that council in Chicago I was a middleman between those two factions. Both parties instructed me to draw up this instrument, in which both were interested. There are twenty pages of type-written matter. I sat down and dictated this matter

to a stenographer and had it written out. Now, I want you to understand I was sent there to represent my party. The other party, the same which gave me this cane, said; " Let Cole write that instrument; he is the best man to write it." Now, I want you to understand that this document is as much to us in our business as this treaty is to you and the Government of the United States. I could have written this in the interest of my own party, but I was chosen to represent both parties in writing this document, and so must be impartial. Suppose I had been so interested in my side that I could not have seen the other's interests. If I had written it in the interest of my party when it went to the council they would have thrown it out; but it was fair to both sides, and the council adopted it without the change of one word. I have told you this to show you that I am used to mediating between parties in important business, where I have to look out for the interests of both. Now, if I can once get at you people, once get you to know me, I think I can do you some good in this matter on which I have been sent to you. I think I can draw a treaty which will be equally satisfactory to the Government and to this tribe.

I have not had much to say to you since my return, for two reasons. First, I always want to have a good understanding of what I am going to talk about, and second, I always want to know the conditions under which I am talking. And I have not felt sure of either of these since I came back to you. I did not come here of my own accord, I did not ask to be sent here, but I was sent here by the great Secretary of the Interior because he thought I could do well the work he wanted done. When I came here you received me cordially: you seemed glad

to see me. I thought you were pleased because I had been sent to you. And I thought that you were my friends and that I could be your friend and that we could do this business quickly, to your advantage, and satisfactorily to the Government.

You all know the painful accident which called me away from here, and that I left on the saddest journey of my life. You all know with what a burden of grief I returned to you after laying away my beautiful boy. While standing by the bedside of my sick wife I received a letter from your agent, Col. Foster, saying that you came to him and expressed your sympathy for me in my great trouble. That touched my heart, and I said I will go back to those Indians and prove to them that I am worthy of their friendship and their sympathy by doing my best to protect their interest and advance their welfare.

When I came back many of you welcomed me warmly, and I hoped to take up the work of my commission and prosecute it successfully. But when I came to talk to you about the sale of your surplus lands I could see a change in you. I could see that there was something wrong. I could see that you did not want to talk about it. Then I was told most of you want to sell your surplus lands, but that you are dissatisfied about many things; that you have some old claims which you want fixed up; that some of you do not like the commissioners; that there are factions among you, and that what one faction wants the other faction opposes. Well, my friends, I am sorry for all this. I am sorry all of you do not like all the commissioners. I am sorry that all of you do not forget your fictional contentions and unite to advance the interests of the whole tribe. I suppose it would not be possible

for the President, through his Secretary, to send here three commissioners whom all of you would like. I do not like to indulge in self-praise, even when I praise two other men with myself, but I think the occasion will justify me in saying that you probably have as good a commission as you will ever get; and I think you should close your factional strife and make the best use of this commission. You should unite your full strength and go right to work with the commission to fix this whole matter up in the best way for the tribe and the best way for the government.

My friends, we have come to you from the Great Father, and he expects us to advise you for your good, and you doubtless expect us to tell you what we think will be best for you to do. I have asked the Great Spirit to guide me in this work. I have asked the Great Spirit to give me wisdom and show me how to make a treaty that will be fair for the Government and will be best for you – how to make a treaty that will benefit this tribe as long as you live, and make you a stronger and happier people. I have one rule by which my life is guided, and that is, "to go straight forward, without fear or favor, and do what my judgment dictates and what my conscience approves," and this rule will govern me in this business.

I have prepared this bundle of sticks and brought it here to illustrate a principle which should govern you in this matter and in all important matters that come before you. I will call this bundle of sticks the Yankton tribe of Dakota Indians. You see this bundle of sticks is bound together by a very strong band, and this makes the sticks very strong, so that I can not break them.

I will call this band the interests of the tribe, which should always bind you together. Now, I will remove this band, and you will see here there are smaller bundles, and I will call these the factions of the tribe. You see that each of these bundles is bound together by a band, which I will call the factional interests. This is the largest and strongest bundle, and I will call this the strongest faction; but see; I can break it. Now, you see it would be still easier for me to break the other bundles, for they are each weaker than the one I have broken. But I will not break them, as I wish to show you something more about them. I remove this band, and you see here a number of separate sticks, and I will call these the individual members of the tribe. You see that each stick has a band wound around it, which I will call self-interest, or individual interest. But this does not strengthen the stick, as it binds nothing to it, and I can break both the stick and band very easily. You see when the whole tribe was untied it could not be broken, and the tribal interests could not be destroyed nor injured, and that the factional interests and individual interests were also safe and uninjured. I would have you all bound together by the interests of the tribe. I would have you use your whole strength to do this work in the best way. I have said all this to try to make you understand us and to get your minds down to the important business before us.

The commissioners are now ready to make you an offer for your surplus lands. The Government will pay you $600,000 for your surplus lands, amounting to about 168,000 acres; payments to be made on the terms of our instructions from the Department of the Interior. This is nearly $3.60 per acre and is more than double what the

Cherokees have agreed to sell for. It is more than the Government paid for the Sisseton Reservation and is the highest price we have ever known the Government to offer. But Dr. Brown told you we would give you the big end of the piece of meat and we are trying to do it. This is more than we think these lands are fairly worth, and Congress may refuse to ratify a treaty on that basis; but we are very anxious to make this treaty, and if you agree to it we will do all we can to get Congress to ratify it.

In closing, after having submitted this proposition, I want to call your attention to the fact that these lands are now doing you no good. While these lands are unimproved you can not rent even your allotted lands which you can not cultivate. But the interest on the purchase will give you annually $30,000 to use. Now, we want to have you consider this matter and give us an answer. I will now close and let Col. Adams talk to you.

Col. Adams: My friends, I want to tell you now, in a few words why I think you should sell this land. The eagle flies on the fact of the sun, looks at the sun, and his eye is not dimmed. When he has shown his strength, has been far above the clouds, and when the sun goes down behind the western hills, he, too, seeks his home high up among the mountain tops. Birds of the air have nests; the deer, the elk, and fox have places they call home, which they feel is better than elsewhere. For years and years the Indians had no home. He went from place to place, and his home was where his tepee was set up for the night. So the Government seeing he was not as well off as the birds; decided to make him a home. He was placed on a reservation that he might learn what a home was. After a while the Government allotted him land on which to

build him a home, to raise crops, that he might learn how much better it is to have one and provide for the long, cold winters. When the Government found how well the Indian liked to have a place called home she sent men like the members of this commission to buy the land the Indians did not want, that the white man might come in and settle near them so the Indian might see how they did and learn all about how to make a home and become like white men, who work to get money to make themselves and families better, to make them wise, to give them more knowledge, to keep disease from their bodies, and how to take care of their bodies.

You see I have here two stones. These stones are smooth. The way they became so was because they were in the water, in a stream, and in running down rubbed against each other. After a while, by constantly rubbing together, they became smooth. These two stones represent the white man. By constantly working among each other, and learning how others did, they became smooth. That is they got lots of money. You see here is another stone. It is not smooth. It has not been subjected to the water. This represents the Indian. Now, if we can bring the Indian and white man together and learn how they do, this stone which represents the Indian will after a while become as smooth as the others. The two which I showed you first. Suppose, now, I want to learn how to hunt deer. I can learn more from John Grayface or Running Bull than I can from any white man. Why? Because John Grayface and Running Bull have been taught that from the time they were papooses until they were men. If a herd of elk came up on the hill back of St. Paul's School I can learn from Medicine Cow or Feather in his Ear how

to get a shot at them. They know the habits of the elk, and could teach me how to get a shot at them. Why can they do this? Because they learned the habits of the elk from the time they were papooses until they were men. Then if I want to know anything about catching the elk, deer, or any other wild game I can come to any of these old men and learn.

Why? Because that was the way they had to make a living; to obtain what they had to eat and wear in the past. But if I wanted to learn to work on a farm, keep a store, run a wagon shop, harness shop, blacksmith shop, or any other business done by a white man, I will go to Mr. Lance, Mr. Tyler, Col. Cole, or Col. Foster to learn. Why? Because they learned that from the time they were papooses until they grew up to be men. The reason, then, why the Government wants you to live close to the white men is that, as the game is all gone, you may learn to get your food, clothing, and living as white men do; so you can improve your minds, and also improve the condition of your homes in many ways. Because the Government knows you can not live as your fathers did. Because there is no longer wild game to be found in sufficient quantities to give you a living. It is, therefore, to teach you how you can improve under this changed condition; how you can do best for yourselves in this new life which has come to you. Now, my friends, there are many ways in which you can be benefited by the sale of this land. My fellow-commissioners have told you of your being able to rent your land. As it is now every family averages 500 acres of land, and unless the head of the family is a cripple they can not rent it. Just as soon as you sell your surplus lands you become citizens of the United States and can rent

your lands. Now, my friends, this year I rented five forties, or 200 acres of land.

The man who rented that land of me agreed to plow it, put in seed, take care of the crop and give one-fourth of it. So when the crop was hauled to market I was to have one-fourth of it. He raised 4,000 bushels of wheat on that 200 acres. He sold it for 70 cents per bushel, or $2,800. I got one-fourth of this, or $700, as my share, and did not raise my hand except to take the money. The man did all of the work. Now, my friends, if I can do that with my land, can not you do the same with yours when you have a chance to do it. Here is the line of the Sisseton Reservation in my county. I live here, about 15 miles from the line of the Sisseton. Right here lives a friend of mine by the name of Vick, just outside the reservation line. Just inside of the line of reservation lives an Indian friend of mine by the name of Chunck. He has land which has plenty of grass upon it. Vick asked Chunck to let him cut grass on his land. He agreed to and Vick was to pay 50 cents per ton for all he cut. This man cut 150 tons of hay and paid Chunck $75 for it. Chunck did not do anything but lie in the grass and see others work and got $75. It was just as if Chunck had gone out into the middle of the road and picked it up. Now, my friends, what made the grass on Chunck's farm worth money? Because his tribe had sold their surplus land and he had become a citizen of the United States and could rent his land. This he could not do until the surplus land was sold to the Government. If this Indian can do this why can not you! You can not farm all your land. If you farm 100 or 150 acres that is as much as you will get done.

Now, if you rent 200 acres to a white man and he goes in with his plow and turns over the sod it is worth $400 to you. Why! Because you could hire 200 acres of land plowed without your having to pay $2 per acre, or $400. Now, you can make an arrangement with him to farm it and give you one-fourth of the crop for rent of the land, and while he is doing this you are learning to farm from him. One of your speakers spoke of your selling your land in 1831 for 1 cent per acre. In 1803 the French, a white people, sold a great many million of dollars' worth of land to the United States. There have been eight or ten great States like South Dakota made out of it, and they sold this land to the Government for less than 1 cent per acre. The reason they gave so little for it was because it was like yours; because there were no people there to make farms on it and was not worth anything until there were. The fact is, my friends, the Government only seeks to benefit you in asking you to sell your surplus lands; to open up the way for you to learn the ways of the white man upon which you might depend in the future for your living; thus the Indian may learn how to take care of his own and be independent like the white man. Does it benefit the white man to buy this land from you? Only in this way, it gives him more land to work. Does it benefit the Government? Not 1 cent, for she will sell the land to white men for the same price she paid you. Then it must be for your good that you may learn this new way to get what you need to eat and wear and get a home; because the way of your fathers has failed you. Now, Dr. Brown told you in his speech that the Government was absolutely giving you, beside what it agreed in the treaty of 1858, $60,000. Now, who pays this $60,000? The white

man. The Government asked him to pay her so much tax money, each person – Col. Foster, Col. Cole, Dr. Brown, Dr. May – and every man is a citizen. Now, my friends, in conclusion, I want to say that I have been a friend to the Indian for a great many years; that I only want to do what will help them and better their condition, to show them the new way to make the home they want. I have finished.

FELIX BRUNOT: I want to speak about this affair which you people have put in our hands. It is on account of this affair that 34 men have stayed up night and day to consider this subject. I have noted all they have deliberated about in their meetings and remember it. I have followed carefully the conduct of all of these men up to the time the meeting came to an end. It is of this end that I am going to speak. At these meetings the points made by the commission have been told to the young men and they have talked over them. The final action they took was this. At a certain night the committee agreed to consider the question – that is, the sale or nonsale of the land – to these three commissioners. This is the committee which was appointed by the people to confer with the commissioners. They got up and asked the commission in the presence of the agent if they would recognize the authority of this committee as coming from the tribe. (How!) That this committee has done its duty to the commission and the tribe. A certain question was put to the commission and it was not answered. But we want to come out plainly, and if there is anything to say to come and any question to answer we want to do it. I do so today. (How!) At a meeting yesterday this question was put, whether we will sell our lands or not, and asked

them if they did not want to sell their land and they answered and said "How." But if the commission prefer to stay and talk more that is their own interest; but we have given our answer.

EUGENE BRUNOT: It was at such a meeting as this that the committee of 24 were appointed and 10 men to keep order. They have decided and desire to lay their answer before you. It is at the desire of the people that I stand on this floor. They have come to a final conclusion that they do not want to sell their land, and they have come to this conclusion. (How!) If I desired I could talk from now to 12 o'clock, but the business we have to do is just what I have said.

JOHN OMAHA: I desire to say one thing. I want to say it to the committee. I desire to state a fact in which the committee was engaged. One time the committee had a meeting up in my room over the police office. We were arranging to feast the people. I said at that time if every one would deposit one dollar bill we could do it. The committee was in favor of the proposition and it was agreed. So we bought a cow from Thomas Hunter and we called a meeting at the dance hall. The committee was there but I was very late. They were there at the time I arrived. This was the 14th day of October. It was decided by the committee that they would sell the land. They were discussing whether the price should be $5 or $6 an acre when I entered. They asked me the question and I said I was in favor of $6 per acre. I do not know of a final decision which the committee came to since that time. That is what I wish to be known.

IRON BULL: My friend who has just spoken is mistaken. The committee at that time did not decide; but they asked what price they should consider, and were discussing whether the commission would offer a lower price than the Indians wanted. I do not want many words on the subject made by the speaker. It is very hard in any way to oppose the Government. We know that. Although our skin is dark we have a right in affairs with the Government. We have come to a decision and desire that you respect it. ("How!" and clapping.)

PETER ST. PIERRE: My friends, I have not much wisdom. We have some friends here. We have no will against them. (How!) The people appointed 24 young men as a committee. I am a member of that committee. The Government has appointed certain parties to act for it in affairs which we have with the Government. That Government has sent this commission for certain purposes and we know them. (How!) We have lost at these councils many days which we should have labored. (How!) The questions have been put to us and, I think, we should decide this matter at the present time. (How!) There is only one proper way to do this. There is a large crowd here, and I move that all who do not desire to sell their land step out of the room and some one count them. ("How!" and applause.) I entreat the commission to consider this. If we do not come to some conclusion now we will keep on having councils here until the spring comes and the grass is green. I think it is the proper thing that this be made the final meeting. (How!) If we had decided to sell the land, then it would be time to make the illustrations which you have made. One of the commission made mention of $600,000 for the land. I do not

entertain that statement in my head at all. ("How!" and applause) This is our land and the price is entirely too small. (How!) I think some of this land is more valuable than that adjoining the reservation and should have as good a price. I desire that this business be settled now. (How!).

TOM NO. 1: My friends, I do not think you have any idea of a million. I have said that for a purpose. I have in the U.S. Treasury to my credit $50, and I am waiting for this money to be paid me. There are others who have claims, and orphans. They should be paid. I am very glad to see these men dressed in citizens' clothes, as I am. On my part I have a great respect for white men. I depend upon the Government for my food; that is why I have mentioned the fact that I do not believe you have my idea of a million. I heard Dr. Brown speak yesterday and I was very glad. He said we received certain things from the Government for the sale of our land. The people desire a high price for this land. Whatever we have we want a good price for it, no matter how small. You know that this is a very small tract of land. You have been sent on by the Government as an interpreter, and I desire that you interpret to it that these people are poor. There is the scout money, and I desire the scout money, and so state it boldly. (How!) If the Government would support our agent we would be in better condition. The gratuitous gifts on the part of the Government I am enjoying. I have horses, cow, and oxen and harness. These gifts of the Government I am very thankful for. When you go to Washington I wish you would look up this scout money and send it to me. I have been appointed one of the ten to keep order. Now I am one of the scouts the Government

employed. I desired to make this speech, and I do not care whether they sell the land or not.

JOHN J. COLE: I want to come face to face with these people as the representative of the great Father and the Government of the United States. You are a strong people because you are better able to take care of yourselves and make bargains than any other tribe I know of. But you have not yet learned the ways of civilization and you are standing in your own light. I want you to understand that while you are many on this little reservation, while you make a strong force gathered together here, yet you are but a small factor as compared with the population of the great United States. Now, if possible, I want to bring you face to face with your present condition. One of your speakers said he thought you were better off forty years ago than at the present time. I do not agree with that statement and I do not believe that many of you do. If his statement were correct it should not have any weight in determining you against this treaty. Forty years ago this plain was covered with buffalo; there were deer and antelope and other wild game. Now I want you to show me where there is a buffalo. You might, perhaps, show me one single deer, but not game enough to live upon. You can not live forty years ago. There are some here who were living then, but they can not live over that time, and the conditions now are totally different from what they were then. Now, I want you to understand that you are absolutely dependent upon the Great Father today for a living. Let the Government send out instructions to your agent to cease to issue these rations, let the Government instruct your agent to cease to issue your clothes. (How!) Let the government instruct him to cease

to issue your supplies, let him take away the money to run your schools with, and I want to know what you would do. Everything you are wearing and eating is gratuity. Take all this away and throw this people wholly upon their own responsibility to take care of themselves, and what would be the result! Not one-fourth of your people could live through the winter, and when the grass grows again it would be nourished by the dust of all the balance of your noble tribe.

Some of your speakers have told me that they did not send for us and that we can go home. This was not said privately, but in open council, when they were supposed to speak for the tribe. You people signified to the Great Father that you wanted to sell your land. He did not send this commission to treat for the sale of your land until he understood that you wanted to sell. He did not send this commission until every one of you had a farm allotted, every man, woman, and child. So that every one of you, down to the smallest baby, has a home of their own on this reservation. And if you now send us away without giving this matter due consideration, and making a fair and reasonable offer for the sale of your surplus lands; will the Great Father think you are trifling with him? What can you do with these surplus lands? You have more land allotted to you than you can possibly use. There are not more than 500 heads of families on this reservation to open farms. Make 500 farms of 124 acres each and you will still have left of your allotted land 200,000 acres unused, and your surplus land is of no use to you unless you sell it. Now, if you indignantly send us back to Washington, what will the Great Father say of it! Is he likely to look favorable on such an action on your

part. Is this action on your part likely to make him ask Congress for an appropriation to get something for you to eat and wear! I would have you realize what you are doing. I want you to think of this before you send us away.

I want now to say just one word in regard to old claims. I told you two or three times that I wanted to tell you something, but you would not let me get at you. When I was in Washington I looked into this matter of scout money. Since I have come back the Government has sent the full history of the scout claims. I believe that I can speak for myself and my fellow commissioners and say that these scout claims should be paid. I believe that these scout claims are just. (How!) Now, why have these scout claims not been paid! Is it that the Government is too poor to pay its debts! Well, let us see. These claims amount to $11,500. The Government takes from its bounty and pours into this tribe $60,000 every year, so it can not be because it is too poor. Is it because the Government is not willing to pay these debts! No. I have been criticized for referring to your agent, but I am going to refer to him again. From the very first Col. Foster has said that this scout money should be paid. Now, suppose Col. Foster should draw a check and pay all of these scout claims. What would be the result! There are many men in Washington whose duty it is to inspect every account that comes into the department. They would ask by whose authority he paid these claims, and they would not approve of it, and Col Foster would have to pay them out of his own pocket. Now, my friends, you are face to face with a commission that can get these claims paid for you. If it is the will of the people we can make that a condition

of this treaty. Both of my fellow commissioners say they will give their consent to it. One word more, and I will not worry you longer. You have spoken of a great many things, and some are very far from business talk. The commission has come here and gotten well acquainted with you, and have found out the condition of things very thoroughly. We can use a great deal of influence for your good. We are willing to consider anything we have the power to grant. Now, let me counsel you to think over this matter and come back here next Tuesday at 2 o'clock and have a talk again. It will do no harm and may do a great deal of good.

COL. FOSTER: I do not suppose it is my business to advise you very much in this land business, but I do not feel that when I see a point that I want to make that I would like to say something. Now, for the first time, the commission has laid before you a definite proposition. Therefore it was a little premature to report against a proposition before it was made. The committee should meet and talk this matter over thoroughly and candidly. Now, there are on this reservation about 11,000 40-acre tracts. About 7,000 of these have been allotted. Now, the commissioners say they will give you $600,000 for the 4,000 40-acre tracts. That will amount to about $140 for each 40. Now, the interest on each 40 will be about $7 a year. Now, each man, woman, and child would have about two and one-half 40's, which would give them about $17.50 a year. This, with the rent you would get, would be very good. It seems to me that the $17.50 would be more than you would realize from it in any other way. I think you should consider this proposition. Or, if the price does not suit you, do not refuse this proposition

outright. Try and get the commission to give you $4 if you want it. When you sell a horse, a man says he will give you $10 and you say "I want $100," but some time you can get together on a price. Now, try and have the commissioners offer you more. Take this into consideration and do not be influenced by anything but the feeling of yourself and the good of the tribe.

JOHN J. COLE: That there may be no misunderstanding, I will say just now that if it is the desire of the tribe we will put into the agreement the settlement of the "scout claim."

PETER ST. PIERRE: My brothers, these commissioners are our friends. I do not wish to cross their opinion. You came here with a form, and probably it was laid down in that form of your instructions whether this should be considered. It was stated in the form that no undue force should be used to induce these Indians to come to a final decision. (How!) I think, my friend, Col. Cole, has made a mistake. The Indians do not understand illustrations, and his illustration has inspired fear on the part of the people. Write on to Washington and have our agent instructed to cease issuing clothes. It was to buy these very clothes that we sold our land in 1858. (How!) They are not real suits. They are gunny sacks smeared over with clay. (How!) But it should not be considered, because we bought these clothes. One thing I believe, and it is in regard to these rations. It is this ration system which is making our people poor. Because they depend entirely upon the rations they do not go to work. It is because they expect food from the Government that they do not earn it; and if that should be struck out, I am in favor of it. (How!) They say there are no buffalo and ask

what we would do if the Government ceases issuing to us entirely. Suppose the Government does! The young men would all exert themselves to realize from their farms more than from any buffaloes. These are my ideas. I wish to say one thing about our agent. He is here to help us on occasions of this kind. He should see that a majority vote of the people is respected. (How!) I do not think our agent considers this his duty. It is his work to protect us. A little while ago a boy was lost, and we had great confidence in our agent. He went there and attended to that and I think he was doing that then. This is our home, and the commission has come here to ask the sale of our land. I think it is only just, when we have given our final decision not to sell, that the commission should depart. (How!) They have been giving us good and sweet things here, and I have been listening to them. It has been said that we have no right to the Pipestone Reservation. In the Treaty of 1858 this Pipestone Reservation was made a condition of the treaty, and it was not signed until the Government bought it back and gave it to us who owned it. If we make a treaty ever so binding and sent it on to Washington, it is changed. I am opposed to negotiating at the present time. It has been decided on the part of the people that they have come to a final conclusion, and if our agent does not protect us in this, we will see that someone else does.

MEDICINE COW: One of the commissioners said we could put in what we desired in this treaty and about the scout claim. When one of the commissioners got up and broke those sticks it made me ashamed. It seems as if we are all broken like that. One mentioned $600,000

which was given us. I think our claims against the Government would make $600,000. Now, my friends, when I get up I like to speak.

FELIX BRUNOT: I think some of you people are getting a little excited. You should not speak so. These people are sent out from Washington and we should respect them. When they made the offer and asked us to consider it, did you wish to and signify by saying "How?" I wish to make a statement. I have been consulting with Col. Adams about what has been said. Our friends have come and asked for the sale of our surplus land. The question was put whether we desired to sell or not. It was declared by two parties that they desired to sell and by two that they did not.

Now, I think it should be decided at this meeting here. If by vote they desire to sell the land, they should come to the commission and say so, and if not, come and say so. If we then desire to sell the surplus land we can treat with the commission. If we do not want to sell and decide and say so, and then come and shake hands with the commission and they will go. When this price was mentioned by the commission I believe no one said "How!" And when Col. Foster got up and said we should consider this proposition, I believe no one gave consent by saying "How!" Did you? (No.) I think we should settle this matter now. Do you wish to consider what Col. Foster said and put the price of land up to $20? I put the question: Do you want the people to decide the question now? (How!) I move all the people in favor of selling their land keep their seats, and those who do not want to sell get up and go outside. (How!)

Mr. Brunot's proposition took the council by surprise and caused some confusion, and there was some wrangling between those favoring and those opposing a sale.

JOHN J. COLE: This action will not decide anything. In calling the tribe together for this council no such action was proposed, but only an ordinary council. Our mission is to the Yankton tribe and it requires a majority of the adult male members of the tribe to decide this matter, and less than 200 people are here – much less than half the tribe. We can not recognize this action.

The people who were opposed went out, and the council was adjourned to meet again Tuesday afternoon.

TUESDAY, *December 13, 1892*

The council met pursuant to adjournment, and was called to order at 2 o'clock p.m. Commissioners all present. Col. Adams in the chair. Chiefs, headmen, and other Indians present to the number of about 126. William T. Selwyn, interpreter; David Zephier, assistant interpreter.

DR. BROWN. The commission have met today not to do much talking, but to offer you a plan of work. We believe this matter of making a treaty is too important to let it pass without getting it before you in a way that will enable you to fully understand it. As has been remarked by Col. Cole, there seems to be something between us and the tribe, and the plan which we have to suggest is one which I think will bring us nearer together. The commission has talked this matter over, and we believe that if your people would select about six of your number who would meet with the commission, that they and the commission could talk over some plan for a treaty that

would bring us nearer together than we are now. Of course, you understand that those six can not make a treaty. We only want to talk over some plan that will bring a treaty. I realize that there are factions in this tribe, and in selecting this six, if that is the number you agree upon, you should select them so that each faction would be represented in this plan, and so that all may be satisfied.

COL. ADAMS: Now, my friends, we would like to hear from you and see if the plan suggested by the commissioners meets with your approval, or we would be glad to hear from anyone in regard to this treaty.

NOT AFRAID OF THE PAWNEE: I have noted the expressions you have made to this people, and what I am going to ask you as a question is this: Have you commissioners seen me standing here alive? You came here to make a proposition for our surplus lands. I understand you to say that at a direct sale our people's land would be about $3.60 per acre or a little more. Now I want to put this question before you commissioners. It is this: Could you make a change in the direct to pay more?

DR. BROWN: My friends, our commission would be glad to give you a big price for your lands, but the price offered you, we believe, is as high as Congress would ever ratify at a direct purchase.

JOHN OMAHA: I want you all to listen to what I have to say now, as you understand I am one of the parties who believe in the treaty, and it is just this way. I want to sell a horse that belongs to me. This horse is certainly mine and whatever I am willing to take for this horse, that I will state. When I am willing to sell this

horse to a certain party at a certain price, if this certain party is not willing to give me that price that I wanted, I would, of course, have the right to hold my horse. I have thought differently from the proposition that has been made by Commissioner Cole. I am one of the committee of the people here who divided up because we could not agree, and I am not in favor of this proposition. I have thought of this business in this way. I was in hopes on the first start that we, like men, would have good consultations with the commissioners and whatever they may do for our interest, that we might be able to talk freely with them so that they could make a favorable report. In thinking this way I have also been looking toward the interest of the people, and there may be some-one that would think that I am favoring this business without thinking about it. For many years in the past up to the present, white people have taught us how to get along in this world, and now we are glad to be able to see for ourselves, but it seems we are neglecting to turn our thoughts to it. I have said this once before. When any man has property he has a right to hold his own property at his own price.

It seems that these commissioners have come here with already established propositions of sale of surplus lands. When I said that I was in favor of disposing of surplus lands, I did not mean that I did so without considering. It should be right and you would be justified if any of you would get up and say I want to have the surplus land sold in this and that way. Now, I am standing before the commission here and am willing to say now that I want this thing to be done in this way. Now, my valuable friends, I am going to present my views on

this point. It is this: I desire to say that we ought to have our land sold under the appraisement; the lowest would be about $6 per acre, and not to go any below that. Now, my friends, I request you to make a reply to my request, if you think this will benefit us. Now, for two months you have been trying to find out whether the people were willing to sell or not, and being one of the number I make this proposition to you in regard to these surplus lands. Now, we understand you in this way, that you commissioners have been sent out here by the President to make negotiations for our surplus lands; that before we do make a treaty that we and you have to understand each other thoroughly before we do anything. What I think about this would be to make a treaty, because of the interest of our people, and not of the money that was coming out of the sale of the land. I have also a certain proposition that I want to lay before you. It is this: As for myself, I am willing for all the surplus lands to be disposed of, except the unallotted lands along the Missouri River bottom (between the bluffs and the river), south from the first ridge from the Missouri River.

The reason why I make this proposition to hold the Missouri River bottom is that most of the unallotted lands in these bottoms are good for haying and that the people may make use of them in the future. It is my personal desire I put before the commission, although there may be a mistake in it. I desire that we should give our attention to this matter carefully and by degrees, as this is what the commission is here for. Now, I have said what I desire to say before this commission and before you people. Now, my friends, there may be some of you who would answer me for putting such expressions as this,

but I can not help it. Whether this treaty is or would be a benefit to us I am in favor of it. I would not care if anyone was trying to tramp me down for favoring this business. When anyone is trying to earn something or do something by which he would be benefited we must watch him carefully. In twenty-five years from now all our aged persons will have disappeared. When I say this I am looking toward the old. At the end of twenty-five years there will be a new generation; therefore I desire to see that these old persons shall enjoy the income of this treaty as well as the younger class of people here. There, for example, is an old man sitting on the workbench, and like many others who have no houses they go from house to house as their stopping places and when an old person has got any home to live in it is the same old log house. Not only the old men who are suffering from this and the widows and orphans are to be benefited, but also all the tribe. I have a great many things to say but the clerks are slow. My friends, you are all more or less connected with me by kinship, and as I said before, whatever we do in this business we want to be very careful and do it in the right way.

BATTES LAMBERT: I think this matter should have been left in the hands of the original committee of 24. It is not wise to change like children.

PETER ST. PIERRE: You commissioners offer us a different plan. I think the committee of 24 did their work and that the tribe supported them – that is, not to sell. I, you know, am opposed to sale; but we ought to meet these commissioners like men. I am against sale. My friends, this land belongs to us. If the price was higher I might be willing to consider it. I have my own view in

regard to price. I know that this commission nor Congress would approve it, and it is no use to state it. I think John Omaha has made some wise remarks. Now, if we appoint committee of six asked, I shall make some propositions to you commissioners and the people. It is time to leave and go home, and I move to adjourn.

JOHN J. COLE: You have asked the commission some questions and we want to answer you. You have asked about the price we would pay for your surplus lands, and we have already answered you as well as we could on that point. We have suggested that you appoint a committee of six to consult with the commission in determining the plan of sale, in drawing up an agreement, etc. I do not understand that this at all interferes with the committee of 24 you already have. The object of this small committee is to meet us and suggest the plan you want to adopt in selling these lands, the provisions you want to put in the agreement, etc. This committee will accomplish the very purpose you have enunciated in your speeches today. It will enable you people to agree with us on the plan and terms of sale. We have tried to make it as plain as we could, that we would allow you as much as the Government could afford to pay. If you cede your lands to be appraised and sold, you are to have all the money from that sale, and if your committee of six tells us the tribe would prefer that plan we will draw the agreement accordingly. There have been misunderstandings among you people and between your people and the commission. It is for the purpose of avoiding these misunderstandings and getting near to you that we suggest this small committee. A large body can not work out such details. It will do you no harm to have a committee to

confer with us. You have this matter all in your own hands, and we can make no treaty till you agree to it.

Some things I have said have been misunderstood. When a full council is called I will explain.

BATES LAMBERT: I second St. Pierre's motion to adjourn.

COL. ADAMS: The council is now adjourned, and the commission will withdraw and give you an opportunity to appoint the committee we have suggested.

Three members of the proposed committee were appointed by friends of the treaty, leaving the other three members to be appointed at another time, as a large faction of the tribe opposing the treaty had but few representatives in this meeting and it was desired that they should appoint the other three members.

SATURDAY, *December 17, 1892.*

A council of the whole tribe was called to further discuss the matter under consideration, couriers having been sent to all parts of the reservation to give notice of the council. Much effort had been made by the opposition to keep people away, but the chiefs, headmen, and other members of the tribe, to the number of about 200 were present; Col. Adams occupying the chair. William T. Selwyn, interpreter; Walter Arconge, assistant interpreter.

Council called to order at 1:30 p.m. in the presence of the full commission.

DR. BROWN: My friends, I lived with you for more than a year, and no man in this tribe ever knew Dr. Brown to say or do a thing that was not right. I generally say

what I mean and say it as hard as I can say it. I have been here now about three months on this treaty business and every day of that three months has been money out of my pocket and I have staid [sic] here for no other reason than because I was anxious to make a treaty with you people that would put you in a better condition. I have had no object except to do a good act for you. It seems that for a long time we have got farther and farther from this treaty, and it has been represented to my brother commissioners that Dr. Brown was in the way of this treaty. I believe that this statement is absolutely false. I believe that it is only an excuse urged by the men who wish to defeat this treaty. Still, it does not seem that we can make a treaty under present circumstances and it may be that my judgment is wrong and that I am really in the way, and in order that there may be nothing in the way of you people and the making of this treaty, I have sent my resignation to the Secretary of the Interior and will leave the other two members alone to do this work. I do not believe I am in the way; still I may be. I do not believe there is a man in this tribe, either friend or enemy, who does not know I would work as hard to get a good treaty for these people as any man in the United States.

I never knew my fellow commissioners until I met them here; but from the acquaintance I have had with them I am satisfied that they will work with all their might to make you people a good treaty, and one that will be a lasting benefit to you. If you let this opportunity pass you will regret it for many years to come. This is the one chance that you will have for many years to come that will enable you to make a treaty that is right and for your benefit. I want to say to these men who have been

my friends in this long fight, that you can do me no greater favor than to do all you can to make this treaty. It is natural, when a man feels that he has been wronged, that he should feel resentful; but any man who will let his personal feeling stand between a great good to a great number, is unworthy the name of man. I expect to leave this agency as soon as I hear from the Secretary, and I expect and hope that you people will go on and make this treaty, and if you do, and I should, in years to come, ever see you people, you will be ready to take me by the hand and say that Dr. Brown was one of the best friends you ever had. Now, friends, I want to say when I leave this agency, I am ready to take you all by the hand and bid you good-bye without any feeling of malice toward anyone of you, and if there is any man on this reservation who has any animosity toward me, it is only because he is such a contemptible man that he ought to be considered beneath the notice of decent people. Now I am done and will shake hands with your chiefs who sit next to me, to show my good will through these to the whole tribe.

JOHN J. COLE: My friends, I regret the step Dr. Brown has taken. In the short time I have worked with him I have found him a zealous and faithful worker in the interest of this tribe; still it may be he is acting in your interest in the step he is taking. In this act, as well as every other act of Dr. Brown since I first met him, I believe he is actuated by only the best and purest motives for your good. He has been a zealous worker for this treaty and this people, and by this act he has shown that his interest in this tribe is above his own interest. I wish to say to all what I have said to many of you in private. Dr. Brown, from the day I first met him, has worked in

season and out of season to get the best treaty he thought Congress would ratify. When people came to me with complaints I told them he was diligently working and was a good man for the tribe if Col. Adams and myself are worthy of the very high praise Dr. Brown has pronounced upon us, I hope by our acts we may be able to prove to you he told the truth. I said to you personally I have desired Dr. Brown should go with us to the end. I knew he was working faithfully and honestly to accomplish what we were sent here to do, and hence I discouraged any change; but Dr. Brown asked me to sit down and let him explain. He said to me in the interest of this treaty, as there was opposition to him, he had made up his mind to step aside so there would be no basis for any one to object to the treaty. I said, then if this is your deliberate purpose I will acquiesce in it. Now, I would urge you to remember what Dr. Brown has said to you and bend all your energies to secure this treaty.

COL. ADAMS: I am sorry Dr. Brown has decided to do this. In everything he has done and said since he has been here, it has always been for your good – for a treaty that would benefit you. Though he has been claimed to be in the way of this treaty, some of the men who have opposed him have come to him to go and see the sick members of their families and he has gone. Although you have a doctor of your own, in the goodness of his heart he has gone to see your sick people and thus shown, because he has asked no pay, his good will, his friendly interest in your welfare. I never met Dr. Brown till I met him at Armour on his way here, and since I have known him I have felt that his honesty of purpose was unquestioned, and his faithful and enterprising work in the

interest of this people was worthy of all praise. He could not be other than the earnest man he is if he tried. He has brought this earnestness to his work in the commission, and it has been all used in trying to promote your interests. Dr. Brown is an honest, earnest man, one who has your best good at heart, and his work here proves this. We appreciate the kindly mention he has made of the balance of the commission, and can assure him the feeling there expressed is reciprocal and mutual.

You, his friends, have heard what he has said; that he wanted to stay with the commission and help make this treaty. We hope you will come forward and continue to work with us with all your might, so that your people may rejoice in the benefits this treaty will bring.

DR. BROWN: I want to say, my friends, I wanted to withdraw two weeks ago, but my fellow commissioners opposed it. That was what I ought to have done, but Col. Cole insisted on my staying. Did I not!

JOHN J. COLE: I can make a short answer to that. I would not let him resign.

COL. ADAMS: I was as much opposed to it as Col. Cole, and was emphatic in refusing to consider it for a moment.

JOHN J. COLE: My Dakota friends, I have promised to tell you something about what I found out at Washington concerning your affairs. I met Gen. Morgan, Commissioner of Indian Affairs, and Mr. Belt, his assistant, and Maj. Larrabee, and Judge Allen, and others. All these men are in the Indian Office, and they are all your friends.

They know much about your people, and they are interested in your welfare, and told me many things that would be for your good. They told me much about the Pipe Stone Reservation, but said our commission could not do anything about that. The Supreme Court will have to decide that for you. The Supreme Court decides all important matters between white people and between the Government and the people. It decides matters between the States and between the States and the Government. When there is a dispute about a treaty, no one else can decide it, and when the Supreme Court decides this matter for you it will give you all the rights you have in the Pipe Stone Reservation under the treaty of 1858. While this commission can not settle that matter, we will do all we can to help you to protect your interests in the Pipe Stone Reservation.

They told me all about the scout claims, and I believe these claims are just, and if we make a treaty with you we will provide in the treaty for the payment of those claims.

They showed me the records about your Iowa land claim, and these show that you are wrong about that. Indian Office letter, June 8, 1882, to W.D.E. Andrus, U.S. Indian agent at Yankton Agency, in the treaty of July 15, 1830, proclaimed February 24, 1831, the Yankton and Santee bands of Sioux Indians assent to the treaty at St. Louis, October 13, 1830, and receive $3,000, their part of the pay for the lands sold. This settles that matter, and shows that you have no just claim for lands in Iowa.

I told them that some of you claimed that the treaty of 1858 had not been faithfully lived up to by the Government. They told me that those who made that statement

were mistaken. Then they went to the books and made out this paper, which I hold in my hands and gave it to me. We have heard a great deal of complaint about this treaty of 1858. Many of your speakers have told us that the Government has not faithfully carried out that treaty.

Now, exactly the reverse of this is true. The Government has not only carried out that treaty faithfully, but it has also given to you as a free gift as much as was due you under the treaty. The paper contains the appropriations for subsistence and civilization only. The period covered is for twenty-three years – from 1871 to 1893, inclusive. For seven years, from 1872 to 1878, inclusive, the appropriation is made jointly with other appropriations; and the amount used for this tribe is not specified. One year the appropriation was $25,000; for eight years the amount varied from $40,000 to $60,000, and during the past seven years it has been $35,000 per annum. In the sixteen years you received $650,000, and it is safe to estimate that you received $285,000 during the seven years. This makes $935,000 you have received for subsistence, etc. In addition to the $35,000 which you are enjoying this year, the Government is giving you about $25,000 for the support of your schools and other purposes.

The sums I have mentioned above do not include the appropriations for your schools, etc., and I estimate that the Government has paid out for your schools and other purposes, besides subsistence, at least, $475,000. All this amounts to $1,410,000, and is a free gift of the Government. Under the treaty of 1858 you have received to date $1,410,000. So you see the Government has not only paid you all that was due under the treaty, but has also given you as much more.

I also saw the great Secretary of the Interior and had a talk with him about this business with you, and he instructed me to deal fairly with you and do what is for your good, but that I must also do what is fair and right for the United States. He is your friend and will support us in everything we do for your good. He is very anxious that we should make this treaty because he thinks it is for your interest to sell your surplus lands. There is much more information which I got at Washington which I would like to lay before you, but will not do so now.

I have been trying ever since my return to get at you people, and I shall keep trying until I find you and you find me. I think you do not quite comprehend your present situation. You have told us much about the ills you now suffer and the advantages of your former life. Well, this is natural. Men's hardships they forget when they are past; their achievements they remember. Their failures, their sufferings they bury with the dead past, but their deeds of valor they hand down to their children. So it seems to be with you. I have told you that you wear upon your shoulder large heads, and that a people with large heads are usually superior to those with smaller heads, and I may properly say that you feel the weight of your heads; but are you using them to the best advantage? You have been a great people; you have been a powerful people. You have felt your superiority and have held yourselves above other people around you. As huntsmen you were fleet of foot and sure of aim. As warriors you were brave and feared no enemy. To be a Sioux was an honor, and you were proud of your name and your fame. Thus was it with your fathers.

But conditions have changed, the country has changed from what it was when your fathers lived here. Then the forest and plains were wild and unbroken, and buffalo, elk, deer, antelope, and other game abounded, and the chase was the only means of securing a living, and self-protection was the only means of safety. But how different are the conditions at the present time. The white man has come, civilization has come; the wilderness has been reclaimed and you are now surrounded on all sides by farms and fields. Horses, cattle, sheep, hogs, and other domestic animals have taken the place of wild animals. Law and order reign and you live in the midst of peace, security, and plenty. This reservation alone proclaims the old time and the old conditions. But even here the means of your former mode of life have vanquished. The tide of civilization is as resistless as the tide of the ocean, and you have no choice but to accept it and live according to its methods or be destroyed by it. To accept it requires the sale of these surplus lands and the opening of this reservation to white settlement.

You were a great and powerful people when your abilities and energies were directed in harmony with the conditions which surrounded you, but the wave of civilization which swept over you found you unprepared for the new conditions and you became weak. In the ways of the white man your men became as boys, almost as babes. But your young men are growing up in harmony with these new conditions, and the same elements of character which made the Sioux great in times past will make him great again. But you must accept the new life wholly. You must break down the barriers and invite the white man with all the elements of civilization, that you young men

may have the same opportunities under the new conditions that your fathers had under the old. Then, if you are industrious and virtuous, you will again become a great people.

Now this is the matter which you have to decide, and we ask you to consider it well and decide wisely. We shall not complain because you deliberate long, but we hope you will take hold of this business in good earnest and help us to conclude it in a manner that will be satisfactory to you and to the Government. In this treaty the Great Father seeks your welfare, and there is no inducement for this commission to work more in the interest of the Government than of the Indian; therefore, we hope you will send us the small committee we have asked for, that we may confer with you through them and draw up a treaty which will be wholly satisfactory to you.

COL. ADAMS: We are informed that part of the tribe appointed three members of the committee we asked for. We hope the other part of the tribe will appoint three members to represent them. The commission desired to confer with this committee and we hope you will not delay in appointing it.

The council is now adjourned.

WEDNESDAY, *January 11, 1893*

A council was called at the dance house, near White Swan. Commissioners Cole and Adams present. Walter Arconge and Thomas Arconge, interpreters. Chief White Swan, with about 45 other Indians, present.

Commissioner Adams called the council to order at 3 p.m. and said: After our long ride through this severe

snow storm we are gratified to find nearly half a hundred of you here to consider this important business. We did not come here today to talk, but to show you what we have done, and Col. Cole will make some explanations and read to you the treaty which we have blocked out to submit to you for your consideration.

JOHN J. COLE: We are very much in earnest in our efforts to come to an agreement with you people for the sale of your surplus lands, and I assure you that it affords me great pleasure, on this stormy winter day, to take by the hand your old chief here, Mr. White Swan, and so many of his people. This shows that you, too, are in earnest in this matter.

We have made a rough draft of an agreement which we wish to read and explain to you. We have sent a copy of this agreement to Secretary Noble for his approval and criticism. It is our desire to secure a treaty which will be fair to you people and satisfactory to the Government, and in drawing up this agreement we have tried to provide in every way we can, for the future welfare of your people, and we hope our work will meet with your approval.

Mr. Cole referred to the recent purchases of Indian lands by the Government, from the Sissetons, from the Cherokees, and others, and showed that the commissioners were offering the Yanktons a larger price than was ever before paid for Indian lands. He then explained the principal provisions of the agreement so that when it would be read to them they would see the relation of each article to the whole agreement and have a better understanding of it.

He then read the agreement, article by article, explaining anything that was not fully understood by the Indians. At the conclusion of reading the agreement he read letters from Rev. John P. Williamson and Rev. Joseph W. Cook, indorsing the agreement in all its provisions including the price offered for the land.

COL. ADAMS: My friends, you have now heard the agreement read, and I will tell you in a few words why I think you should favor it. He then explained the many advantages that would accrue to the Indians from this agreement, and invited expressions of opinion from them.

White Swan and one or two others got up and expressed their gratification at having the treaty read to them and said they would consider the matter, though they did not talk very favorably.

The council was then adjourned.

FRIDAY, *January 13, 1893*

A council of the tribe had been appointed by the commissioners at White Swan, for Wednesday, January 11, and at Cold Spring for to-day, to read and explain the agreement, and they had sent couriers to all parts of the reservation to notify the people that they might suit their convenience in attending one or the other of these councils. The opposition was very active to prevent the Indians from attending councils, and owing to this fact and the stormy weather less than 50 Indians were present at the White Swan council.

Commissioners Cole and Adams, with Walter Arconge and Thomas Arconge as interpreters, had proceeded to Cold Spring to hold the council according to

appointment, but found that the opposition had so cleverly manipulated as to wholly defeat the holding of a council.

SATURDAY, *January 14, 1893*

Commissioner Cole had provided a feast for the chiefs and invited them to the agency mess-house to dine with him and discuss the treaty.

The chiefs were all present, Mr. Philip De Loria, chief of band 8, being represented by Peter Le Grand.

The chiefs were much pleased at the elegant dinner that was served, and expressed their appreciation of the attention thus shown to them.

After the last course had been served Commissioner Cole said: My friends, I am glad to be honored on this occasion by the presence of all the chiefs of the Yankton Indians. I have tried several times to get you all together but did not before succeed. I have had the pleasure of several small parties of your chiefs and headmen to dine with me and talk over this important work which has brought us together on this reservation, but I have made a special effort to honor your tribe today through you, their chiefs and representatives and their old interpreter here. I sent to St. Louis for these fine candies, etc., that each of you might taste the delicate luxuries which civilization brings, and take a box home to your families. These little brushes, which cost but 2½ cents each, are to illustrate the advantages which the white man can bring to you by cheapening the cost of useful articles.

To show the good will of the Government and of the commission toward your people, I sent for an elegant silk

muffler for each of their chiefs, but by a mistake they did not come with the other things, but have been sent by mail and I will give these to you at another time. The treaty book, which I have told you about in some of my previous talks, has come, and I am sure you will be pleased with it.

I have been much interested in the conversation we have had to-day. I find by the inquiry I have just made that Mr. Jumping Thunder is your oldest chief, age 76, and that my brother, Mah'piyato – who gave me his name on a previous occasion like this – is your youngest chief, age 60. The combined ages of your chiefs is 542 years; of the two commissioners present with you, 115 years; your interpreter, 60 years; total 717 years. Surely the wisdom of this combined experience should enable us to do this business greatly to the interest of your people.

I desire that you shall do the balance of the talking on this occasion, and we will now retire to the adjoining room, when I will ask you to respond to the following toasts:

Toast: We regret the absence of Mr. Philip de Loris, chief of band 8. Response by Mr. Peter Le Grand. Toast: The white man's mode of feasting as compared with the Indian mode. Response by Mah'peyato Itancon Tonka. Toast: The work of the Yankton Indian Commission. Response by Commissioner Adams. Toast: The interest of the Yankton Indians in selling their surplus lands under the treaty prepared. Response by Mr. Charles F. Picotte. The toasts were read and responded to with interest and animation, after which the council adjourned.

SATURDAY, *January 21, 1893*

Council met by appointment, couriers having been sent to all parts of the reservation to notify the tribe and to inform them that the commissioners would present an agreement for their signatures.

Commissioners Cole and Adams were present, and the chiefs, headmen, and other members of the tribe to the number of 200 Indians were also present. William P. Selwyn, Charles F. Picotte, Walter Arconge, and George Stricker, interpreters.

The council was called to order at 1:30 p.m. by commissioner Adams, who said; My friends, we have called you together this afternoon not for the purpose of talking, but to submit to you the work of this commission for your approval, but as your agent is present with us, and as he has manifested so much interest in this matter we wish to make an exception in his case and invite him to say a few words before we proceed with the regular work of the council

COL. FOSTER: I have been asked to say a word to you and I appreciate this privilege for I feel interested in the work you are doing. I have been familiar with the work of this commission and have heard the treaty read which they now propose to submit to you, and I think it is a very good treaty, and if you want to sell your surplus lands, it is probably as good an agreement as you will ever get. Under the treaty of 1858 you sold a vast tract of land for but littler more than you will get under this treaty for the small amount of surplus land which you have left. I think the provisions of this agreement are very favorable to you, and if the price is satisfactory, I see

no reason why you should not sign it. But you understand, of course, that you are not compelled to sign the treaty if you do not desire to do so. If you do not want to sell your lands, or if the price or terms of the treaty are not satisfactory to you, you have a perfect right to decline to sign and of these matters you are the best judges. You must do what you want to do, and what you think is for your best interest. The commission has been here a long time, and they have seemed to work hard and faithfully to consummate this matter, and if the agreement which they offer you is satisfactory to you, I hope you will sign it. I hope you will give careful attention to the reading of the treaty, and then let each one do as he thinks best.

JOHN J. COLE: My friends, we have called you together to-day not for talking but for action. We have drawn out an agreement in full, embodying all your demands as we understand the, and we now propose to read and interpret this treaty to you and then ask you to sign it; but before proceeding to read the treaty I wish to make some explanations which will enable you to understand it better when it is read and interpreted.

This treaty has been drawn with very great care to try to provide in the best way possible to tide you people over from the tribal condition to the condition of full citizens of the United States. Before drawing the treaty we consulted freely with your missionaries and other white friends, with your chiefs and your headmen, to try to find out what provisions the Indians want in this treaty, and what will be required for the best interest of the tribe. In drawing the treaty we have consulted with your missionaries almost daily, submitting to them our work and asking for their assistance in this matter. After

making a complete rough draft of the treaty, we on the 10th instant, submitted it to Secretary Nobel for his consideration and approval. I have here his dispatch of the 17th instant, reviewing the agreement in full and suggesting some changes which he desired as to make in it. These changes we have made, and the agreement as we now present it to you is exactly in accordance with his suggestions, and as fully approved by him. In his dispatch he says: "The $600,000 consideration offered is deemed sufficient to secure full and complete relinquishment of surplus lands to the United States. The provisions of section 5, however, not considered materially objectionable, nor those relating to the 'scouts.'" Thus you see that the price we have put into this agreement is considered by him to be a liberal one. In his dispatch, after pointing out the modifications which he desired us to make, he says: "The agreement thus modified will, I believe, be a good one for the Indians."

After completing this agreement we submitted it to your missionaries, and I wish now to read to you what they say about it:

Greenwood, S. Dak.,

January 3, 1893

DEAR SIR: I have read the agreement you present the Yankton Indians, by which the Government would pay them $600,000 for their surplus lands.

I can say to the Indians that I believe the terms of this agreement are the most liberal that could b granted them at this time, and that if this agreement is consummated I have no doubt that the stipulations will all be

faithfully carried out. Also I consider the provisions for the care of the poor, for schools, and for court expenses to be very judicious as begin preparatory to full citizenship. And further there is no cause of apprehension that this agreement will in any way interfere with the treaty of 1858.

John P. Williamson

Col. John J. Cole,
U.S. Commissioner

JANUARY *3, 1893*

DEAR SIR: I have heard read by you at different times, and discussed with you and others, the draft of the treaty or agreement prepared by your commission and which you propose to submit to the Yanktons. I here express to you again what I have already said to you, and to others capable of judging, that I am highly pleased with it, and I think it is a most advantageous and liberal offer. I can not but think that it will be so considered by the friends of the tribe who have their best interests at heart.

I think its general provisions are decidedly in the interest of the Indians in their present needy condition; it establishes the condition and protects the rights and interests of the large number of mixed bloods and takes away that "bone of contention," and removes the fear that they may be thrown helpless upon the world. It provides for the settling of the vexation "scout claim," and will procure the settlement of the status of the Red Pipestone Reservation. Again, I think its provisions, as to the poor and helpless, as to schools, and as to securing

recognition and justice in courts of law, are most wise and necessary to conduct the Yanktons through the transition period until they merge into full citizenship and have their share by right in all public benefits.

As to the price offered, $600,000, for the surplus land of the Yanktons, I am decidedly of the opinion that it is a most liberal price, and that it is all that the Congress of the United States will ever approve. And when the provisions of the treaty are taken into consideration, where Congress is pledged to add an equal or larger amount in several items, it swells the price not only to what is liberal, but generous.

I believe that the benefits which will accrue from a direct sale of the land are far greater in the long run than can be realized from the plan by appraisement.

Sincerely yours,
Joseph W. Cook,
Missionary to the Indians

HON. JOHN J. COLE, *Commissioner*

So you see that this agreement is fully approved by the Secretary of the Interior and by both of your missionaries, and it is, we believe, as good a treaty as was ever offered to a tribe of Indians, and we hope you will see it to be to your interest and sign it.

There has been some question by a few of the Indians in regard to the authority of this commission to negotiate with you in this matter, etc., and on this point I wish to read you the following dispatch sent to your agent by the Secretary of the Interior:

FOSTER, Agent Yankton Agency, Springfield, S. Dak.:

Copies of following telegrams are sent for your information: Greenwood Agency, S. Dak., (via Delmont, S. Dak.) 27th Secretary of the Interior, Washington, D.C.

The undersigned committee at Yankton Agency, duly called as council, are authorized to request the commission sent out by you be recalled. The people, as tribe, do not desire further negotiations can they have no confidence in being commission. When bribery is resorted to influence the Indians, at properly-call council decided by vote in the presence of commissioner to not sell further, the commission allowed the question.

Phelix Brunot
Charles F. Picott
Peter St. Pierre,
Committee.

DEPARTMENT OF THE INTERIOR
Washington, D.C.,
December 28, 1892

Your telegram received. You submit no proofs. Have had information as to your charges and think same unfounded. Brown has resigned and Mr. Funck, of Nebraska, appointed in his place. The commission will know when to ask to be recalled. The reputation of its members will be protected by the United States and must be treated with respect and courtesy.

John W. Noble, Secretary Interior.

You will notify the Indians that the commission represents the United States and must be treated with all due respect and courtesy. This is important and must be

enforced if there is any necessity. You can write a report direct.

John W. Noble, Secretary Interior.

Mr. Phelix Brunot and others, Committee, Greenwood, via Delmont, S. Dak.:

We come to you with full power to negotiate with you in this matter, according to the best of our judgment, without limit or restriction, but any agreement which we make with you is subject to the approval of Congress and will not be complete until it is ratified by Congress.

From the time we first came to you many of your people have expressed a fear that if you make a treaty with us its provisions may be changed after it is signed, either by this commission before it reaches Washington, or by the officials in Washington. To protect you in this matter we have had this treaty book made for you. Many of your people understand how an instrument of writing can be copied by letter press into a book like this, so as to make an exact duplicate of it, with every line and dot just as it is in the original paper. Now, when this agreement is signed, it will be thus copied into this book, which will be left with you, so that you will have an exact copy of the original treaty, containing every pen stroke that is in that document, so that not one letter can be changed in the original treaty without being detected when compared with this copy. To further protect you, so that you may know that no possible change can be made, we shall, as soon as this treaty has been read, interpreted, and explained to you, put it under seal in the presence of witnesses and then deliver the seal into the hands of one

of the witnesses, who will be present when the seal is broken to see that it is all right, so that no possible change can be made in it after it has been read to you until it is copied into the treaty book.

The various provisions of this treaty have been read, interpreted and explained to your people in small general councils and to many groups of your chiefs and head men, so that we think the provisions of the treaty are already pretty well understood by most of your leaders, and, through them, by a majority of the tribe.

We requested Mr. Battes Lambert to be here as a witness and interpreter this afternoon. As he is not present, I will ask Mr. George Stricker to act in his place. We have now present four interpreters on duty – Mr. William T. Selwyn, Mr. Walter Arconge, Mr. Charles F. Picott, and Mr. George Stricker, and I will ask each one of these interpreters to watch carefully the interpretation of the agreement as it is read to you, and if they discover any error or mistake to call attention to it; that a perfect interpretation of the treaty may go to your people, as we desire that there shall be no mistake or misunderstanding in any of its provisions. Also, there are many members of your tribe now present who understand both the English and Dakota languages, and we will ask them to call attention to any error which they may discover. I will now ask Mr. Charles F. Picott to sit here by my left side and Mr. George Stricker to sit here by my right side, where they can look over and see every word of the treaty as I read it, and see that I read it to the interpreters, every word, just as it is written in the agreement. There is an exact duplicate of this agreement here, and your agent, Mr. Foster, and Col. Adams will also look over that as I

read, and if I make any mistake in reading they, or the two witnesses here, will call attention to it.

Under the above provisions Commissioner Cole then read the agreement verbatim and it was interpreted to the tribe by Walter Arconge and William Selwyn, one or two slight errors in interpretation having been noted and corrected.

At the conclusion of the reading of the treaty Commissioner Cole said: The treaty is now ready for signatures, and we will ask you to come forward and sign.

Many Arrows arose and commenced speaking in favor of the treaty, but Col. Adams called him to order, informing him that no discussion would be indulged in, either for or against the treaty, as we had come there not for discussion but for action. Medicine Cow also arose desiring to speak, as was supposed , but he was informed that the above statement was general and referred to every one present, and as it was nearly night we would have to devote the whole time to taking signatures and could not indulge in any talking.

Col. Adams further said: You have heard the agreement read, and as its various provisions have been read and explained to many of your head men during the past two weeks we think you now understand all its provisions thoroughly, and we now ask you to come forward and affix your names to it. After a few moments delay to give the chiefs an opportunity to come up and sign the treaty, first William T. Selwyn affixed his signature to the agreement and between 50 and 60 other Indians followed him, after which the treaty was put under seal and the council adjourned, to meet again on Monday morning,

January 23, at the police office for the purpose of continuing to take signatures.

Monday, January 23, 1893

Council met at the police office at 10 o'clock a.m., pursuant to adjournment. Commissioners Cole and Adams present. Charles F. Picotte and William T. Selwyn, interpreters, Battise Lambert, witness. The council was called to order by Commissioner Adams. The seal upon the agreement was examined by the witness and found to be all right, and the taking of signatures was resumed and continued through the day. At the close of the day the agreement was put under seal, and the council was adjourned with the announcement that it would convene from day to day for the taking of signatures until the agreement was fully signed.

Saturday, January 28, 1893

Council met at the police office from day to day during the week for taking signatures to the agreement. Commissioners Cole and Adams present, with Charles F. Picott and William T. Selwyn, interpreters; Battise Lambert, witness.

The signing progressed slowly, as the opposition sought by every possible device to keep men from signing, even when they had come from the most remote part of the reservation for that purpose. In this way many who had come for the express purpose of signing the agreement were induced to go away without doing so.

Commissioner Cole said: The Government is giving this tribe as a free gift $60,000 this year; and you all

participate in this benefit as members of the tribe. The Government also has a large number of these Indians upon the pay rolls as employees. Indians are employed as clerks, as policemen, as mechanics, as laborers, etc., a very large number of them, and these employees get a double benefit from this bounty of the Government for they not only get a benefit as members of the tribe, but the money is paid directly into their hands for their services. Now, why is it that we can not get these employees to sign the agreement? Of all the Indians employed at this agency but two have signed. Louis Claymore and one other mechanic signed, and all the balance are against us, the office is against us, the police office against us, the shops are against us, the whole agency is against us and is a hotbed of opposition, so that men who come here to sign are sent away without doing so. Why is it! We are offering you an agreement which has been approved by Secretary Noble and by both of your missionaries, and so good in all it provisions that not one of the opponents has been able to point out a single defect, and yet the men who should be the very first to favor it are opposing it. There is a cause of this, and I would like to know what it is.

At the close of the day the agreement was sealed up as usual, and the council was adjourned to continue its sessions the coming week.

TUESDAY, *January 31, 1893*

Council met pursuant to adjournment from yesterday. Commissioners Cole and Adams present, with Charles F. Picotte and William T. Selwyn, interpreters;

Battise Lambert, witness. The taking of signatures proceeded as usual.

COL. ADAMS: We have not been much rushed by signers during the past few days, and we would like to have the clerk keep a little busier. I see a great many men before me who have promised to sign the agreement and who have not yet signed. I would just say to them that this is an excellent time for a little pen practice of that kind, and I would like to have you step up and perform it. Let the young men who can write come up and sign their own names, and the old men who can not write can come up and touch the pen and let the clerk put their names down for them. I know there are a great many men here who want to sign the treaty and I hope they will not be afraid of anybody, but come forward now and do so. If anyone is advising you not to sign the treaty they are advising you against your own interests and against the interests of your tribe, for you all know this is the best treaty that was ever offered to a tribe of Indians.

JOHN J. COLE: In the council on Saturday I asked why none of the Government employees signed the agreement. This question was received in silence, but I have since been told by several persons that the reason is that some of the white employees of the Government are doing all they can to keep Indians from signing and to defeat the treaty. I have said that we can make this treaty in spite of the opposition. When I made that statement I did not expect to find our friends arrayed against us.

This commission has been asked to recommend that when the agency plot is divided up, the employees of the Government shall have a piece of ground taking in their

improvements. This suggestion, I believe, comes from your agent, and has absolutely nothing to do with this treaty; it was definitely so stated in the proposition and I can see no objection to it. But the opposition has seized upon this to cast an aspersion upon the commission for the purpose of defeating the treaty. To remove this weapon out of their hands I will now state that the commission will have nothing at all to do with that matter.

I desire to make one other explanation. Several men have sent other men here to sign the agreement for them. On the day we commenced taking signatures a man from Chouteau Creek sent in his name to be signed to the agreement. I wish to state that we can not take signatures in this way. If men want to sign the agreement they must come here and sign it. If any are sick and unable to come, we will go to their houses and take their signatures.

In conclusion, I will say that we believe a majority of the Yankton Indians want to sell their surplus lands under this agreement, and we will continue these councils and give them a chance to do so.

Several signatures were added to the agreement during the day, among them that of the official interpreter and many of his friends.

At the close, the agreement was sealed up in the usual manner, and the council adjourned to meet again to-morrow morning.

SATURDAY, *February 4, 1893*

Council met pursuant to adjournment yesterday, having convened continuously during the week for taking

signatures. Commissioner Cole was present, with Charles F. Picotte and William T. Selwyn, interpreters, and Battise Lambert, witness.

Commissioner Adams was absent, having been called away from the reservation by business on the second instant.

The signing of the agreement has progressed with varying success, sometimes with satisfactory rapidity and sometimes coming almost to a standstill.

COMMISSIONER COLE: I desire to say a few words to you at this time. I have always felt confident that I could make this treaty because I knew that your people want to sell their surplus lands and I know I could offer them a liberal price and a favorable treaty, and I still feel entirely confident of success. Indeed, we already have nearly names enough to make the treaty. All elements of the tribe are now represented upon the list of signers, but as we approach nearer to the requisite number to make a treaty the opposition seems more determined to defeat that purpose, and all kinds of false stories have been invented and put into circulation about the Commission, about the agreement, etc., for the purpose of defeating it. If I should undertake to run down all the false statements and answer them it would take all my time, and I shall not do this, for I am much more interested in making this treaty, which I know will be a good thing for the Indians and a good thing for the Government; but I do want to make brief references to some of this uncalled-for opposition.

You object to the commissioners sending out couriers to notify the people of council that have been called to

influence them to come in and sign the treaty, etc., but you, who make this complaint and who are opposing the Government in this matter have sent couriers all over this reservation day and night to work against the treaty and get men to sign a paper pledging themselves not to sign the treaty, etc., to influence men against attending the councils and against the treaty in every way you can. I was told that one of your couriers went to a large party of Indians and, without making any explanation of his proposed action, he went around to each man and got him to touch his pencil. He then signed all their names to a paper pledging them not to sign the treaty, and told them that they could not now sign the treaty, as they had signed a paper pledging themselves not to do so. It is the opposition which has made it necessary for the commissioners to send out couriers.

Without stopping to enumerate the various charges which have been put in circulation I will here state publicly what I have stated many times recently to different persons, that any man on this reservation, white, red, or mixed blood, and whether he is a member of your tribe or not, is at perfect liberty to state publicly anything that I have said at any time, in any place, or under any circumstances, provided the statement shall be full and complete, and not partial so as to convey a meaning different from that intended by me. I mean every word of this statement and if any man knows of one thing that is wrong in the acts of this commission I challenge him to make the statement as I have just indicated.

I do not believe that any treaty with Indians was ever made in a more open and above-board and straightforward manner than this one, nor do I believe that more

pains were ever taken to acquaint every member of the tribe with the exact provisions of the treaty and have the people act intelligently and understandingly in signing it. These councils will continue to give your people an opportunity to sign the agreement. At a later hour than usual the agreement was put under seal and the council adjourned until Monday morning.

TUESDAY, *February 7, 1893*

Council met pursuant to adjournment, having been in session yesterday. Commissioner Cole was present, with Charles F. Picotte and William T. Selwyn, interpreters, and Battise Lambert, witness; Commissioner Adams still absent.

During the progress of the council Mr. C.H. Bonnin came in with Sam Packard and, addressing the commissioner, said: Mr Packard wanted me to come in with him and request that his name be taken off the treaty. He went on to explain that Mr. Packard was threatened with dismissal, etc., but Commissioner Cole, interrupting, said: You need not make any explanation of this matter, for I know all about it. Mr. Packard signed the treaty of his own free will, and he can not now have his name taken off; and I wish now definitely to state that no man can have his name stricken off after he has signed the treaty, and you might just as well understand this. If we should proceed in this manner we might be here an indefinite time taking signatures and then striking them off because the opposition had got the signer dissatisfied and then taking the signatures a second time. There is no sense in such a procedure and we will not inaugurate it. If a man wants to sign the treaty he is at liberty to do so and there

is no compulsion to make him sign against his will, but when he has signed his name will remain there. I stepped out of the office a moment yesterday to visit Col. Foster's office, and Peter St. Pierre took advantage of my absence and struck his name from the list without letting the witnesses know what he was doing. Peter St. Pierre signed the treaty on Friday, the 3d, and it was all right until yesterday morning and it would still be all right if I had acceded to his unreasonable demands. We are paying Mr. William Selwyn and others who are assisting us in this work $1.50 per day, and I wanted St. Pierre to assist him in some work for the commission, which he was perfectly willing to do, but demanded $2.50 per day.

I told him the commission could not pay such a price, but that he could assist Mr. Selwyn better than anyone else I knew of at the particular work I wanted done and, as the work would take but a few days, I would make an exception in that case and would allow them both $2 per day for that particular work, even if I had to pay the extra out of my own pocket. He made no answer to this, whether he would or would not do the work at that price, but waited around until Mr. Selwyn was ready to commence the work, and when I asked him if St. Pierre was going to help him he said he did not know and I told him to go and find out. He came back and said that St. Pierre would help him, but would not work for less than $2.50 per day. I told Mr. Selwyn, very well, I do not propose to be bulldogged in a matter of this kind and I will assist you myself, and when Mr. Selwyn and I took up the work and Pete St. Pierre found he had lost his job he was angry and took advantage of my momentary absence to do a wrong and mean thing, and I wish it to be understood

that this will not be accepted as a precedent for such action on the part of signers. Then addressing Sam Packard, he said: Sam, what is the matter with you today? Who has been talking to you to get you dissatisfied over this matter? You came to me last week and said you were dissatisfied over having signed the treaty. I knew then it was because some of the opposition had been talking to you after they found you had signed, but I explained the whole matter to you fully and told you that I knew nothing about what Mr. Picotte might have said to you, but that the commission had never instructed him or anybody else to make the statement that any person would be discharged for not signing the treaty or advanced for doing so; and you came to me at the mess house last Saturday night and shook hands with me and told me that you had seen Charley Picotte and had had a talk with him and that it was all right now and that it was all right between you and Charley, and all right between you and the commission, and that you were now satisfied with having signed the treaty, and I am confident that you would not have raised this matter again if those opposing the treaty had not talked you into it, and I am sorry to see you act so foolish and make such a boy of yourself.

C.H. Bonnin. Then you refuse to let him take his name off the list?

John J. Cole. I do, most emphatically. C.H. Bonnin. We are to understand then, that you will not let any names be taken of the list after they have signed?

John J. Cole. That is exactly what I want you to understand.

C.H. Bonnin. I suppose, then, the commission will do this business their own way, but I think they are exceeding their instructions, and our people are not satisfied with the way this treaty is being made.

John J. Cole. It is unfortunate that the instructions which were sent to us when we were appointed on this commission should have been given out to form a basis of criticism by those who are opposing this work, but we get our instructions from Washington, and not form the enemies of this treaty, and we are responsible to the Department of the Interior for what we do, and not to those who are opposing us on this reservation.

There was some little side talk in a rambling and desultory manner, after which Bonnin and Packard retired, and the business of the council proceeded in taking signatures.

At the usual hour the agreement was put under seal, and the council adjourned to meet again to-morrow morning.

Saturday, *February 11, 1893*

Council met pursuant to adjournment, having been continuously in session, from day to day, since the 7th. Commissioner Cole was present, with Charles F. Picotte and William T. Selwyn, interpreters, and Batties Lambert witness; Commissioner Adams still absent.

But little progress had been made in taking signatures, as the opposition, under the lead of some of the white employes of the Government were straining every nerve to prevent the signing of the agreement.

COMMISSIONER COLE. We have almost enough names to make this treaty and could have had it completed long ago, but this agency has become a perfect hot-bed of opposition and men are influenced against the treaty or intimidated to such an extent that it is almost impossible to take signatures. As soon as a man indicates his intention to sign the treaty, influences are brought to bear upon him to keep him from doing so.

Some men near Cold Spring sent word to us that they wanted to sign the agreement. One was a sick man and one was an old man, nearly blind, and we went there to give them a chance to sign; but when we got there one of the opposition, White Cloud, I believe it was, followed us from house to house to prevent the signing.

There also seems to be a systematic effort to keep the Indians who have not signed out of the way and out of the reach of the commission. Large numbers are off the reservation, and usually the absent ones are those who have not signed the agreement. I have information which satisfies me that many are threatened and intimidated to keep them from signing. The commission have not resorted to any such methods to secure signatures, and I wish to ensure you that we will do all in our power to protect men in the free exercise of their will in the matter of signing this treaty. We shall continue to give the people an opportunity to sign until all have signed who desire to do so. We shall endeavor to give an opportunity for signing the treaty at the agency when desired, but we shall also hold councils and take signatures at other places on the reservation.

The opposition are industriously circulating the report that Indians who are in the employ of the Government are threatened with dismissal if they do not sign the treaty. I again state that this is absolutely false. The commission have never sought to influence men to sign the treaty or to favor it by promises of a reward or threats of any kind, and we have used no influence either at Washington or on the reservation to have men promoted or favored for signing the treaty nor to have them dismissed or discriminated against for refusing to sign or opposing the treaty. To secure the dismissal of one of the Indian employes we would have to apply to your agent, Col. Foster, and he will tell you that the commissioners have never made any effort to have a man favored for signing the treaty or discriminated against for not signing it.

Every prominent man of your tribe who signs the treaty is immediately charged with being bribed. Mr. Homer Johnson came down here on the 4th instant, and it was charged that he was in a dark room with Mr. William T. Selwyn, and his men all the evening paying them off. I was with Mr. Johnson during the whole of the fore part of the evening. I went directly from Mr. Johnson's company to meet Mr. Selwyn and his friends in the dark room spoken of . We were in Col. Foster's office in the rear of the police office and had only the light of the stove for the reason that there is no lamp in that room. We were in there counseling about the treaty but no money was paid. I was with Mr. Selwyn and his friends until they dispersed at bed time, and I know of my own personal knowledge that Mr. Johnson did not meet Mr. Selwyn or any of his men that night. Now this is in keeping with all

the ingenious stories circulated by the opposition and I tell it to show you how the opposition manufactures reports against the work of this commission. In this connection, I want to state that there is not upon this reservation a corruption fund to the amount of one dollar, more or less, nor has there been during the progress of this work, and to the best of my knowledge and belief not one cent has ever been used to bribe men to sign the treaty or to favor it.

MONDAY, *February 13, 1893*

A feast was issued and a council called at Red Bird's house near Cold Spring. Commissioner Cole was present, with Charles F. Picotte and William T. Selwyn, interpreters. Commissioner Adams still absent from the reservation.

Though the day was very stormy, about 50 Indians were present, the majority of them being those who had signed the treaty. A large number of nonsigners who were expected to be present at the council had been taken away from the reservation to Nebraska for the day. The agreement was read and interpreted and explained, and several of those who were present promised to sign the treaty at another time, but none signed at this council. The feast was then served, all partaking, and the balance of the time was put in social entertainment, with occasional allusions to the work of the Commission, after which the agreement was put under seal and the council adjourned.

SATURDAY, *February 18, 1893*

A general council of the tribe was called at the agency, in the presbyterian church, Commissioners Cole and Adams and Special Agent Col. James A. Cooper were present, also chiefs, headmen, and other Indians to the number of about 200, Commissioner Adams having returned to the reservation on the 16th instant, William T. Selwyn, interpreter; Henry Bonnin, interpreter, for the opposition. The council was called in order at 2 o'clock p.m. by Commissioner Adams.

COL. ADAMS. This council has been called to discuss the treaty and to hear from those who claim to have complaints to make against the commission, and as there are probably a large number of speakers here there may not be time for all to speak at as great length as they may desire, and to make the matter fair of both sides I will give one half of the time to the opposition and one-half of the time to those favoring the treaty, and the opposition can have the first part of the time. This was agreeable to the opposition and he asked them to proceed. They answered that they could not do so, as Henry Bonnin, their interpreter, was not yet present. Col. Adams suggested that as William T. Selwyn and several other interpreters were present that they might proceed with another interpreter and asked them if they would not proceed. This they declined to do, saying that they wanted Henry Bonnin, and after further delay Henry Bonnin was sent for.

JOHN J. COLE. While the opposition are waiting for their interpreter I desire to make a few remarks, and will say that this time will not be taken out of the time of the

opposition, but the time for debate can commence when they are ready to talk.

We are offering the Yankton Indians so liberal a price for their lands and have drawn for them so good a treaty that the opposition find it difficult to keep the Indians from signing, and all kinds of stories and false reports derogatory to the commission and their work have been put into circulation to influence the Indians against this treaty. The commissioners have had but one purpose before them in this work, and that was to deal fairly with the Government, and fairly and liberally with the Indians, and to make just as good a treaty for your people as we could draw up. Col. James A Cooper, who is present with us this afternoon, was sent here by the Government to disburse for this commission, and after he came here I asked the department to instruct him to investigate the methods of making this treaty, and he has been so instructed, and if this commission has done anything wrong, I want you to show it up; and that no one may be restrained from the freest expression by any feeling that it would be a violation of confidence, I will here repeat, what I have before stated, that any man on the reservation, white, red, or mixed-blood, and whether he is a member of the tribe or not, is at perfect liberty to state publicly anything that I have said at any time, in any place, or under any circumstances, provided that the statement be made full and complete, and not partial so as to convey a meaning different from that intended. No man need consider anything I have said to him, or which he has heard me say to others, to be a matter of confidence, but he is at perfect liberty to state it all.

Henry Bonnin having arrived, the opposition took the floor. Several speeches were made, objecting to the agreement in a general and rambling manner on account of the price and against the commission, claiming that men had been influenced to sign the agreement who did not understand it, and do not know, what they have signed for, etc. They said the provisions of the treaty were all very good, but they wanted a larger price for their land, and they thought the commissioners were not doing the business as the Government had instructed them to do. They did not think it was right to go about over the reservation to take the signatures of sick men and old blind men, etc. They did not think it was right to send couriers over the reservation to notify men to come in and sign the treaty.

William Ironsoldier. I want to express my opinion in regard to the way the Commissioners are trying to make this treaty. I object to them sending men around over the reservation to get men to sign the treaty. I object to them going to people's houses to get them to sign the treaty. I do not think that they are doing right at all. I do not think they are doing as they have been instructed to do by the authorities at Washington. Pointing to Running Bull, one of the Sully Scouts, he said: There is an old chief. He signed the treaty for the scout money. He did not know anything about the treaty. A sick man signed it. He did not know anything about the treaty. (The sick man referred to, and the only sick man who had signed the treaty up to that time, was Walter Arronge, who interpreted the treaty when it was read at the council for signing, and who had interpreted the treaty day after day for nearly a month, and knew more about it than any

other man on the reservation excepting the commissioners.) Soldier continued thus: I do not believe it is right to get sick men and old men who know nothing to sign. In this way he alluded to all the persons he could think of who had signed the treaty, in each case charging that they had signed it for some selfish motive or without knowing anything about the agreement.

JOHN GRAYFACE. Here are our old chiefs. They have not been consulted in this matter. We have great respect for our chiefs and think they should lead in the matter of this kind. We do not think the commission did right in not consulting them. We do not object to the provisions of the treaty, but we do not want to make a treaty at this time. Grayface continued to discuss the matter in about this manner for some time; also many other speakers who talked before Ironsoldier discussed the treaty and objected to it on almost the same general basis as that set forth in Ironsoldier's speech.

At the conclusion of Grayface's remarks, Judge Ray arose and said: It looks well for my friend Grayface to talk about consulting the chiefs and respecting them. He has always opposed the chiefs and has been against them in every way. He signed a petition and makes the others sign it to do away with the chiefs altogether. Then he did not think it right to follow the chiefs or consult them. It looks very suspicious to see him manifest so much anxiety about the chiefs at the present time. Others spoke in opposition to the treaty until the time allotted them was consumed.

COL. ADAMS. The opposition have now occupied all their time and I have allowed them some additional time

to make up for interruptions. We will now hear from those favoring the treaty.

At this announcement nearly the whole of the opposition arose in a body and started to leave the building, and most of them departed. The commissioners however called for order and informed them that there was other business to be transferred and requested them to remain. The friends of the agreement had remained and a few of the opposition resumed their seats.

JOHN J. COLE. The friends of the agreement have listened attentively to the opposition, but it seems the opponents of the treaty have tired, and ran and the friends of the treaty decline to talk, as those whom they desired to answer and to whom they desired to talk have left the council. I therefore suggest that we now proceed with the other business of the council, an as the opposition claim to have charges against the commission it is a part of the business of this council to hear those charges. Col. Cooper, as I have told you, is instructed to investigate the methods of making this treaty, and I hope you will now lay before him the charges which you want to have investigated.

There are also complaints against the white employes of the Government charging them with interfering with the work of the commission and trying to defeat the consummation of this treaty.

The opposition answered that they were not ready, that they wanted a week to get ready.

COL. COOPER. If these men have done anything wrong you certainly know it now, and I would like to have you state your charges.

SPOKESMAN FOR THE OPPOSITION. We can not make the charges now; we want till next Friday to get ready.

COL. COOPER. That is too long; you can get ready by Tuesday just as well as to put it off till Friday.

White Swan arose, and pointing to Special Agent Cooper, said: you are an agent of the Government and I want you to investigate the charges against this commission. I want you to meet me next Friday in council for that purpose.

COL. COOPER. Yes, I will give you a hearing but do not think you ought to wait till next Friday; it would be better next Tuesday.

WHITE SWAN: Tuesday is too short a time, and I want you to wait till Friday.

COL. COOPER: If you have anything to present I think you can be ready by Tuesday. I want you to present your charges in writing and you shall have a fair and impartial hearing and I won't limit you in the time you occupy. I shall appoint Tuesday, and shall expect you to get your matters here in shape by that time.

COL. ADAMS. Bear in mind that Col. Cooper has appointed a council for next Tuesday, and I hope you will all tell you friends about it and make it a point to be here.

JOHN J. COLE. I have alluded to complaints by the Indians against the white employes of the Government for interfering with the work of the commission. If the

Indians want to lay these charges before Col. Cooper, I hope in presenting them to him you will not tell him what you have heard or what somebody else said, but tell him what you yourselves know, and do not be afraid to express yourselves freely and fully.

The council then adjourned.

CAMP OF YANKTON SOLDIERS,

Sidney, Nebr.,

Saturday, February 25, 1893

WASHINGTON, D.C., *January 17, 1893*

. . . Commission should go, if necessary, to camp of enlisted Yankton Indians to procure their signatures.
* * *

JOHN W. NOBEL;
Secretary

JOHN J. COLE,
Yankton Commissioner.

(To be delivered by special messenger, etc.)

Under these instructions Commissioner Cole left the reservation on Thursday, 23d instant, with Felix Brunot, as interpreter and witness, to give the Yankton soldiers an opportunity to sign the agreement. A council of Yankton Indian soldiers was called in their quarters, in the presence of Lieut. Samuel Seay, their commander, with Felix Brunot and Julia Dezera, interpreters, awaited by Charles Martin and others.

The seal of the treaty was examined by Felix Brunot, who found it to be all right and the seal under which the

treaty had left the reservation. The treaty was then opened, preserving the seal that it might be returned to the official interpreter at the agency. The treaty was read and carefully interpreted to them, article by article, great care being taken to see that they all understood every provision of the agreement. After the article had been read, interpreted, and explained Lieut. Seay would ask the men if they fully understood what it meant, and, if the article was not perfectly understood by all the Indians, it was reread, interpreted and explained until thoroughly understood. At the conclusion of the reading of the agreement, Commissioner Cole exhibited the treaty book which he had prepared for the Yankton Indians and explained how an exact duplicate of the agreement, as signed by the Yankton Indians, would be copied into it by letterpress, and that this book would be left with the Indians so that they would have an exact copy of the treaty containing every line, word, and mark just as it is in the original.

LIEUT. SEAY. You have heard this treaty read and explained and you all say you understand its various provisions and know what it means. You are all men and you know your own business and you must act like men and exercise your own judgment in this matter. If you want to sign this treaty, go ahead and sign it, but understand that you do not have to sign it unless you want to. If you think the treaty is a good one and will benefit you and your people it is right for you to sign it, but if it is not then you should not sign it, and you should not sign it unless you know this to be the case and sign it because you yourselves desire to do so and not because anyone else wants you to sign it. Now, I want you to understand

that you must exercise your own judgment in this matter, and if you want to sign go ahead and do so; if not let it alone.

Several of the soldiers signified their desire to sign, and Louis Shunk being nearest to the table commissioner Cole offered him the pen to sign his name. Lieut. Seay called out: "Hold on there; if you want to, sign in the order of your rank. If Charles Martin wants to sign let him sign first." Charles Martin signed, and Lieut. Seay said, "Now go ahead and sign in the order of your rank, as many of you as want to sign." The signing then proceeded until the 19 Yankton soldiers who were present had affixed their names to the agreement. Commissioner Cole then proceeded to the hospital with Lieut. Seay and Felix Brunot and took the signature of the one remaining Yankton soldier, who was sick and unable to attend the council, after having explained to him the provisions of the agreement.

COMMISSIONER COLE. I want to congratulate these Yankton soldiers upon having unanimously signed this agreement. I think it shows your good judgment, for I believe it is an agreement which will be very beneficial to your tribe. It has been very gratifying to me to see that as many as four-fifths of you soldiers have come up here and signed your own names. This is evidence that your friend and commander Lieu. Seay is much interested in your welfare and has taken pains to give you an opportunity to learn to write, and I understand that he is instructing you in other ways. This evidence of advancement is certainly very commendable to him and to you.

The signing of the agreement by the Yankton soldiers was then certified to by Lieut. Seay and Charles Martin, and the agreement was closed up and sealed with the company's seal, a duplicate of which seal Lieut. Seay was instructed by Commissioner Cole to mail to the official interpreter of the Yankton Agency, with the seal taken from the treaty when it was opened in the council, for the benefit of the Yankton official interpreter.

The council was then adjourned and Commissioner Cole and Felix Brunot, after taking leave of the officers and Yankton soldiers, proceeded to return to the reservation.

THURSDAY, *March 2, 1893*

A tribal feast was issued and a general council of the tribe was called to announce the completion of the treaty. Present, Commissioners Cole and Adams, and between 200 and 300 Indians, the signers of the agreement generally being present, though but few of the opposition attended. William T. Selwyn, interpreter. Council was called to order at 2 o'clock p.m.

COL. ADAMS. My friends, the work of this commission with you is finished, and before retiring I desire to say a few words to you, though I will not detain you long this afternoon. We have been a long time with you and tried to do you good. We have made a good treaty and a majority of your tribe have now signed it, and if Congress ratifies this work it will be a great benefit to your people. I think you have acted wisely in consummation this agreement with the Government, and as commissioners we will do all we can to secure its ratification by Congress.

Every man who has spoken of this agreement has pronounced it a good one. Even the opposition acknowledge this. Not one of them has pointed out a single provision of the agreement which is not in the interest of the Indians, but they have all been forced to say that the treaty itself is a good one, and in order to have any basis of opposition it was necessary to trump up or manufacture charges against the commission, against the friends of the treaty; and the enemies of the treaty have shown great fertility of imagination and vigor of intellect in misrepresentation and in circulating false charges over the reservation. The most ridiculous and incredulous stories were invented. Every prominent man of the tribe who signed the treaty was charged with having been bribed. Often the amount of the bribe was fixed at some fabulous sum. During my absence, Col. Cole requested Secretary Noble to instruct Special Agent Cooper to investigate the methods of making this treaty, which request the Secretary complied with. I am very glad that Col. Cole took this step, for we want to know that no improper methods have been resorted to in making this treaty. The friends of the treaty, those who have worked with us and not against us, know that more pains were never taken to have everything exactly right and perfectly understood; and if the opposition do not know this we are glad to have them find it out. Col. Cooper has held three councils to investigate this matter and has told you that there is absolutely no basis for any of these charges; that more correct methods were never pursued in making a treaty. I have finished.

JOHN J. COLE. My friends, it affords me great pleasure to inform you that, so far as the Yankton Indian are

concerned, their treaty with the Government of the United States is now complete. More than a majority of the adult male members of the tribe have signed the treaty, and it now only remains for the Congress of the United States to ratify our work.

I desire to congratulate you upon consummating with the commissioners the best treaty which any tribe of Indians has ever made - a treaty, which if ratified by Congress and successfully carried out, will benefit your people for all time. We counseled with your chiefs and headmen. We listened to the demands of these men who have worked with us to secure this treaty. We studied the conditions and wants and necessities of your people, and then tried to draw a treaty which would best meet these conditions and answer those demands and all who have examined this agreement tell us that we have been very successful in this effort, and that we have a treaty which is good for the Indians and good for the Government. I congratulate you upon having secured such a treaty and thank the friends of the treaty, who have assisted us in this matter, for their earnest cooperation and untiring efforts to secure this result.

I have said that we could make this treaty if the opposition were twice as strong, and I think I was correct in that statement, for paying the Yankton Indians as we do so liberal a price for their lands and offering them an agreement, which even the enemies of the treaty, without a single exception, say is all right in all its provisions. I knew we could overcome all such personal and factual opposition as was brought against us. But when those who should have been on the side of the Government joined the opposition and with all the means at their

command interfered with the work of the commission, I must confess that we did not desire that the opposition should be doubled; still we have met it and have made a treaty, as I have steadily promised the friends of this work we would do. As a commissioner I am gratified at the successful termination of this business, every friend of the treaty has a right to feel proud of the part he has borne in it.

I want you to know who is entitled to the credit for making this treaty. It is not the opposition, but the friends of the treaty, who have secured for you these great benefits. The leaders of the opposition, with their white allies, and those who have trained with them in opposing the work of this commission, have done nothing to benefit your tribe. They have not secured for the tribe a single one of the favorable provisions of the agreement. They did not secure for the tribe one cent per acre on the price of your lands. They are not entitled to one iota of the credit for what has been done for the benefit of your people. They have not labored with the commissioners to secure a better price, better terms, or better provisions. They have simply waged a blind, unreasoning warfare against the commission, against the friends of the treaty, and against the treaty itself, for the sole purpose of defeating it upon general principles and personal grounds and not because of any objection they had to the treaty itself. In this matter the friends of the treaty have been the real friends of the tribe, and every man to whom you are indebted in the least degree for the benefits of this agreement has put his name to it.

William T. Selwyn, Charles F. Picotte, Felix Brunot, Rev. Isaac Tuttle, Robert Clarkson, Judge Ray, Battise

Lambert, and those who have cooperated with them, are the men who have made this treaty and who have secured for the Yankton Indians all the benefits contained in the agreement. They secured for you the liberal price paid for your lands. They secured every desirable and favorable provision of the agreement. They have all signed the treaty, but their signing was conditional upon such price and such favorable provisions as were satisfactory to them, and not one of them signed until these conditions had been met. Mr. Selwyn has worked with us from the very first in trying to forward the work of this commission, but he was one of the most critical Indians upon the reservation and hardest to please in the matter of price and provisions of the agreement and he would never promise the commission that he himself would sight the treaty until he was satisfied that we were offering as large a price as the Yanktons could secure for their lands and every provision in the treaty which he thought the interests of his tribe demanded. Mr. Picotte, Mr. Brunot, and some others opposed us for a while when some things were not satisfactory to them, but after we had satisfied them upon these points they came in and have since worked faithfully with us. In this connection I can not omit your agent and your missionaries, for these men have all been your real friends in this work. The commissioners know every element which has contributed in the making of this treaty and we want the Yankton Indians to know who have been their real friends in the management of this important affair.

To disarm the false statements which were put in circulation by the opposition, and to show that their charges against the commission and against the friends of

the treaty were false and groundless, I asked the Department to instruct Special Agent Cooper to investigate the method of making this treaty. He was so instructed, and he has made the investigation, giving you the benefit of three councils for this purpose, and he has told you that the opposition have utterly failed to make a case against the commission or any of the leaders who have favored the treaty, and that not only were the current charges unsupported by evidence, but when it came to the matter of charges no one was found who, of their own knowledge, could make a charge that reflected discredit upon anyone, except those who have been circulating these false charges. Owing to the utter failure of the opposition in this matter, the friends of the treaty have determined not to present to Mr. Cooper, any charges against the white employes of the Government for interfering with the work of the commission; and I am glad of this, for all we sought was the successful termination of this work and the vindication of our methods in performing it; and now that the treaty is made, and as it has been shown that it was made by perfectly correct methods, we do not care anything about the white opposition.

I have no desire to review the criticisms of the opposition or make any attempt to answer them, as Col. Cooper has done this well and sufficiently. We have not objected to letting the opposition worry over what they considered to be great sins on the part of the commission; but we desire to let the friends of the treaty know that all the way through we have acted in perfect harmony with our instructions from the Government. The following dispatch and Secretary Noble's answer will explain our authority for holding councils at different places on the

reservation and for taking signatures at the homes of sick men, etc., and for taking the signatures of squaw men to a paper of approval.

ARMOUR, S. DAK, *January 23, 1893*

Agreement is dated at Yankton Agency. Fifty signatures in first council. Can we hold councils for signing at other places on reservation? Must all signing be done in open council? Some sick at home. Must squaw men be prevented from signing? Messenger will wait at Armour for answer.

JOHN J. COLE.
MR. SECRETARY OF THE INTERIOR.
WASHINGTON, D.C., *January 23, 1893*

You can gold separate councils for signing and can take signatures of individuals anywhere, having witnesses and explaining agreement carefully. Squaw men better sign separate paper expressing consent, but enough without them. It is good contract for Indians.

JOHN W. NOBLE, *Secretary.*
JOHN J. COLE *Yankton Indian Agency (via Armour)*

It is unfortunate that much strife and contention should have arisen over this business, and now that the agreement has been signed by more than a majority of the tribe, all animosity and personal feeling should cease and the tribe should be united in securing the ratification and judicious and faithful carrying out of so favorable an agreement, and I truly hope that his will be the case. Should I come back here at some future time, as I trust I may do, I shall hope to see you united, prosperous, and happy. You have the conditions, the opportunity, and the

ability to become the riches community in South Dakota if you rightly use your advantages.

We promised you a feast upon the conclusion of the treaty and a feast has been provided for you, and as I cast my eye through the window upon the common I see the tongue of flame licking the bottom and sides of the camp kettles and then condensing into smoke which rises above the savory feast which your women are preparing for you. I will therefore not detain you any longer, but say farewell.

COL. ADAMS. Is there any more business before the council? If not, we will adjourn.

JOHN J. COLE. I would like to give some of our friends here an opportunity to say a word at the conclusion of this work, and to save time I suggest that these gentlemen address the Indians in their own tongue without interpretation.

Rev. Isaac Tuttle, Judge Henry Sticker, Peter Le Grand, William T. Selwyn, and others, all signers of the agreement, then made speeches in the Dakota language. During the speaking Mr. Shunk sat between the commissioners and interpreted such outlines of the various addresses as would give a good understanding of what was said. All these speeches were forcible arguments in favor of the treaty and setting forth the very correct methods pursued by the commissioners in making it. They pointed out the favorable features of the agreement and called attention to the advantages which would result to the tribe from carrying it out.

They alluded to the unfair and illegitimate methods employed by the opposition in trying to defeat the treaty, and particularly of the very improper methods resorted to to prevent the signing of the agreement, and they emphasized the utter failure of the opposition in trumping up charges against the commissioners and friends of the treaty, which had no foundation in fact, and trying to defeat the treaty on personal grounds and not because of any objections to the treaty itself. They spoke with emphasis concerning the painstaking efforts of the commissioners in their dealings with the Indians. They pointed out the desirability of dropping the feud and contention over the treaty, and all uniting in carrying it out for the greatest benefit of the tribe. Among other things Mr. Selwyn said, "The young men wanted the chiefs to lead off in this business, but they were very slow. They would not go ahead in the business and we had to take it up. They now complain that they want changes made in the agreement. If they want changes in the agreement they should have investigated it and changed it before it was sent to the Secretary for his approval. It is too late now, but I think this claim, that they want changes in the agreement, is only an excuse for not signing it. It is a good treaty; all the bad feelings had been manifested by the opposition. The friends of the treaty were always ready to welcome any and all to cooperation with them and never indulged in threats, innuendoes, or any other improper methods to secure their cooperation, and that they now have no feeling of animosity toward the opposition and trust that so much feeling as may exist on the part of the opposition may be dropped in the interest of the tribe.

The commissioners then affixed their names to the agreement, which was afterwards put under seal, and the council adjourned.

MEMORANDA.

(1) Councils were held by Special Agent Cooper on February 18, February 21, and February 24, for the purpose of investigating the methods of making the treaty, and the proceedings of those councils were forwarded to the Department with his report. We do not deem the councils of February 21 and February 24 as properly belonging to the work of this commission, and do not record the proceedings.

(2) A feast was issued to the Indians at White Swan about February 6, and the friends of the agreement held a council in the interest of the treaty; and arrangements were made to hold a council there later for signatures, but at the time set for that council a large party of Indians, some 20 or 30 in number, was gotten up by the opposition to leave the reservation and visit Swift Bear camp. Most of the Indians in the party were those who had not signed the agreement, many of whom had expressed a desire to do so, and the object of the visit was to get them away from the reservation to keep them from signing . The commission informed the agent of this fact and requested that the Indians be brought back. An Indian policeman was sent after them, and upon their return Commissioner Adams went there with interpreter and witness and took the signatures of several of them.

SATURDAY, *March 4, 1893*

Council for consultation and to examine the signatures to the agreement. Present, Commissioner Cole, the interpreters, witnesses, and a few of the head men.

WILLIAM T. SELWYN. The signers of the agreement have appointed 6 of these gentlemen as a committee to examine the signatures to the agreement and see if everything is right, and I will ask Commissioner Cole to show them the treaty and the sheets containing the signatures, that they may examine them.

JOHN J. COLE. I am very glad indeed that your people have taken this action. You men who have worked with us know that everything pertaining to this treaty is right and all that has been done by the commissioners and friends of the treaty is correct, and I am glad this committee has been appointed to investigate the signatures and report upon them.

The agreement was then shown and the sheets of signatures were passed from hand to hand, each member of the committee and the other persons present examining each name to see that the signing was all correct and to count the signatures to ascertain if a majority of the tribe had signed. This committee made its report in writing, stating that the signing was all correct and that a majority of all the adult members of the tribe had signed the agreement, and that report was attached to the treaty; the committee having been increased to 8 at the suggestion of Commissioner Cole.

After a general consultation in regard to the interests of the treaty, the council adjourned.

WEDNESDAY, *March 8, 1893*

Council for consultation and for certifying to the agreement by the interpreters and witnesses. Present, Commissioner Cole, the interpreters, witnesses, and a few of the headmen of the tribe. Commissioner Adams absent, having left the reservation on the 5th Instant.

JOHN J. COLE. I have now completed the work of the commission and have drawn certificates for the interpreters and witnesses to sign. Please examine the agreement and other papers and the certificates, and if you find everything right sign them.

This was done and the certificates were signed.

WILLIAM T. SELWYN. We have thought that it would be best for you to turn the treaty book over to the Rev. John P. Williamson, to be delivered upon demand of the tribe when they shall have appointed a custodian and committee for that purpose.

COLE. I think this is the best disposition to make of the treaty book for the present, and will comply with your request. The seal upon the treaty was broken in the presence of witnesses and the agreement with signatures and all accompanying papers was copied into the treaty book, so that your people will have an exact copy of this treaty. As the agreement is now copied in the treaty book there is no longer necessary for putting it under seal. I will copy the certificates and then deliver the book to Rev. John P. Williamson, as you request, and I think he had better hold it until the treaty is acted on by Congress, or at least until the original is deposited in the Interior Department with our report.

There was then a general consultation in regard to the interests of the treaty, Commissioner Cole urging the friends of the treaty to stand together and protect the good work which they have done.

The council adjourned *sine die*.

WASHINGTON, D.C.,

March 31, 1893

The foregoing council proceedings, from Saturday, October 8, 1892, to Wednesday, March 8, 1893, were kept without the aid of a stenographer, except for two or three councils, and are not intended to be a verbatim report, but they are correct in all substantial particulars and are as nearly verbatim as possible under the circumstances, and they correctly represent the council proceedings between the commissioners and the Yankton Indians.

J.C. ADAMS

JOHN J. COLE

Yankton Indian Commissioners

LIST OF ADULT MALES OF THE YANKTON TRIBE OF SIOUX INDIANS. BASIS FOR AGREEMENT OF DECEMBER 31, 1893.

List of adult males of Yankton tribe of Sioux Indians used by Yankton Indian commissioners is taking signatures to treaty of December 31, 1893.

(Omitted chart of Indian signers and corresponding English names, the summary of the total number of Indians, and the number of full-blood and mixed-blood Indians and their distribution on or off the reservation).

53d Congress
2d Session
United States Senate

EXH 606

Doc. No. 134

YANKTON AGENCY
GREENWOOD, S. DAK., March 2, 1894

Hon. J.K. Jones, U.S.S.,
Chairman Committee Indian Affairs:

DEAR SIR: We the undersigned chiefs, headmen, and members of the Yankton tribe of Sioux Indians do hereby petition and request you to take views in our needs, necessities, and points in connection with the treaty of 1892 now pending for its ratification in the present session of Congress.

When we signed the treaty we knew what we were doing for ourselves and for the Yankton tribe in general. We did sign it because we love and respect our families, for whom we expect a support could be made out of the sale of our surplus lands. We signed it because our old and infirm people and orphans are in the need of help and are just at the present time badly off in various ways. And also we signed it for the following reasons: We think it is a good treaty. We have had a good understanding of its provisions and the compensation. We know that we are gaining every day by signing this treaty, that is by getting interest on the money. We have had no inspiration given us to make this treaty by any white man, either outside or inside of the Yankton Reservation, like the opposition who were continually butting their heads against the doings of the Great Father with the Yankton tribe at the advice of some soreheads. (*See* Yankton Sioux Commissioners' Report, pp. 22, 23, 24, etc.). The opposition shows itself by the element of their ceaseless attacks.

By means of the treaty we want to encourage our churches and schools and have the people progress in enlightenment and civilization. We want the nation to take on new life by becoming good farmers and mechanics and professional men, and that they should all be good citizens of the United States. We do not want to become loafers and beggars like the majority of the opposition. We want the laws of the United States and the State that we live in to be recognized and observed. We do not think it is a proper thing to keep up the tribal relation – like the tribal relation and its existence now on this reservation – as the tribal relation on this reservation is an obstacle and hindrance to the advancement of civilization. For instance, the matter of the tribal relation is a bondage to a tribe of Indians where the tyrannical chiefs are principally looked upon for advice, but of course there are some exceptions. We know that the Yankton tribe is decreasing very fast, and the reason is that we live in miserable huts with dirt roofs, and can not raise crops enough to support our families, especially for the last three or four years, and our rations for that length of time could not support us, hence the sickly ones, in need of special help and suitable food perished. At the same time we are dying fast with consumption and scrofula on account of the poor modes of living both as to dwellings and food. We are therefore anxious that this treaty should go through at once, so as to enable us to receive a sufficient sum of money as cash payment to improve us mentally and physically. Without this treaty we have no hope of prosperity, and no desire for civilization. We think it will benefit our children by associating them with white people, especially in the schools and in farming.

We do not wish to see people other than Indians get this treaty mixed up and into confusion on account of personal prejudice against each other (*See* Yankton Sioux commission's report, pp. 22, 23, 24, etc.) for it is a detriment to the Government and also to us. This demoralizing influence on the part of the opposition reminds us that of the Minnesota massacre of 1862 and the Canadian war, under Louis Riel, and also the new Messiah craze, which resulted in war at Pine Ridge by the inspiration of white people on account of political and personal revenge and prejudice.

We have the honor to request you to use your influence in the passage of the bill effecting our treaty with the U.S. Government for the relinquishment of our surplus land.

We hereby certify to and corroborate the correctness of the report of the commission to treat with the Yankton tribe in 1892, and that we as a nation wish to adopt the white man's way and request you to see that justice may be done to us by ratifying the treaty of 1892 aside from the opposition.

(signers omitted in printing)

EXH 669

CONGRESSIONAL RECORD

1894

(53 Cong. Rec. ___)

* * * *

H.R. 6913 –

Making appropriations for current and contingent expense of the Indian Department and fulfilling treaty stipulation with various Indian tribes for the fiscal year ending Jun 30, 1895, and for other purposes.

* * * *

(53 Cong. Rec. 6372)

Mr. HOLMAN said: Mr. Chairman, the Clerk has now read down to page 77. I wish to ask unanimous consent that the names of the Indians who subscribed to this agreement, all from line 11, page 77, to line 23, page 92, be omitted. These pages embrace the names of the Indians who subscribed to this agreement and the various certificates of authentication. I suggest that those pages be omitted.

Mr. MARSH. Mr. Chairman, I object.

Mr. BOWERS of California. I object. We can not change the order of the House.

Mr. OUTHWAITE. One minute, Mr. Chairman –

Mr. MARSH. Regular order.

The CHAIRMAN. The Clerk will read.

The Clerk proceeded with the reading of the bill. Having proceeded for some time,

(53 Cong. Rec. 6373)

Mr. MAHON said: I ask unanimous consent that all those names be omitted.

The CHAIRMAN. The gentleman from Pennsylvania [Mr. MAHON] renews the request that the names of the Indians signing this petition be omitted by the Clerk. Is there objection?

Mr. WILSON of Washington. What is that?

The CHAIRMAN. The gentleman from Pennsylvania [Mr. MAHON] asks unanimous consent to dispense with the reading of these Indian names in the treaty. Is there objection? [After a pause.] The Chair hears none.

Mr. WILSON of Washington. The Chair will recollect that I called his attention to that matter in the early part of the reading of this bill. There is not a human being on earth who could read them so that anybody could understand, and I will not object.

The Clerk, omitting the reading of the signatures, proceeded with the reading of the bill. Having read the first paragraph on page 94,

Mr. McRAE said: A parliamentary inquiry. Should a point of order be made before a paragraph is read, or after?

The CHAIRMAN. At the conclusion of the reading of the paragraph.

Mr. McRAE. I desire to make a point of order to the second paragraph on page 94.

The CHAIRMAN. The Clerk will read the paragraph. The Clerk read as follows:

> Second. That the lands by said agreement ceded to the United States shall, upon proclamation by the President, be opened to settlement, and shall be subject to disposal only under the homestead and town-site laws of the United States (except section 2301 of the Revised Statutes, which shall not apply), excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common-school purposes and be subject to the laws of the State of South Dakota: *Provided*, That each settler on said lands shall, before making final proof and receiving a certificate of entry, pay to the United States, for the land so taken by him, in addition to the fees provided by law, the sum of $3.75 per acre, one-half of which shall be paid within three years from the date of his original entry: but the rights of honorably discharged Union soldiers and sailors, as defined and described in sections 2304 and 2305 of the Revised Statutes of the United States, shall not be abridged except as to the sum to be paid as aforesaid: *Provided, however*, That each settler shall be limited to 80 acres in amount, but after the expiration of six months from the opening of said land to settlement, may take an additional 80 acres from any of the lands of said tract then subject to entry: *And provided further*, That after three years' actual and continuous residence upon said land from date of settlement, the settler shall, upon full payment of $3.75 per acre, receive patent for the tract entered: *Provided*, That settlement shall

> be made under this act within thirty days from date of filing on land.

Mr. McRAE. Mr. Chairman, that paragraph changes the public land laws of the United States, is new legislation, and contradicts the very treaty that it confirms. Article 8 of the treaty provides that surplus lands shall be disposed of under the existing land laws of the United States. This paragraph of the bill which has just been read involves new land legislation, and I have always contended and now insist that while all the treaties that can possibly be should be ratified, yet I do not want a separate land system for every reservation that is opened. It is vicious and makes a great deal of trouble and allows fraud in many cases.

The CHAIRMAN. Does the gentleman from South Dakota or any member of the committee care to be heard on the point of order?

Mr. HOLMAN. Mr. Chairman, I suppose as a matter of fact that the provisions which have already been read are subject to the same objection as this particular section. The legislation is founded on a treaty or an agreement with an Indian tribe. I suppose that at the present time these are regarded as agreements or as contracts between an Indian tribe and the United States. They were formerly treated as a treaty, and stood on the same footing as a treaty with a foreign nation, until about fifteen years ago.

Since that time they have been considered as contracts, requiring the action of both Houses of Congress. Prior to that time they were ratified in the Senate, after they had been negotiated by the President, just the same as a treaty which had been negotiated with a foreign

nation. This is the ratification of an agreement between an Indian tribe and the United States, and it involves a modification of the treaty or the provisions of the agreement; as, for instance, the agreement provides that the money is to be placed to the credit of this Yankton band, bearing interest at the rate of 5 per cent. That is above the rate we have been paying of late years; and therefore it is proposed to modify this agreement so as to reduce the amount of interest to 4 per cent, as of late years we have never paid more than 4 per cent.

There are all through this ratification changes in the terms of the agreement: and I admit that in the particular section referred to, there is a provision that modifies the land law. The present law, the act of March, 1891, provides for a residence of fourteen months to the extent of a quarter section of land.

This provision contemplates a homestead of 80 acres, instead of 160 acres, except that after a period of six months after the land has been opened, if the land is not taken up, a settler may enter an additional 80 acres, making 160. In this respect there is a change made in the law now in force. There is also a provision extending the time of commutation from fourteen months to three years: and I do trust that my friend from Arkansas will not object to that. The homestead law of 1862 contemplated a resident of five years.

Mr. PICKLER. I would like to know what paragraph the gentleman makes his point of order on.

Mr. HOLMAN. To the second paragraph.

Mr. McRAE. If I could make it to a part of it I might do it, but I made it to the whole of the paragraph.

Mr. HOLMAN. He made it to the whole of the second paragraph.

Mr. McRAE. Not in reference to the bonds.

Mr. HOLMAN. Now, Mr. Chairman, I wish to call the attention of the Chair to the fact that this legislation is based on an act of Congress providing for negotiations with these Indians for the cession of their lands and taking a portion of their lands in severalty. It is based on an act of Congress, and under all the circumstances it seems to me it comes within the rule, as it is carrying out an agreement made under an act of Congress, and it modifies that agreement and refers the subject back to the Indians. I did not think of this point being raised, or I would have had the law; but I would be very glad if the Chair will see the law under which this agreement was made and on which this legislation is founded before deciding.

The CHAIRMAN. The Chair will state to the gentleman from Indiana that the point of order, as stated by the gentleman from Arkansas, is that it changes the existing law under which this treaty was made between the Yankton tribe and a commissioner of the United States. Article 8 says that after the ratification of this agreement by Congress these lands shall "be offered for sale through the proper land office, to be disposed of under the existing land laws of the United States," etc.

Now, the gentleman from Indiana admits, as the Chair understands, that this is a modification of the existing laws of the United States, and that in that respect it differs from the treaty which has been agreed upon between the tribe and a commissioner of the United States.

Mr. HOLMAN. It is not only with reference to that provision, if the Chair please, and not only with reference to that article of the treaty, but here all the articles are modified and sent back to the tribe. The Chair will have to consider the existing law authorizing these negotiations so as to see whether this comes within the inhibition –

Mr. PICKLER. Call the attention of the Chair to the words "as modified," on page 93, Mr. HOLMAN, and to see whether that is subject to the point of order? If it is new legislation, not included by the existing law, why the point of order is well taken.

Mr. HERMANN. If the gentleman will permit me, in the line of his argument, I desire to call his attention to the "general allotment act," which authorizes the Secretary of the Interior to do certain things by or between the Government and Indians. For instance:

> *And provided further*, That any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interest of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such

> reservation is held, of such portions of its reservations not allotted as such tribe shall from time to time consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and the said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress.

Now, the position of the gentleman from Indiana, chairman of the committee, as I understand it, is that all of this proceeding is in line with existing law.

Mr. HOLMAN. In line with existing law.

Mr. HERMANN. And this law authorizes the Secretary of the Interior to enter into negotiations with these Indians.

This particular paragraph includes matter which forms the substance of an agreement with the Indians, modified by these proceedings on the part of Congress, and therefore it is in line with existing law.

Mr. HOLMAN. This is an important provision and the question which it raises is applicable to some other provisions of the bill. I therefore suggest to the Chair that this second clause on page 94 be passed over for the present until we can look up the statute.

Mr. PICKLER. Nearly all of this section is a recital of the present law.

The CHAIRMAN. The Chair understands the objection of the gentleman from Arkansas to be to the proviso beginning in

(53 Cong. Rec. 6374)

line 9, page 95, and extending down to and including the word "entry," in line 14.

Mr. McRAE. No, sir. I make the point of order against the second subdivision of this section, because it can not be amended. If I could submit my amendments now I think I could make it conform substantially to the land laws, but as I can not do that, I am compelled to make the point of order.

The CHAIRMAN. The Chair hopes the gentleman will agree to let that go over also.

Mr. McRAE. I have not the slightest objection to that; with the understanding that the point of order is still pending.

The CHAIRMAN. The point of order is pending, of course.

Mr. HOLMAN. There are two other provisions that cover the same ground.

Mr. McRAE. I make the same point of order on the next paragraph.

The Clerk read as follows:

> Third. That any person who was not the owner of land in any State or Territory of the United States at date of passage of this act may make an entry of the lands open to settlement under the provisions of this act, although said person may have heretofore made an entry under the provisions of the homestead law: *Provided*, That said person is not otherwise disqualified.

Mr. McRAE. I make the point of order on that paragraph.

The CHAIRMAN. The Chair suggests that the gentleman let that go over too.

Mr. McRAE. That is satisfactory to me, with the same understanding as in the other case.

The Clerk read as follows:

> Fourth. That immediately after the passage of this act the Secretary of the Interior shall prescribe rules and regulations to procure the ratification by said Yankton tribe of Sioux Indians to the changes in said agreement, as provided for in section 1 of this act, and shall without delay, upon the agreement of said Indians to said changes, under such regulations as he may prescribe, open said lands to settlement, provided the settlers upon said land shall be required to pay 75 cents per acre at the time of filing upon same: *Provided*, That the proclamation of the President opening said lands to settlement, as provided in section 3 of this act, shall be issued within thirty days after the ratification of the changes in said agreement by said Indians, as provided in section 1 of this act, and that said proclamation shall be issued giving at least sixty days' notice of the date said lands will be open to settlement.

Mr. McRAE. I make the point of order on that also.

The CHAIRMAN. Without objection, this paragraph also will go over until tomorrow.

There was no objection.

The CHAIRMAN. The Chair calls attention to the fact that there is a duplication in the printed bill, beginning on line 10, page 108, and extending down to and including line 19, page 116.

Mr. HOLMAN. The committee are aware of that. That is a mere blunder of the Printing Office.

The Clerk continued the reading, and read the bill down to the word "Congress," line 23, page 127.

Mr. HOLMAN. Mr. Chairman, I move that the Committee rise.

The motion was agreed to.

The committee accordingly rose; and the Speaker having resumed the Chair, Mr. O'NEIL of Massachusetts, from the Committee of the Whole, reported that they had had under consideration a bill (H.R. 6913), the Indian appropriation bill, and had come to no resolution thereon.

* * * *

(53 Cong. Rec. 6419)

* * * *

INDIAN APPROPRIATION BILL.

The SPEAKER. Under the special rule the House will now resolve itself into Committee of the Whole on the state of the Union for the further consideration of the Indian appropriation bill, and the gentleman from Massachusetts will please resume the chair.

The House accordingly resolved itself into Committee of the Whole, Mr. O'Neil of Massachusetts in the chair.

The CHAIRMAN. The Clerk will proceed with the reading of the bill.

Mr. PAYNE. Mr. Chairman, before that I desire to state that my colleague, Mr. SHERMAN, a member of the committee, desired to submit some remarks on a paragraph of the bill, but was called away suddenly last night. He desires to have leave to print his remarks in the RECORD.

The CHAIRMAN. In the absence of objection, leave will be granted to the gentleman from New York.

There was no objection.

Mr. BARTHOLDT. Mr. Chairman, I desire to make the same request.

The CHAIRMAN. Is there objection?

There was no objection.

Mr. HUNTER. I also, Mr. Chairman, as a member of the committee, ask the privilege of submitting certain remarks to be printed in the RECORD.

The CHAIRMAN. Is there objection?

There was no objection.

The Clerk resumed the reading of the bill.

Mr. McRAE. Mr. Chairman, I make the point of order upon this provision in the bill which has just been read by the Clerk: The mineral lands shall be disposed of

under the laws applicable thereto, and the balance of the lands so ceded shall be disposed of until further provided by law under the town-site law and under the provisions of the homestead law: *Provided, however,* That each settler, under and in accordance with the provisions of said homestead laws shall, at the time of making his original entry, pay the sum of 50 cents per acre in addition to the fees now required by law, and at the time of making final proof shall pay the further sum of $1 per acre, final proof to be made within five years from the date of entry, and three years' actual residence on the land shall be established by such evidence as is now required in homestead proofs as a prerequisite to title or patent.

Mr. PICKLER. I would like to understand what the point of order is made against.

Mr. McRAE. Beginning with line 21 after the word "law" on page 136 and down to and including line 9 on page 137.

Mr. HERMANN. Is it not too late now to make that point?

The CHAIRMAN. The Chair will also reserve the decision on that point of order. The Clerk will proceed with the reading of the bill.

The Clerk read as follows:

> That immediately after the passage of this act the Secretary of the Interior shall prescribe rules and regulations to procure the ratification by said Indians of the Siletz Reservation to the changes in said agreement, as provided for in this act, and shall without delay, upon the agreement of said Indians to said changes, under

> such regulations as he may prescribe, open said lands to settlement after sixty days' notice.

Mr. McRAE. I also make the point of order against that provision.

The CHAIRMAN. That also will be reserved for the present.

The Clerk read as follows:

> SEC. 10. That to pay the expense of purchasing goods and supplies for the Indian service and pay of necessary employ'es; advertising, at rates not exceeding regular commercial rates, inspection, and all other expenses connected therewith, including telegraphing, $35,000: *Provided,* That the office for purchasing goods and supplies and the principal depot shall be established at Chicago, and the bids shall be opened there.

The CHAIRMAN. This completes the reading of the bill.

Mr. STRAUS. Mr. Chairman, I desire to raise the point of order against the provision on page 138, beginning with line 1 and ending with line 3, the proviso to section 16. I make the point of order that this is new legislation and that it does not reduce expenditures. It makes it incumbent upon the Secretary of the Interior to establish a warehouse contrary to any previous regulations; consequently it does not retrench expenditures, but on the contrary increases them.

Mr. HARTMAN. I rise to a parliamentary inquiry.

The CHAIRMAN. The gentleman will state it.

Mr. HARTMAN. Are amendments now in order under the Rule?

The CHAIRMAN. Not at present; a point of order is pending, raised by the gentleman from New York. The gentleman will please restate his point of order.

* * * *

(53 Cong. Rec. 6425-6426)

Mr. POST. Can I offer an amendment to the next section?

The CHAIRMAN. Not now.

Mr. BINGHAM. Do I understand that no amendment can be offered to any part of the bill preceding page 90?

The CHAIRMAN. Not until the unfinished business has been disposed of.

The Clerk read as follows:

> Second. That the lands by said agreement ceded to the United States shall, upon proclamation by the President, be opened to settlement, and shall be subject to disposal only under the homestead and town-site laws of the United States (except section 2301 of the Revised Statutes, which shall not apply), excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common school purposes and be subject to the laws of the State of South Dakota: *Provided*, That each settler on said lands shall, before making final proof and receiving a certificate of entry, pay to the United States, for the land so taken by him, in addition

> to the fees provided by law, the sum of $3.75 per acre, one-half of which shall be paid within three years from the date of his original entry; but the rights of honorably discharged Union soldiers and sailors, as defined and described in sections 2304 and 2305 of the Revised Statutes of the United States, shall not be abridged except as to the sum to be paid as aforesaid: *Provided, however,* That each settler shall be limited to 80 acres in amount, but after the expiration of six months from the opening of said lands to settlement, may take an additional 80 acres from any of the lands of said tract then subject to entry: *And provided further,* That after three years' actual and continuous residence upon said land from date of settlement, the settler shall, upon full payment of $3.75 per acre, receive patent for the tract entered: *Provided*, That settlement shall be made under this act within thirty days from date of filing on land.
>
> *And provided further,* That sections 16 and 36 of the lands ceded and relinquished by said agreement are hereby confirmed to the State of Oregon for the support of the common schools of said State under the limitations prescribed by law; the mineral lands shall be disposed of under the laws applicable thereto, and the balance of the lands so ceded shall be disposed of until further provided by law under the town-site law and under the provisions of the homestead law: *Provided, however,* That each settler under and in accordance with the provisions of said homestead laws shall, at the time of making his original entry, pay the sum of 50 cents per acre in addition to the fees now required by law, and at the time of making final proof shall pay the further sum of $1 per acre, final proof to be

made within five years from the date of entry, and three years' actual residence on the land shall be established by such evidence as is now required in homestead proofs as a prerequisite to title or patent.

The CHAIRMAN. On this the gentleman from Arkansas [Mr. McRAE] makes the point of order.

Mr. McRAE. The point of order applies to what has been read on pages 94 and 95, and to all of the paragraph on pages 136 and 137, beginning with the words "the mineral lands," in line 21, page 136, down to and including the word "patent," in line 9, page 137, and also to the lines from 14 to 20, inclusive, on page 137.

Mr. HERMANN. Mr. Chairman, I rise to a parliamentary inquiry. The gentleman from Arkansas did not make his point of order until after the Clerk had proceeded to read the last line on page 136, and about six lines beyond. His point of order, as I understand, applies to all after the words "provided, however," on line 25, page 136.

Mr. McRAE. No, sir; the point of order applies beginning at the word "law," on line 21, page 136.

Mr. HERMANN. Then I make the point that the gentleman did not make his point of order until after the Clerk had passed that point in the bill.

The CHAIRMAN. That was the proper time to make the point of order, after the paragraph was read.

Mr. HERMANN. But the Clerk had read six lines beyond that particular paragraph.

The CHAIRMAN. The Chair thinks the gentleman's point of order is in time.

Mr. McRAE. Now, Mr. Chairman, I will repeat what I have already said, that these provisions will change the manner of disposing of the lands treated for, and are therefore new legislation. This kind of legislation does not belong on an appropriation bill. So far as I am personally concerned, I wish these and all other treaties could be ratified, but when the Committee on Indian Affairs undertakes to change the public-land laws simply because we have ratified an agreement with an Indian tribe, I think it exceeds its jurisdiction. These provisions change the public-land laws in several particulars. They allow in some cases only 80 acres of land where the general law allows 160 acres, and in other cases they allow people who have no right to the benefit of the homestead law to take the benefit of it. They allow persons who have taken the benefit of the law and who have sold the land to speculators to enter under this act. They suspend the operation of some of the laws by making them inoperative here, and in many other important respects they change the public-land laws as to these reservations.

Now, I maintain that we should ratify these treaties, but that these provisions should go out, and instead of them we should, if necessary, enact a general provision for the disposal of the lands acquired by this act, or that may be acquired hereafter.

The CHAIRMAN. The gentleman claims that the provisions in this section interfere with the laws in relation to public lands now on the statute books. Are those

lands, before the treaty is confirmed, subject to the laws of the United States?

Mr. McRAE. Certainly not until the treaty is confirmed; but these provisions change the methods of disposing of the lands that will become a part of the public domain under these agreements and set up in every reservation a different system of land laws, a system under which, in Oklahoma, in the Outlet, and on other reservations, we have had the most outrageous scandals and frauds upon the honest settlers that have ever disgraced our Government. Now, in the face of the experience we have had, I feel it my duty to make the point and to warn this committee that there are in the bill provisions which will allow a repetition of those outrages. I will not quietly consent for the land laws of this country to be so changed as to make it possible for those outrages to be repeated. I want these reservations opened, but I want them opened in an orderly way under the existing public-land laws, or under some system adapted to the end in view, and I insist that we ought not to change existing laws in this way on an appropriation bill.

Mr. LYNCH. Mr. Chairman, the different propositions contained in this bill for disposing of the surplus lands on the several reservations are numerous, but in each instance they are conformed to the circumstances of the case as nearly as possible. I contend that this point of order is not well taken, because the lands to which these provisions apply are not now public lands of the United States. The Government has no interest in them, and it will have no interest in them until it acquires such interest by the ratification of each of the treaties separately. When that is done and the Government acquires these

additional lands it has a perfect right to prescribe the methods by which they shall be disposed of.

Mr. McRAE. But are the treaties themselves germane to an appropriation bill?

Mr. LYNCH. Entirely so.

Mr. PICKLER. Positively so.

The CHAIRMAN. The Chair thinks it is too late to make that point now.

Mr. LYNCH. The Government obtains these lands at different prices in different cases. By some of the treaties the lands cost 75 cents or 80 cents or $1 an acre; and in one case, that of the Yankton Reservation, the Government pays $3.50 an acre, so that it would have to sell that land for $3.75 in order to come out even. These cases, therefore, can not all be provided for by any general uniform law.

Mr. McRAE. I think they can be. I think I have an amendment which will cover the whole matter, and could be adopted, I think at this time.

Mr. LYNCH. I have read the gentleman's bill and I wish it could be passed, but it is too important a matter to be considered and disposed of in the short time now at our command. If the gentleman can pass that bill, it can be modified as to include these cases, because its passage will be subsequent to this. These different methods of disposing of these surplus lands are absolutely necessary. In regard to the Yankton Reservation the committee were of the opinion that as the price of those lands was $3.75 an acre, $1.60 an acre would come too high for a poor man to buy, and therefore we concluded to reduce the

amount which one man could enter there to 80 acres. Each reservation was taken up on its own merits, and disposed of on its own merits, it being impossible to make any general rule or law applicable to all these cases. I contend that as the Government does not own the land now, it has a perfect right to acquire that land and dispose of it upon any terms that it may deem fit, regardless of existing law.

Mr. HOLMAN. Let me suggest to my friend that these contracts are made in pursuance of law; and his proposition simply carries the agreements into effect.

Mr. LYNCH. That is all. The Government finds itself the owner of those surplus lands, and must dispose of them. They are of no account while they remain in the possession of the Government. It seems to me that it is simply acting in furtherance of their acquisition to adopt limitations or restrictions in regard to their sale, and to dispose of them as may be deemed proper; and this I submit is not a change of existing law.

Mr. McRAE. It is new legislation; that is the point.

Mr. LYNCH. Well, everything is new legislation in one sense.

Mr. HOLMAN. The purpose is to carry out existing law.

Mr. LYNCH. Contracts are made according to law. The treaty is referred to Congress according to law – .

MR. TERRY. Allow me to ask this question: As soon as these lands were purchased under this treaty, did they not become a part of the public domain of the United States?

Mr. LYNCH. Not necessarily.

Mr. PICKLER. No; they are to be sold at $3.75 an acre –

Mr. TERRY. Did not the United States purchase the land?

Mr. PICKLER. If they were public lands, under the homestead law they have to be granted to homestead settlers for nothing.

[Here the hammer fell.]

Mr. PICKLER. Mr. Chairman, I submit that the point of order made by the gentleman from Arkansas is clearly not well taken. We do not by this provision change one word or syllable of the public land laws of the United States. I ask the attention of the Chair to that proposition. We simply provide in this bill how these 168,000 acres of land acquired from the Indians shall be disposed of. It is impossible to dispose of this and under the public land laws of the United States. Why? Because under those laws every homesteader is allowed to take 160 acres, and, after five years residence thereon, to acquire title. Now in this case that is impossible. We acquire these lands at $3.50 an acre, and dispose of them to settlers at $3.75 an acre. So that the public land laws of the United States will not and can not govern this case.

Wherever there is an acre of public land subject to the public land laws of the United States we do not interfere with it or affect it in any particular. We simply carry out the agreements as modified by Congress. The point made against this proposition is not applicable. We are not attacking the land laws of the United States; we

are not proposing to vary in any way those laws as applicable to any portion of the public domain.

One other point, Mr. Chairman. We are not here by sufferance. In the Forty-seventh Congress Mr. Kasson, as Chairman of the Committee of the Whole, held squarely upon a point raised by the gentleman from Indiana [Mr. HOLMAN] – and I may say that as a parliamentarian Mr. Kasson has had few superiors in this House – that the ratification of a treaty where a commission had been appointed, and its action came before Congress for ratification, was in pursuance of a "public work," and was therefore proper on an appropriation bill.

Now, if the ratification of a treaty is proper on an Indian appropriation bill, then whatever is necessary to carry out such an agreement is proper and in order. We are inevitably forced to that conclusion. If the treaty covered by this section is in order as it is, and would have been under this decision even if a point of order had been made against it – then whatever is necessary to carry out that treaty must necessarily be in order.

But, Mr. Chairman, my other proposition is too clear for argument. We do not interfere with the public land laws of the United States. We propose to take the only course possible to dispose of these lands; and the proposition affects no land but that which has been acquired under the conditions I have stated.

Mr. HERMANN. Mr. Chairman, inasmuch as this point of order applies to the provision pertaining to the allotment of lands to Indians in my State, the point is in some respects different from that which relates to the Dakota reservation.

Now, in the first place, I ask the consideration of the Chair to this fact – these are not public lands of the United States. They are lands belonging to the Indian reservations and to certain bands of Indians. They do not become lands of the United States at all until after the ratification of the treaty made with the Indians. Then and only then do they become subject to our land laws.

Now, as to the point made by the gentleman that this is new legislation, I desire to make the distinct proposition that this is in accordance with existing law, and that therefore it is pursuant to regulations already provided and strictly in accordance with such regulations. In order to convince the Chair of that fact I ask his kind attention to the act approved February 8, 1887, the law providing for the allotment of lands in severalty among the Indian tribes, in which will be found this provision:

> All lands adapted to agriculture, with or without irrigation, so sold or released to the United States by any Indian tribe, shall be held by the United States for the sole purpose of securing homes to actual settlers, and shall be disposed of by the United States to actual and bona fide settlers only, in tracts not exceeding 160 acres to any one person, on such terms as Congress shall prescribe.

In reference to this proviso as to the Oregon Indians shore is no minimum fixed for the sale of the lands. The maximum limit prescribed by the homestead law is followed, 160 acres; but as to payments, terms, and conditions they are prescribed in this particular bill, and that authority is given by the general act of Congress providing for the allotment of lands in severalty to the Indians.

So, Mr. Chairman, all of the precedents are in line with existing law and not in contravention of it, and it occurs to me that the point of order the gentleman makes is not tenable.

Now, to show again the effect of it, it is provided here that $142,000 shall be paid to these Indians for a large body of land; that $42,000 shall come by way of appropriation; that $10,000 shall be appropriated by the bill, and $32,000 shall come from the sale of the lands; that in order to economize, the settlers shall pay $1.50 an acre for the homestead land, and that they shall have have [sic] 160 acres of land and shall be required to reside on them according to the provisions of the homestead laws of the United States.

The Chair will perceive therefore, that there is nothing here in contravention of the existing law. It is pursuant to the well-known provisions of law regulating the homestead lands of the United States and is in strict accordance with the language of the provision of the general law which I have read, which provides that Congress may regulate the terms and conditions on which the land may be sold to the settlers after the lands are segregated from the rest of the Indian lands and become excess lands and subject to disposal by the Government.

But the first fact that I desire to impress upon the Chair is that they are not public lands of the United States; they are not governed by any of the public land laws until they become segregated from the Indian lands and become in fact a part of our public domain.

[Here the hammer fell.]

Mr. TERRY. Mr. Chairman, I think the point of order submitted by my colleague, Mr. McRAE, is very well taken. It seems to me, sir, very clear that the provisions contained in the bill are not germane to the treaty proposed to be ratified. A modification or a change to be germane to a contract or an agreement is one that in some way or other naturally affects the rights of both parties to the contract.

Now, the question as to how the United States shall dispose of these lands after she has acquired them is a matter with which the Indians have no concern, whatever, and therefore it shows very plainly that it is not germane to a question of contract.

Mr. HERMANN. Will the gentleman permit me a moment? As to the Indians not being concerned in the transaction, it is just the reverse. They can not obtain payment, according to the treaty, unless the funds are derived according to the provisions objected to by the gentleman from Arkansas.

Mr. TERRY. That is not in the treaty.

Mr. PICKLER. Oh, yes it is.

Mr. TERRY. You are putting it in here.

Mr. PICKLER. It is a modification.

Mr. TERRY. Of course, but the terms of the treaty provide that Congress should ratify or confirm the treaty terms and conditions, not as to how the lands should be disposed of, but how they should be purchased.

Mr. PICKLER. In the point of order against my bill, it is provided in section 8 that very thing.

But another question, if the gentleman will permit me. Does not the gentleman know that there has never been a treaty ratified by Congress in all these years, but the bill for the disposition of the land followed directly the treaty? It is universal.

Mr. TERRY. That may be, but it has nothing to do with the point of order.

Mr. PICKLER. And this bill was prepared by the Indian Bureau in accordance with the precedent. It is their bill.

Mr. TERRY. Very well; I have endeavored to answer the gentleman's question.

Now, as I say, the original act provided for a commission which was sent to negotiate the purchase of this land.

They have submitted a treaty, which has been signed by these Indians. If we wish to modify the terms of that treaty as to paying more or less for the land, or as to when the payment shall be made, etc., that is all germane; but to bring forward legislation as to what the United States shall do with the lands after they have purchased them is not germane to the proposition of purchasing them.

Mr. HERMANN. Will the gentleman indulge me again – and this is a very vital point? I ask the gentleman what is his construction of the provision of law which I have just quoted?

Mr. TERRY. I did not have my attention called to that.

Mr. HERMANN. That the specific act of Congress providing for the allotment of lands to the Indians, provided that as to the excess lands they shall be disposed of to actual settlers under the homestead "under such terms and conditions as Congress shall prescribe."

Now Congress is proposing to prescribe that under the general provision of the law these lands may be occupied by actual settlers, but one of the conditions shall be that they shall pay $1.50 per acre at the time of final proof. Now, I ask the gentleman if that is not in accordance with existing law?

Mr. TERRY. Not now recalling the particular section to which the gentleman from Oregon [Mr. HERMANN] refers, I will leave the answer on that matter to my colleague [Mr. McRAE], who has just been examining it, and I now yield the floor to him.

Mr. McRAE. The section of the law read by the gentleman from Oregon, instead of being an authority for him, it is to my mind very conclusive against him. That law contemplates that when we acquire lands we shall dispose of them, as I am insist-

(53 Cong. Rec. 6426)

ing we should, under the public land laws. The gentleman points to this law, which requires that they shall be disposed of under the homestead law, and yet he contends for a proposition in this bill which literally takes all the life and vitality out of it. That is what I complain of.

Mr. HERMANN. My answer to the gentleman is this, Mr. Chairman, that if that were the construction to

be placed upon this provision, then it would be necessary simply to say that they shall be acquired under the conditions imposed by the homestead act, but we go further, according to the language of the allotment act, and we are standing upon the allotment act, which provides for such terms and conditions as may be prescribed by Congress. Why insert those words if the lands were to be disposed of under the homestead act?

Mr. McRAE. The gentleman forgets that this is a point of order, and the question is, at what time and upon what bill shall Congress make or prescribe these conditions? The point I make is that it can not be done upon an appropriation bill. Now this is a very plain proposition, that does not, as my colleague has correctly and clearly stated, have any reference to the confirmation of the treaty; but it is a proposition to change the land laws, so far as these lands are concerned, giving men the benefit of the law who are not entitled to it, changing the time of residence from five to three years and depriving settlers of the right of commutation. Almost every important provision of the homestead law is changed. Men who have had the benefit of it can take it again under this bill, and gentlemen, will find that if these provisions are adopted the land jumpers and "sooners" will take every valuable piece of land that you open to settlement by it.

Mr. PICKLER. Oh, no.

Mr. LYNCH. Will they not take it under the homestead law just as well?

Mr. McRAE. Oh, no.

Mr. HOLMAN. Why not?

Mr. McRAE. This bill restores the right to those who have lost it.

Mr. HOLMAN. Mr. Chairman, I only rise to correct a mistake in the statement of my friend from Arkansas [Mr. McRAE]. There is no such change here as from five years to three. The act of the 3d of March, 1891, provided a period of fourteen months, and this makes it a period of three years. That is the only difference.

Mr. PICKLER. It is to prevent fraud.

The CHAIRMAN. The Chair is ready to rule. The Chair was of the opinion yesterday that perhaps the point of order was well taken, but he has given the matter very careful consideration last night and this morning, and the Chair wishes to direct the attention of the gentleman from Arkansas to the fact that the question whether or not a point of order would lie against a treaty in an appropriation bill does not now come up for consideration. It is too late to raise that point, and that has nothing whatever to do with the question before the House. Now, it is conceded by the gentleman from Arkansas that these lands are not public lands of the United States, and are not governed by the laws now on the statute books in relation to the public lands of the United States.

In addition to the Chair finds, upon looking at the matter, that it is the universal custom, in considering these treaties to modify and change them just as now being done in the present bill, and that is not only true of Indian treaties, as the Chair understands, but it is also true of other treaties. In fact, the Chair is informed that when the treaty between France and the United States

was made, by which the United States acquired the great territory of Louisiana, after that treaty had been made by the high contracting parties, the great Napoleon twice modified the treaty, and the Senate of the United States once modified it, before it finally became a law. It seems to the Chair, therefore, that in view of the custom which has existed from time immemorial in this country that the point of order is not well taken, and the Chair so rules.

Mr. WILSON of Washington. I rise to offer an amendment.

Mr. McRAE. I wish to offer an amendment.

The CHAIRMAN. The Chair desires to be perfectly fair, and he will first recognize the chairman of the committee to offer any amendment. This ruling cleans up the four points of order which were pending against the bill.

Mr. HOLMAN. Mr. Chairman, since the preparation of this bill –

Mr. McRAE. I understand the Chair's decision goes to all of these, the whole of them.

The CHAIRMAN. The Chair thinks the point of order against each is good on the same ground.

Mr. McRAE. That any kind of land legislation as to these lands will be germane. Is that the ruling?

The CHAIRMAN. The Chair so holds.

Mr. McRAE. Then, I wanted to move an amendment myself. That is the reason I asked the question.

Mr. HOLMAN. Mr. Chairman, I submit the following amendment in behalf of the committee.

The Clerk read as follows:

On page 7, line 8, after the word "Muscogee," insert the following language:

"And also provided that the Pueblo, Jacarilla Agency, in New Mexico, is hereby abolished and consolidated with the Southern Ute Agency, Colorado."

The amendment was agreed to.

* * * *

(53 Cong. Rec. 6435)

* * * *

The SPEAKER. It was a motion to recommit with instructions. It was all one motion. The Clerk will report the motion which the gentleman from Arkansas proposes to make.

The Clerk read as follows:

Strike out all of the paragraph on page 95 after the word "entry," in line 14, down to and including the word "land," in line 19.

Strike out all after the word "third," in line 20, page 95, down to and including the word "disqualificated," in line 2 page 96.

Strike out all after the word "law," in line 21, page 136, down to and including the word "law," in line 23, and insert the following words:

"The remainder of the lands by said agreement ceded to the United States shall, upon proclamation by the President, be opened to settlement and disposal under the public land laws of the United States.

Strike out all of this paragraph after the word "acre," in line 5, page 137, down to and including the word "patent," in line 9.

Mr. SPRINGER. I make a point of order on that, Mr. Speaker. There are about half a dozen amendments there. None of them are necessarily connected with each other.

Mr. PICKLER. And they were held to be out of order in Committee of the Whole.

Mr. McRAE. Oh, the gentleman is mistaken. There was no opportunity to present them there. I made points of order against these and other provisions, which were overruled.

Mr. PICKLER. They were the same propositions substantially.

Mr. SPRINGER. It would not be in order in Committee of the Whole to move all these amendments together.

Mr. McRAE. These are not amendments. They are instructions to strike out certain parts of the bill. They are offered not as amendments, but as instructions to strike out certain parts, so as to make the bill conform to existing law and prevent fraud and injustice in the entries.

Mr. SPRINGER. There is a proviso there which changes existing law.

Mr. TRACEY. The gentleman's motion is not germane.

Mr. McRAE. Mr. Speaker –

The SPEAKER. This question is not debatable.

The question being taken on agreeing to the motion of Mr. McRAE, it was rejected, there being ayes 9, noes 130.

The question being then taken on the passage of the bill, there were, on a division (called for by Mr. GEAR) – ayes 137, noes 2.

Mr. GEAR. No quorum.

Tellers were ordered, and Mr. GEAR and Mr. HOLMAN were appointed.

Mr. PICKLER. I demand the yeas and nays.

Mr. HOLMAN. Oh, no.

The yeas and nays were not ordered.

The House again divided: and the tellers reported – ayes 158, noes 23.

So the bill was passed.

On motion of Mr. HOLMAN, a motion to reconsider the vote by which the bill was passed was laid on the table.

* * * *

(53 Cong. Rec. 8057)

* * * *

The committee of conference have been unable to agree on the following amendments of the Senate, namely:

* * * *

(53 Cong. Rec. 8058)

* * * *

On amendments numbered 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, and 114, which provide, as proposed by the Senate, for the payment in cash for lands ceded by the Yankton Sioux Indians of Dakota, the Yakima Nation of Indians in Washington, the Coeur d'Alene Indians in Idaho, and Alsea and other Indians on the Siletz Reservation in Oregon, instead of deferring such payments until after the lands shall be disposed of by the United States;

* * * *

(53 Cong. Rec. 8136)

* * * *

I must further state that the subjects upon which no conclusion has been reached involve $2,447,766.49. There are only a few items involved, largely the appropriation of money for lands purchased from the Nez Perce Indians of Idaho and lands purchased from the Yankton Sioux in South Dakota, and lands purchased from the Siletz Indians of Oregon.

Those are the principal items in the sum of $2,447,766.49 as to which no agreement has been reached. I ask the House to accept this report to the extent that agreements have been reached and to consent to the conference asked by the Senate on the remaining disagreements between the two Houses.

It is proposed by the Senate, in all of its amendments in relation to the purchase of Indians lands, that the United States shall pay 5 per cent per annum on the deferred payments. The House conferees insist that as the Government can borrow money at 3 per cent, and as the Government is now paying the Indians from $1.25 to $3 per acre for their lands instead of 40 or 50 cents in former years, this rate of interest is excessive. However, in any event, we must provide for these Indians; yet an admitted large obligation on the part of the Government, as to charges on the public Treasury for these tribes, in the opinion of the House conferees, would not be beneficial to tribes interested. No one can deny that the United States should deal justly and liberally with the Indian tribes, but we ought not to leave in their minds the idea that the Government must support them.

* * * *

(53 Cong. Rec. 8264)

* * * *

The SPEAKER *pro tempore*. The question on the motion of the gentleman from Indiana that the report of the committee of conference be adopted has not yet been submitted.

Mr. HOLMAN. Mr. Speaker, I wish to occupy a minute or two to explain a matter to which I ask the attention of the House.

Mr. LYNCH. Why not dispose of the pending motion to agree to the conference report as made?

Mr. HOLMAN. There is no objection to that, but before it is done I wish to occupy a minute or two.

Mr. WILSON of Washington. Now, Mr. Speaker, I move that we agree to the conference report as submitted.

Mr. LYNCH. I do not yield the floor, Mr. Speaker, for any gentleman to make a motion.

The SPEAKER *pro tempore*. The gentleman from Wisconsin refuses to yield. If the motion of the gentleman from Indiana [Mr. HOLMAN] prevails it simply ratifies the agreement reached by the conferees. After that has been disposed of, it will be in order to move that the House insist upon its disagreement on the other points and ask for a further conference. Then it will be in order to make a motion to recede from the disagreement, and the vote will be first taken upon the motion to recede.

Mr. MADDOX. After those two questions are voted upon, will the other one be open for discussion?

Mr. WILSON of Washington. Mr. Speaker, my motion has precedence over the second motion, as stated by the Chair.

Mr. HOLMAN. The motions come in this order. First, the motion on the adoption of the report itself –

The SPEAKER *pro tempore*. As the Chair understands, no motion has been submitted to the House except a motion to agree to the report of the committee of conference.

Mr. HOLMAN. Mr. Speaker, I overlooked a matter to which I wish to call the attention of the House, and I should feel very much mortified if, by an oversight on my part –

Mr. PICKLER. Who has the floor, Mr. Speaker?

The SPEAKER *pro tempore*. The gentleman from Wisconsin [Mr. LYNCH] has the floor.

Mr. HOLMAN. The gentleman from Wisconsin yields to me.

Mr. LYNCH. I yield the gentleman from Indiana five minutes to make some remark on the part of the report already agree to.

Mr. HOLMAN. The matter to which I wish to call attention is a matter of much moment –

Mr. WILSON of Washington. Mr. Speaker, I understand that the chairman of the committee of conference is entitled to the floor.

Mr. LYNCH. I yield five minutes to the gentleman from Indiana.

The SPEAKER *pro tempore*. The motion of the gentleman from Wisconsin [Mr. LYNCH] will not be in order until after the motion of the gentleman from Indiana [Mr. HOLMAN] has been voted upon. After that, the gentleman from Wisconsin wili be recognized.

Mr. HOLMAN. Mr. Speaker, of course there can be no difficulty as to the order in which the votes shall be taken upon the several motions. First comes up for consideration the question of the adoption of the report of the committee of conference. After that two other motions are in order; one, that the House insist on its disagreement and ask for a further conference, and the other, that the House recede, and the latter question must be first put.

Now, the matter to which I wish to ask attention is this, and I especially ask the attention of the members of the Committee on Indian Affairs. It will be remembered that when the subject of those asphalt lands in Utah was under consideration a provision was inserted in the House bill fixing the minimum price at $50 per acre. The Senate adopted an amendment, which will be found on page 147 of the printed bill, which reads as follows:

> SEC. 20. That the remainder of the lands on said reservation, except lands containing asphaltum, gilsonite, or other like substances, which are hereby reserved from sale.

The House proposition was to sell, and we fixed the minimum price at $50 per acre. It was supposed that these asphalt lands would be of very great value, and accordingly the House fixed that price. The Senate, on the other hand, determined to withhold the lands from sale, but finally they submitted a proposition to strike out the words "except lands containing asphaltum, gilsonite, or other like substances, which are hereby reserved from sale," which words they had themselves inserted, and then to provide for the disposal of the remaining lands under the homestead and mineral land laws of the United States. At the last meeting of the conferees the Senate abandoned that; but insisted upon these words:

> That these lands shall be disposed of under the homestead and mineral laws of the United States.

The mineral laws being applicable to land containing asphalt and like substances. Now, the House conferees have receded from the disagreement on that point; so that the bill as it now stands authorizes the entry of those

asphalt lands under the mineral land laws, it being, however, provided at the instance of the House conferees that no one person shall be permitted to make more than two entries of 10 acres each.

Mr. LYNCH. There is no controversy over that provision.

Mr. HOLMAN. The House therefore understands that in adopting this report it adopts the provision authorizing the entry of these mineral lands under the mineral land laws, with this qualification, that instead of allowing 40 acres to be entered no one person can make more than two entries of 10 acres each, or 20 acres in all. This is all I wish to say.

Mr. LYNCH. I now ask a vote on adopting the report of the conferees so far as they have agreed.

The question being taken, the report of the committee of conference was adopted.

Mr. HOLMAN and Mr. LYNCH claimed the floor.

Mr. HOLMAN. The gentleman from Wisconsin [Mr. LYNCH] of course yielded the floor when he made his motion.

Mr. LYNCH. I yielded five minutes of my time to the gentleman from Indiana.

Mr. HOLMAN. If the gentleman wishes to be heard I will, of course, yield to him.

Mr. LYNCH. I decline to yield further at this time.

Mr. WILSON of Washington. The gentleman from Wisconsin lost the floor when the motion which he made was submitted.

The SPEAKER *pro tempore*. The motion indicated by the gentleman from Wisconsin [Mr. LYNCH] was that the House further insist on its disagreement on the remaining amendments and ask for a further conference with the Senate.

Mr. LYNCH. That is my motion.

The SPEAKER *pro tempore*. On that motion the gentleman from Wisconsin is recognized.

Mr. WILSON of Washington. I rise to a parliamentary inquiry. The gentleman from Wisconsin made a motion which was put to the House and adopted. Under those circumstances did not the gentleman lose the floor?

Mr. LYNCH. I beg the gentleman's pardon.

Mr. WILSON of Washington. Wait a moment. The Chair will decide this question.

Mr. LYNCH. I decline to yield further.

The SPEAKER *pro tempore*. It was upon the motion of the gentleman from Indiana [Mr. HOLMAN] that the conference report was agreed to. Before that question was submitted, the gentleman from Wisconsin [Mr. LYNCH] rose to a parliamentary inquiry as to whether a motion to insist upon the disagreement to the remaining amendments and ask for a further conference would be in order. The Chair stated it would be, but that the report must be

first disposed of. Having agreed to recognize the gentleman from Wisconsin to make that motion, he is now recognized for that purpose.

Mr. LYNCH. Mr. Speaker, during this session there have been submitted to both Houses of Congress seven or eight propositions to treat with the Indians. The Committee on Indian Affairs of the House has considered each of the treaties submitted to it and has agreed to three of those treaties. Having examined the provisions of each treaty separately, it has recommended the ratification of those three treaties with certain amendments proposed by the House committee. In each of those treaties we have changed the rate of interest from 5 per cent to 4 per cent, believing that at this time the Government ought not to be required to pay over 4 per cent interest.

We have applied the same rule to all those treaties, inserting this expense provision in each, and providing that in each case the treaty be submitted to the Indians for a ratification of the changes made.

Mr. PICKLER. Right there, allow me to ask whether the proposition of the House committee does not remit all these treaties back to another agreement with the Indians?

Mr. LYNCH. It is provided that the treaties shall be submitted again to the Indians for the ratification only of the amendments made by Congress.

Mr. PICKLER. And three new commissioners are to be appointed.

Mr. LYNCH. Oh, no; that is stating the matter entirely wrong.

Mr. PICKLER. That will be the result.

Mr. LYNCH. Not at all. The treaties as passed here will

(53 Cong. Rec. 8265-8271)

be sent back to the agent in charge of the Indians to procure their consent to the change, if possible; if not, then the treaties will fail.

Mr. PICKLER. That is just the point. We do not want the treaties to fail.

Mr. LYNCH. The question is simply whether Congress shall deal directly with the Indians or follow implicitly the action of the commissioners.

Mr. PICKLER. The question is whether Congress will in good faith carry out its agreements with the Indians or will go back on the contract of the Government.

Mr. LYNCH. Congress should not be subject to the whims or freaks of two or three commissioners.

Mr. PICKLER. Your Secretary of the Interior, one of the highest officers of the Government, sent out these commissioners to make these treaties.

Mr. LYNCH. It was his predecessor who sent them out, as I understand it. We have had instances in the past where commissioners went out and gave to the chiefs of tribes $300 or $500 or some other sum in the nature of a bribe. We have had that happen repeatedly. That is the way our commissioners have acted in certain cases. Now, I do not feel that we are bound at all by the action of the

commissioners, but that what they do is subject to our ratification.

Mr. PICKLER. Does the gentleman say that any of these commissioners bribed any of the chiefs?

Mr. LYNCH. Let the gentleman remember the Yankton-Sioux treaty and what was done in connection with it – a twenty dollar gold piece given to each head of a family as an inducement, or a bribe, to sign the treaty,

Mr. PICKLER. But does the gentleman assert that there was anything improper in the conduct of the commissioners in these cases?

Mr. LYNCH. I do not assert any such thing. I have only asserted what has taken place in the past within the knowledge of many of the older members of the House.

I claim that this House ought not to be bound for one minute by such action on the part of commissioners.

Mr. PICKLER. Then why did you send them out there?

Mr. LYNCH. Well, they go and they are very anxious to do something, and they do many things that they have no right to do, and make agreements by which they try to bind the Government when they ought not to do it.

Mr. PICKLER. Certainly these commissioners have general instructions from the Secretary of the Interior to do what they do. He lays down the rules and regulations to guide them, and fixes the general scope of their duties. The commissioners are understood to be acting within the rules laid down by the Department.

Mr. LYNCH. But there is very much left to their discretion, and they always make out to secure some kind of a treaty.

Mr. PICKLER. Well then, it is 5 per cent you oppose, is it?

Mr. LYNCH. I will tell you after a while.

Mr. Speaker, there are three of these treaties – one with the Siletz Indians, of Oregon; the Yankton Indians, of South Dakota; and the Yuma Indians, in which treaties the amount involved is small.

Mr. HOLMAN. The Yanktons is over $600,000.

Mr. LYNCH. Well, the land is worth it. The committee went carefully over the bills, and particularly guarded everything connected with the treaties. Three of these treaties were put on the bill by the House, but when it went to the Senate that body put on another treaty with the Nez Perces Indians, in Idaho, and it is to that particular treaty that I wish to address myself a short time.

Mr. HOLMAN. We do not call it a "treaty;" it is simply an agreement or understanding.

Mr. LYNCH. Certainly it is a misnomer to call it a treaty; it is, in its present stage, only an agreement.

Mr. PICKLER. The same kind of a treaty we have always made.

Mr. LYNCH. The Nez Perces Indians, according to the last census, have a population of 1,838. They already have 1,900 allotments. You will notice, therefore, that there are more allotments of land than there are Indians.

The total amount of land in the reservation was 756,968 acres. There has been divided or allotted 182,234 acres to the Indians of the reservation and 32,660 additional reserved, leaving a balance of about 542,074 acres to be sold under this treaty. The price agreed to be paid is $3 an acre for the whole 542,000 acres, amounting to $1,662,000 and some odd dollars.

Mr. HAUGEN. How is that land, good or bad; and what the proportions of each kind?

Mr. LYNCH. I am coming to that in a moment. This treaty was made –

Mr. HOLMAN. This agreement.

Mr. LYNCH (continuing). By two men. One is Mr. Fenn, who was born in the county and lived there all his life; and the other is Mr. Sleicher, who has resided near the reservation for many years and is familiar with the country and its resources. The report says he is a "conservative man, a man of good judgment, as we are informed." Now, let us see how these two men differ as to the quality of this land and its value. Mr. Sleicher says that there are 350,000 acres of agricultural land worth $3.75 an acre. That is the value put by himself upon it. He further says that there are 70,000 acres of timber and agricultural land worth also $3.75 an acre. The other commissioner values that timber and agricultural land at $5 an acre. Mr. Sleicher says, 70,000 acres of mineral land at $5 an acre, and the other fellow, only 30,000 acres at $5 an acre.

Mr. WILSON of Washington. Well, that is the price of all mineral land.

Mr. LYNCH. Mr. Sleicher says that there is some mountainous land on it which is of very little value; and Mr. Fenn says that there is a hundred thousand acres of mountainous land of nominal value – 50 cents an acre. And yet we are asked here to pay $3 an acre for every acre of that land! That is the injustice of the proposition. Three dollars an acre for the good and the bad land alike. And we are asked to sell the agricultural land for $3.75 an acre, and the mineral and timber lands at an estimate of $5 put on two qualities of land, leaving us, of course, all of the bad lands on our hands for all time, because we will never be able to get rid of them.

Mr. PICKLER. May I ask the gentleman a question?

Mr. LYNCH. Certainly.

Mr. PICKLER. Does the gentleman suppose we will ever be able to buy these lands for less than $3 an acre? I can only tell the gentleman that when you go again you will find that you will have to pay $4 an acre for them.

Mr. CURTIS of Kansas. Will the gentleman yield for a question?

Mr. LYNCH. Certainly. –

Mr. CURTIS of Kansas. If that reservation is sold, and the bad land is left entirely out, does it not still leave a surplus to the Government?

Mr. LYNCH. Why, if you could sell all of the other lands at the estimates it would perhaps even up. But who believes, when these two commissioners differ so much in their estimates, one estimating that there is but a small quantity of mountainous land, and the other a hundred thousand acres of land of this character, and when they

are so wide in their estimate of the value of the land, who believes that we can rely upon such an estimate as that?

Mr. CURTIS of Kansas. Is it not a fact that one of the commissioners failed to estimate the hundred thousand acres, and that was put in by the committee at 50 cents an acre? The whole amount of land is accounted for by each, but differently classified and appraised.

Mr. LYNCH. He gives the whole of it here on the bottom the first page.

Mountainous lands, not estimated, about 46,000 acres.

That is the way one of them puts it.

Mr. CURTIS of Kansas. The other failed to estimate 100,000 acres, and the committee put it in at 50 cents an acre.

Mr. LYNCH. One of them estimates it at 46,000 acres and the other at 100,000 acres. But the point I make is that these commissioners agreed to pay altogether too much for that land, and that the Government will eventually lose a million of dollars if it approves of this treaty in its present form. The idea of buying a chunk of land out there in Idaho, 542,000 acres, and paying $3 an acre for every acre of it, when the commissioners admit that from one-third to one-half is of little or no value!

Mr. PICKLER. There is no necessity to sell the lands until the Government can get that price for it, is there?

Mr. LYNCH. There is no guaranty that we will ever get that price or any other price for all the land.

Mr. PICKLER. Then we can hold the land?

Mr. LYNCH. Yes, and pay 4 or 5 per cent interest on it. That is not a very profitable transaction for the Government.

Mr. HAUGEN. If you remit this treaty back to the Indian agent, do you put a limit on the authority given to the agent as to price?

Mr. LYNCH. I certainly would.

Mr. HAUGEN. Do you do that now, in this proposed amendment?

Mr. LYNCH. No; there is no such proposed amendment; but, if I did, I would sell every foot of that land to the highest bidder, and give the Indians every dollar there is in it, and not let the Government make a dollar. I would give the Indians the whole benefit of it.

Mr. HAUGEN. When this treaty is remitted back to the Indian agent to treat anew with the Indians, how is it proposed to limit his authority?

Mr. LYNCH. By proper instructions from the Interior Department.

Mr. LYNCH. No amendments have been prepared to obviate the objections I have made.

Mr. HAUGEN. Are you going to prepare any? What I wish to know is, what it is proposed to do here?

Mr. LYNCH. To reject the treaty, for the present, and by proper amendments protect the interest of the Indians and the Government.

Mr. PICKLER. And then when a new treaty is made there will be a proposition to reject that?

Mr. LYNCH. Not if it gives the Indians all that belongs to them and the Government a fair deal. I think a treaty ought to be made by which the surplus lands there would be thrown open to settlement; but I am opposed to the Government paying what seems to me a clean million of dollars more for this tract of land than it will ever get for it.

Mr. HERMANN. This treaty has been made on the part of the Indians and on the part of the commissioners. That is, the two parties, the Indians and the commissioners, have agreed together. Now, if this treaty should be repudiated by us and sent back to them the same proceeding must be had over again.

Mr. LYNCH. As to the amendments only.

Mr. HERMANN. Now, does the gentleman believe that these Indians will agree to dispose of this land for a less sum than they have already done?

Mr. LYNCH. I suppose they will, and if they do not I would do the other thing, and I think the Government will come to the other plan in a very short time. That is, to sell all of these surplus lands under the sealed bid process; and if these lands are worth more than the price mentioned here, give it to the Indians. I want them to get every cent there is in it. This is a wealthy, prosperous tribe of Indians. They are now cultivating over 30,000 acres of land. They have 75,000 acres under fence. There are 1,900 allotments already made, and they are pretty well able to take care of themselves.

Mr. LUCAS. What is the aggregate price that it is proposed, under this treaty, to pay the Indians for the lands purchased?

Mr. LYNCH. Three dollars an acre for the whole reservation.

Mr. LUCAS. To pay the Indians that?

Mr. LYNCH. Yes, and to pay them right off, whether the Government sells any of the land or not. We have got to pay them that amount of money, or put it out at interest at 5 per cent.

Mr. LUCAS. That is the Nez Perce Reservation?

Mr. LYNCH. That is the Nez Perce Reservation. Now, in regard to the quality of the land, I want gentlemen who disagree with me about this to pay special attention to what the commissioners say. They say:

> Much of the land, however, is fine agricultural land, worth perhaps eight or ten dollars an acre, while from one-third to one-half of it is of little value.

"Of little value" is the language they themselves use.

That is the judgment of the commission and in their report they say so –

> That while some of it is worth from $8 to $10, that one-third or one-half of it is of little value.

That is undoubtedly true; and that is the point I make – that we are paying too much when we pay $3 all around.

There is another thing. In the first place the Indians are allowed to take their allotments before anything is

done. They have selected the very choicest pieces of land on that reservation. The commissioners practically say so. They have gone all over it and picked all the land that has water or that can be watered, and they have got the cream of the whole reservation. Now, they want to sell the balance of that great tract of land to the United States for $3 an acre and commence to draw their interest on it immediately whether the Government sells any of it or not.

Mr. PICKLER. Now, I want to ask the gentleman if that has not been the universal practice of the Government, and if we have not bought Indian lands during a period of time immemorial? Have we not also sold the lands to settlers? Is there anything new in that?

Mr. LYNCH. There is nothing particularly new about it; and it is all right where all the land is good.

Mr. PICKLER. The Government will have the land until it is paid for.

Mr. LYNCH. Yes; by paying interest on it. It is to a great extent not worth $3 an acre.

Mr. PICKLER. The Government ought to stand by its agreement.

Mr. LYNCH. The Government did not make any agreement.

Mr. PICKLER. You are asking the government to repudiate its agreement.

Mr. LYNCH. There is no agreement to repudiate.

I want to say that there are 1,900 selections or allotments made already, every one of them a choice piece of

land. You gentlemen who have traveled through the Western country, on the borders of these mountains, have some idea of how broken the land is; and you know, after they have taken so many good allotments out of an area of twenty-three townships, nearly one hundred choice allotments in a township, the general character of the land left, for which $3 an acre in cash is to be paid, can not be otherwise than a losing job to the Government. As to the quality of the land, the agent in his report in 1892, in speaking of the Indians as farmers and the quality of lands, says:

> Owing to the many years of successive failure in raising crops the Indians have become heartily discouraged, and the progress or advancement made by them in this industry has been very slow. Nothing more could be expected of them when from year to year they have been compelled to contend with the many failures in raising their crops. This year is included with the preceding years of failure.
>
> The hay yield this year would not average more than a half ton to the acre, and the yield of wheat and oats averaged not more than 7 or 8 bushels to the acre. This small amount of hay, wheat, and oats raised they were compelled to feed to their stock during the cold and severe months of last winter. They were compelled to buy the seed oats and wheat which they planted this spring.
>
> From a tract of land of about 10 acres, which I sowed to hay for the purposes of subsistence for the agency horses, I was able to cut the insignificant amount of about 1 ton. These successive years of failure in raising crops is due to the hot

> scorching winds with which this section of the country is invariably visited each summer.
>
> While the Indians have made no great showing in the way of advancement or progress in this great industry, nevertheless it can be noticed, in some instances, that many steps forward have been taken by them. Consideration must be given the fact that they do not till or farm any large tract of land, but confine themselves mostly to the valleys and low lands, where only small tracts can be found that are tillable. When they have each received their allotment, and have placed such improvements as will enable them to live upon and cultivate the same, then, and not till then, will rapid and progressive strides be made by them in this industry, their chief revenue of support.

This is the report of the agent himself; but one objection to this treaty, taking the judgment of the men who made it, is the commissioners did not classify the lands, by putting a fair value on the good lands and a lower value on poor lands. My short experience on the Committee on Indian Affairs has taught me that in every instance the Government has lost in its deal by buying these lands of the Indians.

Mr. WILSON of Washington. Will the gentleman be kind enough to state a singe [sic] case?

Mr. LYNCH. Why, in all of them. The highest price we ever paid was a dollar until the treaty with the Yankton Sioux Reservation came up; and even on that we shall lose. I am satisfied that about all of it is good land and will sell so that the Government will get out of it whole. But when you go out to the State of Idaho and pay $3 an

acre for that immense body of land of which the commissioners in their report say "one-third or half of it is of little or no value," I can not see how you are doing justice to the Government when you do it.

Mr. HARTMAN. Will the gentleman allow me to ask him a question?

Mr. LYNCH. Certainly.

Mr. HARTMAN. If one-half of it is worth nothing and the other one-half of it is worth $8 or $10 an acre, how can the Government, purchasing it at $3, lose anything by it?

Mr. LYNCH. Then let the Government confine itself –

Mr. HARTMAN. If one-half of it is worth nothing and the other half is worth $8 or $10, how can the Government lose anything by buying it at $3 an acre?

Mr. LYNCH. If the Government could sell the lands worth $8 to $10 per acre it would lose nothing; but that is not the provisions of the bill. The Government is paying $3 an acre for all of it and paying interest on the whole amount, with scarcely a hope of ever selling more than half.

Mr. HARTMAN. That is evading the question.

Mr. LYNCH. It is not evading the question. There is no proposition in the bill to sell the good lands for double what was paid for them. If there was, the question of the gentleman would be pertinent.

Mr. McRAE. The bill only fixes $3 as the price to be paid for the land, and only land which is worth that will be taken at all, and it will be taken at that price.

Mr. WILSON of Washington. The gentleman is mistaken. Three dollars and seventy-five cents is the price for agricultural lands.

Mr. McRAE. Very well. The other portion of the land will be left on the Government's hands, so that we shall lose the value of all those lands which will not bring $3.75 an acre.

Mr. LYNCH. That is, the Government will lose very nearly half the amount that it pays for these lands.

Mr. HARTMAN. I speak from the testimony that is printed and laid before the House.

Mr. LYNCH. I speak from that, too.

Mr. McRAE. If there was a provision, as the gentleman from Wisconsin [Mr. LYNCH] suggests, authorizing these lands to be disposed of for their full value, I suppose the Government might realize out of the part of them which it could sell the cost of the whole, but you can not sell half these lands for $3.75 an acre and have the other half left on your hands without losing money.

Mr. HARTMAN. The statement is that about half of these lands is worth from eight to ten dollars an acre.

Mr. LYNCH. Oh, no; they do not say that. They say that much of the land is worth that.

Mr. HARTMAN. They say virtually that from one-third to one-half is worth that.

Mr. LYNCH. Not at all. You can not sell half those lands for $3.75 and have the Government come out whole.

Mr. HARTMAN. One thing is certain, that if you put up the lands at public auction you will not get much for them.

Mr. LYNCH. That again shows the injustice to the Government. That is all the more reason why the Government should not approve this treaty at all. It is to this unfair feature of the treaty that I am opposed.

I am willing that we should buy this land upon any reasonable basis which will bring the Government out whole. I submit that the Government is under no obligation to pay such a price for this tract of land that it can not come out whole. You can amend this bill – and I will raise no objection to that – so as to provide for selling these lands to the highest bidder under the sealed bid system recommended by the Interior Department.

Mr. HARTMAN. That is for the benefit of the speculators.

Mr. LYNCH. No; for the benefit of the Government.

Mr. HARTMAN. The settlers will not get any benefit out of it.

Mr. LYNCH. Well, the Government ought to protect itself first. Speculators usually take care of themselves.

Mr. COOMBS. Is not the Government in this case becoming a speculator with the certainty of loss?

Mr. LYNCH. With a dead certainty of loss. Mr. Speaker, this whole system of buying lands must soon come to an end. It is not the proper method. Some of the land in those reservations is valuable, and it ought to be sold to the highest bidder, and the Indians ought to get

every dollar it brings, but much of this land is not worth a cent. It will lie there for centuries and nobody will pay the taxes on it.

Mr. TALBERT of South Carolina. What is the date of the treaty in this case?

Mr. LYNCH. It has been made within the past year.

Mr. TALBERT of South Carolina. Was it not made subject to ratification by Congress?

Mr. LYNCH. Certainly.

Mr. TALBERT of South Carolina. Then if Congress does not ratify it, I do not see how that can be called breaking a treaty.

Mr. LYNCH. It is not breaking a treaty. This is simply a proposition submitted by the Indians for us to act upon. Mr. Speaker, I reserve the balance of my time.

Mr. PICKLER. Mr. Speaker, I desire to call the attention of the House very briefly to the provision in this bill in relation to the treaty for the Yankton Sioux Reservation; and what can be said of that treaty can, in general terms, be said of the others. The proposition that is before the House to-day is very simple. We are needing more lands for settlement. By an act of Congress we provided for sending out a commission to treat with the Yankton Sioux Indians for their reservation. That commission was organized by the Secretary of the Interior and was sent out with general instructions.

The commission called together the chief men of the tribe. They were about a year, as I now remember, getting up this treaty, and finally they agreed with the Indians to

buy the lands upon certain terms, to pay them a certain amount for their lands, and they further agreed that on the deferred payments we were to allow them 5 per cent interest. That agreement comes here for ratification, and the proposition now is to abandon it and to go back to those Indians and say to them: "You got the best of us in that agreement, so we do not propose to stand by it; but we want to make a new treaty with you."

Mr. COOMBS. Were those commissioners authorized to bind the Government in any way?

Mr. PICKLER. Yes, sir.

Mr. COOMBS. Were they not merely authorized to see what could be done?

Mr. PICKLER. Now I hope the gentleman will not evade the matter in that way.

Mr. COOMBS. I do not evade anything.

Mr. PICKLER. If you are going to split hairs with these Indians when you treat with them, let me tell you it is not acting in good faith. The commissioners were sent out there under an act of Congress, and under instructions from the Secretary of the Interior. They called the Indians together and said to them, "We want to make an agreement with you." Of course it was understood that the agreement would come back to Congress for ratification, and the Indians were so told; but now we are complaining here that the Indians got the best of the bargain, and saying that we will not stand by it.

It seems to me Congress will occupy a humiliating position if it should say "We do not want to pay what we agreed to pay in dollars and cents."

Mr. COOMBS. But the commissioners had no right to make such an agreement.

Mr. PICKLER. They had the right; they were authorized by the Government.

Mr. COOMBS. They were authorized to go and treat –

Mr. PICKLER. The gentleman from New York [Mr. COOMBS], if he desires to do so, can join in voting these treaties down; he can join in breaking faith with the Indians. We have the power as a great Government to badger these Indians, to tell them that they must consent to whatever we say. That is the position which the question of the gentleman from New York would seem to indicate he desires to take. But there is no reason why these agreements should not be ratified. These commissioners went out in good faith; the Secretary of the Interior gave them their instructions; they kept within their instructions; they have made an agreement for these lands; and now Congress ought to live up to the agreement.

What will you tell these Indians when you send the matter back to them? What faith will they have in the Government under such circumstances? How will another agreement be arrived at? If the present agreement be sent back, then why may not a new agreement be sent back, and so continue to agree with the Indians and repudiate the agreements indefinitely?

Mr. TALBERT of South Carolina. If the action of these commissioners was final, if they had a perfect right to make an absolute bargain, why should it be necessary to bring these treaties back to Congress for ratification?

Mr. PICKLER. The commissioners had not the power to make an appropriation for the payments under these treaties; and therefore the matter must come back to Congress for final action.

Mr. TALBERT of South Carolina. It comes back, then, not for ratification, but for appropriation.

Mr. PICKLER. I will ask the House to observe that if we agree to the Senate proposition, a reasonable proposition, to which five out of the six conferees have agreed, we simply procure these lands in the same way we have always procured lands from the Indians. We make no departure from our past policy; we are following in the same line.

Now, a word as concerns the economy of this transaction. Upon the reservation now in question there is a deferred payment of $500,000, upon which the gentleman from Indiana and the gentlemen supporting him think we ought to pay but 4 per cent interest instead of 5, as has been agreed upon. Now, there are about 1,750 of these Indians. They are poor. They have only this fund of $500,000, which, at 5 per cent, will yield them only $25,000 a year, which will not support them; and when their own means of support are exhausted the Government must support them. There is nothing, then, to be made by sending these treaties back. We will have to pay for their support in addition to this interest. Aside from the question of breaking faith with the Indians, aside from the humiliating position which we assume in declining to stand by the agreement of our own commissioners, there is no economy to the Government in any such line of conduct.

There is another very bad proposition in this bill as it passed the House, to which I am glad to see the Senate has declined to agree. Heretofore in all similar treaties within my knowledge, without any exception, the Government has always said, "We will pay the Indians so much money, and on the deferred payments we will pay a certain rate of interest;" and then the Government has taken the lands and disposed of them to the settlers. In other words, the Government has closed the contract with the Indians at the time of purchasing their lands.

But the gentleman from Indiana and others now propose, in the bill as passed by the House, to say to these Indians (they will never agree to it, however, I fear): "When we sell 100 acres or 1,000 acres, or 10,000 acres, we will pay you the money for that proportion of the land." In other words, it is proposed to open up a system of bookkeeping with the Indians; and if we do not sell the lands to settlers, then we are never to pay the Indians!

That is the position which the House took in the bill which it passed. But, gentlemen, that is not the correct way of doing business. You could not do business with white men in that way, much less can you do business in that way with the Indians. It has been the policy of the Government always in these treaties to close up the contract with the Indians and then to step in and dispose of the lands to settlers as it may deem proper.

So far as the Yankton treaty is concerned, there is no economy in such a policy as is now proposed. We shall in any event have to insure to these Indians a support, and the money derived from this treaty will not support them. There are about 1,750 of these Indians; and, as I have

said, the interest at 5 cent [sic] on the $500,000 which they are to receive would be only $25,000 annually.

Mr. COOMBS. What becomes of the remainder of the money – that portion in addition to the $500,000?

Mr. HOLMAN. That is paid at once.

Mr. COOMBS. But what do they do with this money paid at once?

Mr. PICKLER. The Government is to pay them $100,000, to be divided among them. Let me remind the gentleman from New York what is the uniform policy of the Government in these matters. The Government does not want to speculate off of settlers; so it buys lands from the Indians as fairly and as cheaply as it can, and then disposes of the lands to the settlers at such prices as will reimburse it for the money paid to the Indians. The aim always is simply to get back from the settlers the amount we pay to the Indians.

That is the policy pursued in all these cases. And until very recently the Government purchased the lands of the Indians and disposed of them to the settlers free, but lately it is charging the settler what it paid the Indians.

And while I am not so much concerned about the Nez Perces agreement, I want to say that if the settlers do not take these lands at once the Government will have them on hand. They are valuable lands, and it will be only a very short time before they will be disposed of.

In regard to the Yankton lands which are situated along the Missouri River, in the southern part of my State, splendid lands, these will be taken up at once. They

are as good farming lands as can be found anywhere. The Government will have the settlers' money coming into the Treasury at once from their sale.

Now, the proposition of the gentleman from Indiana – and I admire the gentleman as a financier, and as keeping down the appropriations of the Government – the gentleman from Indiana brings up the other proposition. He says that we must let this matter go back. He does not want to pay the Indians for the lands except as they are sold; and here is the whole point, and he will tell you himself. He wants the bill to show no increase in appropriations.

That was the argument before the Indian Committee, when we were almost compelled to agree to it; so if you say in the bill that we will pay the Indians as we get pay from the settlers for the lands, then of course we made no appropriation in the bill, and it shows no increase. But the Senate has said in an honest and a businesslike way, as we have always said in our dealings with the Indians, and in our treaties heretofore, we will pay you so much for the land; we will close the contract and have done with you, and then deal with the settlers.

Mr. WILSON of Washington. Will the gentleman yield for a question?

Mr. PICKLER. Certainly.

Mr. WILSON of Washington.

Supposing, now, we ratify the treaty to-day, is that binding on the Indians?

Mr. MAHON. Of course.

Mr. WILSON of Washington. Will that bind the Indian tribes?

Mr. PICKLER. Undoubtedly, if we ratify it.

Mr. WILSON of Washington. Then, is it not equally binding on the Government?

Mr. HUNTER. Of course, if we ratify it.

Mr. TALBERT of South Carolina. But suppose we do not ratify it.

Mr. PICKLER. The question of the gentleman from Washington is well put. We have gone out there with our machinery of the Government, and the Indians understood that they represented the Government. They were allowed to believe that such was the case.

It was the Indians who were hard to get into the agreement; and they understood that when they agreed with the Commissioners there would be no difficulty about the ratification of the matter by Congress. They were led to believe that such was the case. There has never been such an attempt heretofore to defeat an agreement of that character. It was a fair agreement, and those representations were made to the Indians as the basis of the agreement. If we were paying twice what we are paying the Indians in this bill, we could not afford to break faith with them and repudiate the contract and agreement as we are doing if we deny these contracts and refuse to ratify them now.

We could not afford to do it for three times the amount involved in the bill. We must act with them in good faith. The Indians understood that the commissioners were empowered to deal with them. Let us, then,

stand by our agents and by the agreement our agents made. They made a good contract; and let me say to you, gentlemen, that if you defeat these treaties (and these are treaties, just as all other cessions of land have been), then you may appoint all the agents you want and send them out there, but they will never make an agreement again as fair to the United States as this one is.

You can not buy these lands cheaper than the commissioners have agreed with the Indians to pay for them, and the probability is that you will pay a great deal more if you do not take advantage of this opportunity. We have been dragging along for two years out in our country trying to settle the matter; the people want the land, and therefore let us end the trouble now by receding from the disagreement to the Senate amendments. Let us settle with the Indians at once and give the settlers all over this country who want homes an opportunity to secure them.

Let us agree with the Senate conferees. It is no difference in the end to the Government. The only question is whether we will settle up with the Indians now or keep books with them and pay them hereafter as the lands are sold, supposing they would so agree. You will never agree to such a proposition, I trust, as that which has been suggested by gentlemen who oppose these treaties.

I hope the House will recede from its disagreement.

Mr. MADDOX. Mr. Speaker, when I first went into the Indian Committee room and heard these agreements discussed I thought they were something binding on the Government, but I soon found to the contrary and that that impression was not true.

Now, as a matter of fact, as I understand the functions of these commissioners or agents sent out amongst the Indians, it is simply to find out a basis of agreement; in other words, negotiate a trade with the Indians and then the matter is referred to Congress, whether we will accept the terms proposed or not. We are not bound, as I understand the gentleman from South Dakota to maintain, by any obligation, legal or otherwise, to carry out such an agreement. It is simply a proposition made to us for legislative action.

Mr. HOLMAN. Undoubtedly. Why, what did we do in the Cherokee Outlet case?

Mr. MADDOX. And as the distinguished gentleman from Indiana [Mr. HOLMAN] tells me, there has been scarcely a treaty made with the Indians which has not been amended in some way by Congress before its ratification.

Mr. PICKLER. The gentleman, I think, is mistaken. The exceptions are largely the other way.

Mr. COCKRELL. Will the gentleman allow a question?

Mr. MADDOX. Certainly.

Mr. COCKRELL. Are the Indians bound by this treaty?

Mr. MAHON. That is the question. Are the Indians bound by it now?

Mr. MADDOX. They are bound by it if we do not change it and accept it.

Mr. COCKRELL. Suppose we do not ratify it – can they get away from it?

Mr. MAHON. I hope the gentleman will answer that question. Can the Indians get away from it whether we ratify it or not?

Mr. COCKRELL. That settles the question.

Mr. MADDOX. We are not bound to accept or ratify the treaty at all. We are not compelled to do it by any means. The gentleman from South Dakota maintains that the House itself is in honor bound to do it; that the Government itself is in honor bound. But if that be so why is it here? Why are we discussing it at all?

Mr. PICKLER. Does the gentleman say it is not in honor bound? Are we playing with these Indians? Were we playing with them when we sent the commissioners out there?

Mr. MADDOX. No; we are not playing with these Indians. We are simply trading with them; and if the trade does not suit us, we are not bound to accept it. That is the common English of it. Now, what are we asked to do? The House committee adopted a principle which we are insisting upon here.

We did not think this Government was in a condition to appropriate money to buy these public lands to be sold at mere haphazard. We did not think that was proper, and we provided that these lands should be sold, and that as fast as they were sold and the money received from the sales it should go to the credit of the Indians. That was the principle which governed the Committee on Indian Affairs of the House.

Mr. TALBERT of South Carolina. And they to get interest in the mean time [sic]?

Mr. MADDOX. Oh, yes; at 4 per cent.

Mr. PICKLER. Does the gentleman think that would be a satisfactory way of doing? Suppose some of these lands were not sold for twenty-five years. We should have to keep an account with these Indians for twenty-five years.

Mr. MADDOX. Very likely, and we have accounts with them now, which have been running that long, and longer yet. But we have been told by gentlemen advocating the ratification of these treaties – and we are told in this House to-day – that these lands will be taken up at once.

I think the gentleman from Wisconsin [Mr. LYNCH], my colleague on the committee, has demonstrated the fact to this House that they will not be taken, and that the government will lose largely in this transaction. Now, the question that presents itself to the common sense of this House, and especially to this side of the House, is whether we can appropriate $2,500,000 to buy a lot of Indian lands that we have no present use for, when at the same time we are borrowing money and selling bonds in order to run this Government? That is the question that I want you to consider. That is the question that presents itself to our minds; whether you are ready to do that or not.

Now, we are not obliged to accept this contract. We are not obliged to open up this land. The truth of the matter is this: We have now got a bill before this House

and before our committee asking the Government of the United States to pay taxes upon the Indian lands in those States and counties where they have been allotted – actually to bear the burden of local taxation, and yet you want to open more, adding an additional burden to the Government.

Mr. PICKLER. That is where lands are allotted to the Indians.

Mr. MADDOX. I understand that. And now you want the lands allotted here.

Mr. PICKLER. Oh, no.

Mr. MADDOX. You want these lands allotted.

Mr. WILSON of Washington. They are already allotted.

Mr. LUCAS. They have been allotted.

Mr. MADDOX. And as soon as they are opened up to settlement you will come in and ask to have the taxes paid, just exactly as you have done in other locations of the same character, where you are now absolutely asking the Government to pay the taxes on the Indian lands to help support the counties. That is the next thing to follow.

Now, Mr. Speaker, it is unnecessary for me to go into details in regard to our objections to this matter, because they have been so ably presented by the gentleman from Wisconsin [Mr. LYNCH] that I am satisfied that the members of this House understand this question and that they will not recede, but that they will insist that if these treaties are to be ratified at all, they shall be ratified in

accordance with the terms laid down by the House committee, which is that as fast as these lands are sold and paid for the Indians shall be given credit for the moneys so paid. Or if that is not acceptable to them, why, they need not accept it. That is my position and my proposition. We are not obliged to accept this agreement. We are in no condition to accept it.

Mr. PICKLER. Oh, we have the brute force to go back on the Indians, of course, if we want to.

Mr. MADDOX. We are not going back on the Indians.

Mr. PICKLER. That is exactly what we are doing.

Mr. MADDOX. If we do not accept the contract, if we do not buy the land, the Indians will still have the land. They will still have title to it.

Mr. TALBERT of South Carolina. It will not take anything away from them.

Mr. PICKLER. What are we doing, then? Is this boy's play?

Mr. MADDOX. The lands will remain in the same condition in which they now are. The Indians never have done anything with them yet, and it will not disturb them at all; and from the argument made by the gentleman and those who agree with him, it is said that we have got to support them anyway. The question is whether we are willing to advance this money – to appropriate $2,500,000, when, as I have said, we are already borrowing money to run the Government? Ought we to make this appropriation for something that is unnecessary?

Mr. PICKLER. Will the gentleman allow me a question right there?

Mr. MADDOX. Yes.

Mr. PICKLER. Does not the gentleman know that it is only of very late years that the Government has taken money from the settlers at all for public lands? Does not the gentleman know that heretofore we have bought the lands of the Indians and given the lands to settlers? Now we are buying land from the Indians and selling it to the settlers, and in that way getting our money back. It is only within the last few years that we have done this, but now we are making ourselves whole by selling the lands to the settlers for all that we pay the Indians for it.

Mr. MADDOX. But I say we have come to that period in our history when we should change our policy again, and that is, that Congress ought not to buy any more of these lands from the Indians and sell to the settlers, but let the settlers deal directly with the Indians.

Mr. PICKLER. That is impossible.

Mr. MADDOX. I do not think so.

Mr. PICKLER. The settler can not deal with the Indians.

Mr. MADDOX. It will not be but a few years when we will have but little of the public domain left. There are three or four other treaties to follow; and under this precedent you are about to set it is not only a question of $2,500,000. It will not stop at $8,000,000 when we get to the other treaties to be ratified and the money to be paid under them. When you are talking about this question of

interest you will remember that; and when you are talking about appropriations for advancing the money, you will remember that others are to follow.

Mr. WILSON of Washington. Will the gentleman allow me to ask him a question?

Mr. MADDOX. Certainly.

Mr. WILSON of Washington. In the last Congress a very important matter came up from your section of the country.

Mr. MADDOX. Mine?

Mr. WILSON of Washington. Yes, sir; to your whole section of country. I think every member upon this side of the question, with the exception of the gentleman from Mississippi, was in favor of the purchase of what is known as the Cherokee Outlet at an expense of $8,000,000. Now, your people were greatly interested in that.

Mr. MADDOX. My people!

Mr. WILSON of Washington. Your whole section.

Mr. MADDOX. I did not know that my people were interested in that.

Mr. WILSON of Washington. Maybe not directly, but indirectly. It will be of great advantage to you in the future. You were interested in that the same as I am interested in this. You received about all the Western votes, because it was right and proper and just for the benefit of the settlers of your section; and we think to-day that your people should meet us half way in the development of our section of the country.

Mr. MADDOX. Now, as the gentleman has raised that question I will state that we had no interest in it. We have got none of it and did not have any interest in it so far as that is concerned. Now, there is about 6,000,000 more acres to be opened up, and this House will remember that we went forward and made a treaty with the Cheyennes and Arapahoes and paid them for their lands according to the treaty and acts of Congress. We paid $2,900,000 to the Choctaws and the Chickasaws for the same land. That is another proposition that I want to call your attention to. Two million nine hundred thousand dollars we paid to get a title to that property.

Mr. HUNTER. And have not got the title yet.

Mr. MADDOX. And we have not got the title yet. We have two treaties. We have the treaties with the Comanches, the Kiowas, and the Wichita and affiliated bands, which will probably cover about 4,000,000 acres of land; and they have the same interest in this land that they had to the Cheyennes and Arapahoes Reservation; and if we are asked to ratify those treaties, according to the gentleman from South Dakota and the gentleman from Washington, we are bound to do so when we have a precedent before us that the Government had paid twice for this land and will be called upon to do the same thing again unless the question of title be settled before we indorse the action of our commissioners.

Mr. WILSON of Washington. When was that treaty first made with the Arapahoes and Cheyennes?

Mr. MADDOX. I think it was four or six years ago.

Mr. WILSON of Washington. That was the first. When was the one made previous to that?

Mr. MADDOX. I do not remember; away back.

Mr. WILSON of Washington. Away back.

Mr. HUNTER. In 1820.

Mr. MADDOX. The treaty was made with these Choctaws and Chickasaws in 1820, and the Cheyennes and Arapahoes claimed title under Executive order and by right of possession, and the Choctaws and Chickasaws claimed that they only ceded these lands in trust to the Government to locate friendly Indians on, and when open for settlement to the whites that the title reverted to them.

Mr. WILSON of Washington. I will not interrupt the gentleman further with questions at this point, as I see that it disturbs him; but I desire to reply to some things that he has said before the debate closes.

Mr. MADDOX. So you will see that there is another question which opens itself up for the consideration of this House; and behind that is the proposition that the Government is bound to accept this treaty or agreement. It is no longer a treaty, as the Supreme Court says it is not a treaty, but an agreement, and that the consent of this House and of the Senate is required in order to ratify that agreement and make it a contract. It is not a contract and binding upon this Government until we do consent, and the question is whether you will consent to ratify it or not. If you do not do it, it is not a contract with the Indians.

Now, even if that side of the House or this side of the House, as the case may be, does believe that this agreement ought to be ratified, I ask you gentlemen again, Is this the acceptable time to do it? Is this Government in a condition to do it? That is the question for you to consider. I claim that we are not in a condition to do it at this time.

Mr. HERMANN. Will my friend, who is, I believe, a member of the Committee on Indian Affairs, permit me to make a suggestion? Take the case of a reservation that has not been enlarged upon by any member on the floor today, one which lies within my own State, the reservation of the Siletz Indians. I wish to point out to the gentleman the injustice that will be done to those Indians if we do not recede from our disagreement to the Senate amendment.

Those Indians agreed to receive $142,000 for their surplus lands. The Government, through its agents, agreed to pay them that amount. The money was to be paid out of the Treasury of the United States, $100,000 of it to be deposited at 5 per cent interest for an indefinite length of time, and $42,000 to be paid to the Indians individually as they came of age, $75 per capita. Now, those Indians have had their lands allotted to them. They are there assuming that they have title to the lands which they have received by allotment. The House proposes that the Indians shall receive their pay out of the sale of those lands at the rate of $1.50 per acre.

The fact is that the Indians have selected the best lands in that reservation and the balance is comparatively refuse land, so that very few people will pay anything for

it at this time, for the reason that it consists largely of mountain ranges which at some time or other have been burned over, so that the land is not valuable either for timber or for agricultural purposes. It is utterly impossible, therefore, within any reasonable length of time to realize out of the sale of those lands even a small percent of the amount of money that we have agreed to pay the Indians. Now, the gentleman will see that if this agreement is not ratified at the present time and is again submitted to the Indians for reconsideration, they never will agree to any better terms than they have agreed to already, because they will know that if the money is to come out of the sale of the lands it will not be realized within the present generation.

The bill was submitted to the House over a month ago. I have heard from the Indians, and I have taken some pains to ascertain public opinion as to the value of these lands. Many people have gone upon them for the purpose of taking appropriate locations to be homesteaded, but they have declined to take the lands and have given their opinion that they are worthless for homestead purposes.

Now, I submit that a refusal to recede from our disagreement to the Senate amendment will render it utterly impossible for us to treat with those Indians hereafter for those lands. And see the position that we shall leave them in. They have their allotments upon which they are living, believing themselves to be entitled to them, and the surplus lands are left upon their hands with this condition attaching to them.

Mr. COOMBS. Is not the gentleman's own statement an admission that by this treaty the United States is buying worthless lands from these Indians, after allowing them to take up the best part of the reservation by allotment? Upon what principle can the gentleman justify such legislation?

Mr. HERMANN. I desire to say that that is the consideration that is being paid to these Indians for the excess lands.

Mr. COOMBS. But, according to the gentleman's own statement, those lands are worth nothing. He has just told us that settlers have gone upon them and have declined to take them.

Mr. HERMANN. Ultimately those lands will be valuable; but I say that at the present time and for many years to come we can not realize the money that we are to pay Indians from selling the land at $1.50 an acre. Now, in the meanwhile, how are those Indians to be paid the consideration which has been promised to them? That is the question.

Mr. MADDOX. It seems to me that the question, or rather the speech of the gentleman from Oregon shows clearly that my position in this matter is correct. It appears that we have sent agents out there to negotiate for lands which, according to the gentleman's own admission, are absolutely worthless. As to the position of the Indians, if we refuse to ratify this agreement the Indians have got just what they had before; they have got their entire reservation; we have not hurt them in any way. According to the gentleman's own statement, these lands are worthless at the present time.

Mr. HERMANN. No. What I say is that at the present time, and in the present financial condition of the country, you can not sell such a large body of land as that and realize the amount that is to be paid to the Indians. Ultimately the lands will undoubtedly be disposed of at a good price.

Mr. COOMBS. But did you not say a while ago that settlers had gone upon those land and had declined to take them as worthless?

Mr. HERMANN. I say that large bodies of people will not settle upon those lands at the present time. Ultimately I believe those lands will be disposed of, but it will take a considerable time, and meanwhile the Indians desire some assurance that they are to receive the money that has been promised them.

Mr. LYNCH. Does the gentleman think it is fair or proper that the Government should pay $3 per acre for such lands and pay 5 per cent interest on the deferred payments when, according to his own statement, the lands will not sell for $1.50 an acre?

Mr. HERMANN. The Government is not paying these people $7 an acre, but only 89 cents an acre; and the Secretary of the Interior certifies to Congress that the Government is making the difference between 89 cents and $1.29 an acre, amounting to something over $20,000. That is so much to the credit of the Government of the United States.

Mr. MADDOX. I think, from what the gentleman from Oregon [Mr. HERMANN] has said, that we have negotiated a very bad trade with the Indians; and the

question is whether this House should ratify that trade. According to the admissions made here, a considerable portion of this land can not be disposed of at the present time. Now, we should take into consideration the financial condition of the Government. Is it in a condition to purchase land on credit and pay interest on the purchase money?

Mr. PICKLER. This will bring to the Government more money than it pays out.

Mr. HERMANN. Allow me to ask the gentleman from Georgia [Mr. MADDOX] whether there is any reservation in the United where all the surplus land could be disposed of immediately at a good purchase price?

Mr. MADDOX. Is there any portion of this that may be disposed of at once?

Mr. HERMANN. There is.

Mr. MADDOX. After the allotment?

Mr. HERMANN. I am speaking entirely of the surplus after the allotments have been made. A considerable portion of these lands which have not been disturbed by fire contain timber, and can be readily disposed of. But I was speaking of the possibility or probability of realizing $142,000 at once to pay these Indians. I say it can not be done in the present condition of affairs.

Mr. COOMBS. Why should we want to do it?

Mr. HERMANN. In order to settle the title of these allottees who have taken land in good faith, and in order to settle titles generally.

Mr. PICKLER. Some things which have been said here would leave the impression that this transaction is actually going to take money out of the Treasury. I say it will bring more money in than it will take out.

Mr. HERMANN. Ultimately it will.

Mr. PICKLER. No, now. We pay only a small amount of money down, and give bonds for the balance. Then the applicants for these lands pay into the Treasury three times as much as we take out.

Mr. MADDOX. But I protest against the policy of issuing bonds to put money into the Treasury.

Now, I think it has been clearly demonstrated that this is a bad trade for the Government. The question is whether we shall ratify it or not. The agreement is not binding upon the Government until we do ratify it. In the present condition of the Treasury should we now go forward and ratify this trade, appropriating for the purpose $2,400,000? I think not.

Mr. WILSON of Washington. Will the gentleman from Georgia [Mr. MADDOX] yield to me for five minutes?

Mr. MADDOX. Yes, sir. I yield five minutes to the gentleman from Washington, and reserve the residue of my time.

Mr. WILSON of Washington. Mr. Speaker, I express my thanks to the gentleman from Georgia for kindly yielding to me at this time. I desire only to call attention to one or two things stated by the gentleman from Wisconsin [Mr. LYNCH] in the course of his argument.

Of course, Mr. Speaker, the ratification of these treaties is of the greatest importance to our section of the country. I have seen this reservation; I think I know something about this matter, and it is my judgment that the Government of the United States, notwithstanding the statement of the gentleman from Wisconsin, has made an exceedingly good bargain with reference to those lands. I know of my own knowledge that within thirty-six hours a company could be formed to pay $3 or $3.75 for every acre of this land if the Government would permit that arrangement to be carried out.

The gentleman talks about half of this land being of no value. That statement is not correct as a matter of fact. As shown by the report of the committee, the agricultural lands are estimated to embrace 350,000 acres, amounting, at $3.75 an acre, to considerably more than $1,000,000. The timber land, which has been stated to be worthless, is in my judgment the most valuable portion of this reservation, because in that section of the country timber is exceedingly scarce; and whenever you can secure a tract of timber land it sells promptly.

Such land would quickly bring the price estimated here. The mineral lands would sell, of course, under the mineral land law at $5 an acre. Here you have in this reservation 350,000 acres of valuable agricultural land, which the Commissioner has estimated to be worth from $8 to $10 an acre.

Consequently, it is my judgment that the Government, taking those lands and selling them as provided for in the treaty and in the bill, at $3.75 an acre, will recoup itself every dollar of all of the expenses attending the

transaction. I believe that every acre of the agricultural land will be taken up within thirty days after the reservation is opened.

All over the State of Idaho – and the gentleman from Wisconsin [Mr. LYNCH], speaking of the land as being in Idaho, would seem to be trying to establish the idea that the lands of Idaho were of no value – all over Idaho are valuable lands. Why, Mr. Speaker, in the Pan Handle district of Idaho, which is as large as the entire State of Maryland, there are over over [sic] 10,000,000 acres of valuable timber lands.

There are in the Pan Handle counties that produce more wheat to the acre than any land on the habitable globe. There are mines also which have produced wealth in the last five years enormous in amount. And this reservation is standing as a block in the way of the development and progress of the country. That is one reason why it is so important that action, and prompt action, should be taken upon this treaty.

The SPEAKER *pro tempore*. The time of the gentleman has expired.

Mr. WILSON of Washington. I hope the gentleman will yield to me a few moments longer.

Mr. MADDOX. I will yield five minutes more.

Mr. WILSON of Washington. Now, I think, Mr. Speaker, that it is exceedingly unfair, it is exceedingly unjust to this people out there, that Representatives on this floor should come in here and state to people who do not know anything about the facts that those lands have

no value, and that the Government will lose a million dollars or more by the transaction proposed.

Why, both of the commissioners who made this agreement with the Indians, taking the highest and the lowest estimate they have made, show that the Government will receive according to the highest estimate $2,025,000, and the lowest $1,860,776. Is it fair then, in view of these facts, to say that those lands are of no value? Is it fair to take the judgment of those men residing there who know the value of the lands, who know their quantity and who give us these figures as the result of the transaction? I think it is fair. I think we ought to take it. I think they were competent to make the estimates.

Will the Government lose anything when we get an estimate of $1,800,000 from the lowest estimate, and over $2,000,000 from the highest? Where is the ground for the ascertain? The whole basis of the argument of the gentleman from Wisconsin; the whole argument of gentlemen who have discussed in opposition to the ratification of those treaties, is an argument which is designed for the purpose and the sole purpose of defeating their ratification. They say, or that is the inference to be gathered from their remarks, whether we will make anything or not, "we do not propose to ratify the treaty." Mr. Speaker, that is no way to deal with such a question.

I spoke awhile ago of the opening of the Cherokee Outlet. In the course of business in the last Congress it was my good fortune to be a conferee on the bill which provides for the ratification of that treaty and which was talked over fully in conference. It was talked over in the

House, and it was contended that we were paying $8,000,000 on the ratification of that treaty, and so in order to obviate the adding of that amount to the bill we agreed that they might sell the land or the certificates, and that the Government would hereafter appropriate for it.

Yet to-day we have come here and ratified an agreement whereby the purchaser of that certificate might receive a bond from the Treasury of the United States in payment for it: That was all done simply "to beat the devil around the stump." that is all. But we opened the Outlet; and the opening of that section of the country I voted for. I am glad to vote for anything in Oklahoma or Texas or Alabama or Georgia that will advance the prosperity of that people.

I hope in return that they may be as generous to the people of the West, and help us to develop that empire, and throw open the reservations of the Government, giving the Indians their allotments, teaching them how to sow and reap and raise crops, and throwing open the lands to the settlement of the whites, letting them get homes, and in this manner shedding the blessings of civilization upon our Western country.

Why should you retard the growth of that section? There is not an Indian reservation in my State that I have not had to stand here and plead and plead for a bill to get the right of way for a railroad or canal or something across it. They stand in the path of progress. They stand right in the highway of the growth and development of the country. When we want to get a railroad over one of those reservations we have got to come to Congress, and

the people have the inconvenience that comes from such a condition. I have already referred to a condition of affairs that exists there.

A great reservation is located at Tacoma. Fifty thousand people have built a great city there, but they can not get a railroad without the consent of Congress. The Indians are in the way. They can not use the land themselves and we can not get the restrictions removed – which, it is true, last but eight years longer – because when an effort of that kind is made we are met by the point of order. We are stopped all the time. We are completely at the mercy of the conditions that surround us, and we have no aid from Congress. Why should there be this opposition to the development of our Western country?

[Mr. ALLEN addressed the House. See Appendix.]

Mr. ALLEN. Now, Mr. Speaker, I move that the House recede from its disagreement to the Senate amendment with reference to the treaties and agree to the same; and on that I move the previous question.

The SPEAKER *pro tempore*. The gentleman from Wisconsin [Mr. LYNCH] moves that the House insist upon its disagreement and ask for a further conference; the gentleman from Mississippi moves that the House recede from its disagreement to the amendment of the Senate and agree to the same; and upon that he demands the previous question. That motion takes precedence of the motion of the gentleman from Wisconsin.

The question was taken and the previous question was ordered.

Mr. ALLEN. My motion now is to recede from the disagreement to the amendment of the Senate and agree to the Senate amendment.

The SPEAKER *pro tempore*. The question is. Shall the House recede from its disagreement to the amendment of the Senate and agree to the same?

The question was taken, and the Speaker *pro tempore* announced that the ayes seemed to have it.

Mr. MADDOX. Division, Mr. Speaker.

Mr. REED. "All up." This is what we will have to do all along the line, and you may as well practice it.

The House divided; and there were – ayes 73; noes 40.

Mr. MADDOX. No quorum.

The SPEAKER *pro tempore*. The Chair will appoint as tellers the gentleman from Georgia, Mr. MADDOX, and the gentleman from Mississippi, Mr. ALLEN.

Mr. MADDOX. I call for the yeas and nays. [After a pause.] I withdraw the demand for the yeas and nays, and insist upon the point of no quorum.

The SPEAKER *pro tempore*. The Chair will appoint as tellers the gentleman from Georgia and the gentleman from Mississippi.

Mr. PICKLER. I rise to a point of order. After the yeas and nays are demanded and refused, what right has the gentleman to make the point of no quorum?

The SPEAKER *pro tempore*. The gentleman made the point of no quorum.

Mr. PICKLER. But the yeas and nays were demanded and refused. [Cries of "Oh, no."]

The SPEAKER *pro tempore*. The yeas and nays were not refused. The chair was taking the count when the demand was withdrawn.

Mr. PICKLER. I demand the yeas and nays, Mr. Speaker. The question was taken; and the yeas and nays were ordered.

The SPEAKER *pro tempore*. The Chair will appoint as tellers the gentleman from Georgia [Mr. MADDOX] and the gentleman from Mississippi [Mr. ALLEN].

Mr. MADDOX. Pending that motion, I move that the House adjourn.

The motion was agreed to.

And accordingly (at 4 o'clock and 55 minutes p.m.) the House adjourned.

EXH 11

ANNUAL REPORT
OF THE
COMMISSIONER OF INDIAN AFFAIRS.

1894.

REPORT
OF THE
COMMISSIONER OF INDIAN AFFAIRS.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,

Washington, September 14, 1894.

(page 26)

* * *

AGREEMENTS WITH INDIANS.

Siletz, Yankton, and Nez Perces. – The agreement concluded with the Siletz Indians in Oregon, October 1, 1892, that with the Yankton Sioux in South Dakota, concluded December 31, 1892, and that with the Nez Perces in Idaho, concluded May 1, 1893, referred to in my last annual report, were ratified by the act of Congress approved August 15, 1894 – the Indian appropriation act. Under these agreements some 880,000 acres of land will be restored to the public domain for disposition as provided in said act.

* * *

EXH 27

Department of the Interior
Office of Indian Affairs
Washington, March 29, 1895

The Honorable
The Secretary of the Interior.

Sir:

I have the honor to repeat the following telegrams, dated March 25th and March 28th (instant) from the Agent at the Yankton Agency, South Dakota, for your information in connection with the proposed opening to settlement of the ceded lands of the Yankton reservation:

"Yankton Agency, 25,

Commr. Indian Affairs, Washington, D.C.

The State of South Dakota is taking steps to appropriate a large portion of the unallotted land of this reservation for school purposes on violation of agreement between the government and Indians. The Indians protest against this action and I concur.

Smith, Agent".

"Yankton Agency, S.D., March 28,

Via Armour, S.D., 28,

Commr. Indian Affairs, Washington, D.C.

Large number of settlers have squatted on reservation. Have ordered them off but cannot enforce order.

J.A. Smith, Agent".

Very Respectfully,
Your obedient servant,
T.P. Smith,
Acting Commissioner.

EXH 602

PRESIDENTIAL PROCLAMATION

(page 985)

YANKTON SIOUX LANDS. May 16, 1895.

No. 1.

BY THE PRESIDENT OF THE
UNITED STATES OF AMERICA:

A PROCLAMATION.

Whereas, pursuant to section one, of the Act of Congress, approved July thirteenth, eighteen hundred and ninety-two, entitled "An Act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the fiscal year ending June thirtieth, eighteen hundred and ninety-three, and for other purposes", certain articles of agreement were made and concluded at the Yankton Indian Agency, South Dakota, on the thirty-first day of December, eighteen hundred and ninety-two, by and between the United States of America and the Yankton tribe of Sioux or Dacotah Indians upon the Yankton reservation, whereby the said Yankton tribe of Sioux or Dacotah Indians for the consideration therein mentioned, ceded, sold, relinquished, and conveyed to the United States, all their claim, right, title and interest in and to all the unallotted lands within the limits of the reservation set apart to said tribe by the first article of the treaty of April nineteenth, eighteen hundred and fifty-eight, between said tribe and the United States: and

Whereas, it is further stipulated and agreed by article eight that such part of the surplus lands by said agreement ceded and sold to the United States as may be

occupied by the United States for agency, schools and other purposes, shall be reserved from sale to settlers until they are no longer required for such purposes, but all of the other lands so ceded and sold shall, immediately after the ratification of the agreement by Congress, be offered for sale through the proper land office, to be disposed of under the existing land laws of the United States, to actual and bona fide settlers only; and

Whereas, it is also stipulated and agreed by article ten that any religious society, or other organization, shall have the right for two years from the date of the ratification of the said agreement, within which to purchase the lands occupied by it under proper authority for religious or educational work among the Indians, at a valuation fixed by the Secretary of the Interior, which shall not be less than the average price paid to the Indians for the surplus lands; and

Whereas, it is provided in the act of Congress accepting, ratifying and confirming the said agreement approved August 15, 1894, section 12 (Pamphlet Statutes 53d Congress, 2d session, pages 314 to 319),

> That the lands by said agreement ceded, to the United States shall, upon proclamation by the President, be opened to settlement, and shall be subject to disposal only under the homestead and town-site laws of the United States, excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common school purposes and be subject to the laws of the State of South Dakota: *Provided,* That each settler on said lands shall, in addition to the fees provided by law, pay to the United States for the land so taken by him the

> sum of three dollars and seventy-five cents per acre, of which sum he shall pay fifty cents at the time of making his original entry and the balance before making final proof and receiving a certificate of final entry; but the rights of honorably discharged Union soldiers and sailors, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States, shall not be abridged except as to the sum to be paid as aforesaid.
>
> That the Secretary of the Interior, upon proper plats and description being furnished, is hereby authorized to issue patents to Charles Picotte and Felix Brunot, and W.T. Selwyn, United States interpreters, for not to exceed one acre of land each, so as to embrace their houses near the agency buildings upon said reservation, but not to embrace any buildings owned by the government, upon the payment by each of said persons of the sum of three dollars and seventy-five cents.
>
> That every person who shall sell or give away any intoxicating liquors or other intoxicants upon any of the lands by said agreement ceded, or upon any of the lands

(page 986)

> included in the Yankton Sioux Indian Reservation as created by the treaty of April nineteenth, eighteen hundred and fifty-eight, shall be punishable by imprisonment for not more than two years and by a fine of not more than three hundred dollars.

and:

Whereas, all the terms, conditions and considerations required by said agreement made with said tribes of Indians and by the laws relating thereto, precedent to opening said lands to settlement, have been, as I hereby declare, complied with:

Now, therefore, I, Grover Cleveland, President of the United States, by virtue of the power in me vested by the Statutes hereinbefore mentioned, do hereby declare and make known that all of the lands acquired from the Yankton tribe of Sioux or Dacotah Indians by the said agreement, saving and excepting the lands reserved in pursuance of the provisions of said agreement and the act of Congress ratifying the same, will, at and after the hour of twelve o'clock, noon (central standard time), on the twenty first day of May, 1895 and not before, be open to settlement, under the terms of and subject to all the conditions, limitations, reservations, and restrictions contained in said agreement, the statutes hereinbefore specified and the laws of the United States applicable thereto.

The lands to be so opened to settlement are for greater convenience, particularly described in the accompanying schedule, entitled "Schedule of Lands within the Yankton Reservation, South Dakota, to be opened to settlement by Proclamation of the President", and which schedule is made a part hereof.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this 16th day of May, in the year of our Lord, one thousand eight hundred and ninety-five, and of the Independence of the United States, the one hundred and nineteenth.

[SEAL.] GROVER CLEVELAND

By the President,
Edwin F. Uhl
Acting Secretary of State.

* * *

EXH 638

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) ss.	
COUNTY OF Charles Mix	)	First Judicial Circuit
	)	
THE STATE OF SOUTH DAKOTA,	)	INFORMATION FOR Rape
vs.	)	
Andrew War	)	

D.L.P. Lamb, State's Attorney of the County of Charles Mix, State of South Dakota, in the First Judicial Circuit, duly and legally elected, qualified and acting according to law in the name of and by the authority of the State of South Dakota, upon his oath informs the Court: That Andrew War, late of said County, yoeman, [sic] on the Twenty First day of September in the year of our Lord One Thousand Eight Hundred and Ninety Five at the County of Charles Mix and State of South Dakota aforesaid, with force and arms, in and upon one Susan Bean, a female over the age of sixteen years, who was not then and there the wife of the said Andrew War, violently and feloniously did make an assault, and [sic] her, the said Susan Bean, then and there, to-wit, on the day and year last aforesaid, feloniously did ravish and carnally know, and accomplish with her an act of sexual intercourse, by force, violence, and against her will and resistance, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of South Dakota.

/s/ D.L.P. Lamb
State's Attorney Charles Mix
County, South Dakota.

(Filing stamp omitted in printing)

EXH 611

HOUSE OF REPRESENTATIVES

54TH CONGRESS,) (REPORT
1st Session.) (No. 100.

HOMESTEAD SETTLERS UPON YANKTON INDIAN RESERVATION, S. DAK.

JANUARY 21, 1896. – Referred to the House Calendar and ordered to be printed.

Mr. DOWNING, from the Committee on the Public Lands, submitted the following

REPORT:
[To accompany H.R. 2642.]

The Committee on the Public Lands, to whom was referred the bill (H.R. 2642) granting leave of absence for one year to homestead settlers upon the Yankton Indian Reservation in the State of South Dakota, have had the same under consideration and report it back with the recommendation that it pass with the following amendments:

Strike out the preamble.

Add the following proviso to the first section:

Provided, That the settler shall not receive credit upon the period of actual residence required by law for the time he is absent hereunder.

The necessity for this legislation is clearly stated in the annexed communications from the Interior Department.

DEPARTMENT OF THE INTERIOR,

Washington, January 18, 1896.

SIR: I have the honor to hand you herewith a copy of a report from the Commissioner of the General Land Office, dated the 14th instant, on H.R. bill 2642, entitled "A bill granting leave of absence for one year to homestead settlers upon the Yankton Indian Reservation in the State of South Dakota," which was referred to the Department by your letter of the 9th instant.

The Commissioner recommends the passage of the bill with the amendment suggested by him. His letter, in my judgment, clearly sets forth the justice and necessity of the proposed legislation, and I concur in his recommendation that the bill, with the amendment suggested, be passed.

Very respectfully, HOKE SMITH, *Secretary.*

Hon. JOHN F. LACEY,
Chairman Committee on the Public Lands,
House of Representatives.

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE,

Washington, D.C., January 14, 1896.

SIR: I have had the honor to receive, by reference from the Department, under date of January 10, 1896, for report in duplicate and return of papers, H.R. bill No. [redacted] "Granting leave of absence for one year to homestead settlers upon the Yankton Indian Reservation, in the State of South Dakota," which was referred to the Department January 9, 1896, by Hon. John F. Lacey, chairman of

the Committee on the Public Lands of the House of Representatives, in order that you may make any suggestions which you deem desirable in regard to the same for the assistance of the committee in its consideration of the bill.

After a recital of the fact that owing to the late date when the lands in the Yankton Reservation were opened to settlement the settlers were unable to plant and mature crops in the year 1895, and therefore will be compelled to temporarily leave the lands for the purpose of earning a living, the bill provides:

"That all settlers who made settlement under the homestead laws upon lands in the Yankton Indian Reservation in the State of South Dakota during the year eighteen hundred and nine-five are hereby granted leave of absence from such homestead for one year from and after the date of this act, and that by such absence such homestead settler shall not lose nor forfeit any right whatever.

"SEC. 2. That any such homestead settler may avail himself of the benefits of this act by filing a notice with the local land office describing his land and date of settlement thereon, which notice shall be signed by the settler and attested by the register of the land office.

In reply I have the honor to report that the lands in the former Yankton Indian Reservation, in the State of South Dakota, were opened to settlement and entry on May 21, 1895, by the President's proclamation of May 16, 1895.

It is evident that this date was too late in the season for settlers to plant a crop with any expectation of reaping a harvest that would afford a support for the coming year. Section 3 of the act of March 2, 1889 (25 Stat. L., 854), makes provision for leaves of absence where homestead settlers are unable to obtain a support upon the land settled upon, by reason of a failure of crops, sickness, or other unavoidable casualty. Many of the settlers on the Yankton lands will not be able to receive the benefits of said law for the reason that, having planted no crops owing to the lateness of the season, they are unable to show a failure of crops.

Yet if, under the circumstance, they are unable to support themselves and their families on the land settled upon, it seems advisable to permit them to seek elsewhere for a support without any risk of forfeiting their homesteads on a charge of abandonment.

It is provided, however, in the act of March 2, 1889, that settlers who are granted leaves of absence shall not receive credit on the period of residence required for the time absent. This appears to be a reasonable provision, and, in my opinion, should be incorporated in the bill under consideration.

I respectfully recommend, therefore, that the bill be amended by adding after the word "whatever," in the ninth line of the first section, the words: "*Provided*, That the settler shall not receive credit upon the period of actual residence required by law for the time he is absent hereunder."

With such amendment, I see no objection to the bill which, with accompanying letter, is herewith returned.

Very respectfully, S.W. LAMOREUX, *Commissioner.*

The SECRETARY OF THE INTERIOR.

EXH 18

29 Stat. 16 (1896)

An Act Granting leave of absence for one year to homestead settlers upon the Yankton Indian Reservation, in the State of South Dakota, and for the other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all settlers who made settlement under the homestead laws upon lands in the Yankton Indian Reservation, in the State of South Dakota, during the year eighteen hundred and ninety-five are hereby granted leave of absence from such homestead for one year from and after the date of this Act, and that by such absence such homestead settler shall not lose nor forfeit any right whatever: *Provided,* That the settler shall not receive credit upon the period of actual residence required by law for the time he is absent hereunder.

SEC. 2. That any such homestead settler may avail himself of the benefits of this Act by filing a notice with the local land office describing his land and date of settlement thereon, which notice shall be signed by the settler and attested by the register of the land office.

SEC. 3. That the time for making final proof and payment for all lands located under the homestead laws of the United States of upon any lands of any former Indian reservation in the State of South Dakota, be, and the same is hereby, extended for the period of one year from the time proof and payment would become due under existing laws.

Approved, February 26, 1896.

EXH 612

Twelfth Census of the United States

CENSUS BULLETIN.

No. 47 WASHINGTON, D.C. February 1, 1901

(page 2)

TABLE 2. – POPULATION OF SOUTH DAKOTA BY COUNTIES: 1870 TO 1900.

COUNTIES.	1900	1890	1880	1870	1860
* * * *					
Charles Mix	8,498	4,178	407	152	
* * * *					
Cheyenne River Indian reservation.[36]	2,357				
Fort Sisseton[37]				134	
Pine Ridge Indian reservation.[38]	6,827				
Rosebud Indian reservation.[39]	5,201				

[36] Located in Dewey and Stanley counties, but division by counties can not be made.

[37] Abandoned in 1888.

[38] Located in Lugenbeel, Shannon, Washabaugh, and Washington counties, but division by counties can not be made.

[39] Located in Gregory, Lugenbeel, Lyman, Meyer, Tripp, and Washabaugh counties, but division by counties can not be made.

Sisseton and Wahpeton Indian reservation.[40]		73
Standing Rock Indian reservation (part of).[41]	1,658	
Unorganized territory		[42]899

[40] Parts annexed to Richland county, North Dakota, and Codington, Day, and Grant counties, South Dakota; and parts taken to form part of Sargent county, North Dakota, and parts of Marshall and Roberts counties, South Dakota, between 1880 and 1890.

[41] Located in Boreman, Dewey, and Schnasse counties, but division by counties can not be made. For population of remainder of reservation see figures for North Dakota.

[42] Of the population of the unorganized territory in Dakota in 1870 (2,091), 899 persons are estimated to have been within the present limits of South Dakota.

EXH 29

DEPARTMENT OF THE INTERIOR
UNITED STATES INDIAN SERVICE

Washington, D.C., November 28, 1903

Hon. E.A. Hitchcock,
Secretary of the Interior, Washington, D.C.

Sir: –

I have the honor to state that in obedience to instructions of September 10, 1903, I made a careful and thorough examination of the sales of inherited Indian lands at the Yankton Agency, South Dakota, and respectfully submit the following report: –

Location and General Character of the Reservation.

The Yankton reservation is in Charles Dix [sic] County on the Southern border of the State of South Dakota. It is situated on the East bank of the Missouri river, having a river frontage of about 33 miles, and extending back from the river something like 20 miles. Besides the Missouri river, the reservation has several small creeks and Lake Andes, quite a large body of water, now supplied by two artesian wells constructed by the Government. Three years ago a line of the Chicago, Milwaukee and St. Paul Railway was built through the center of the reservation East to West . . . After allotting [sic] all the members of this tribe from their tribal lands, the remainder was bought by the Government and has been taken as homesteads by white settlers.

EXH 630

HISTORICAL ATLAS
OF
SOUTH DAKOTA

CONTAINING

STATE AND COUNTY MAPS, GEOLOGIC MAPS,
STATISTICAL CHARTS,

Geography, Geology, History.

DESCRIPTIVE NOTES, TABLES, ETC.
ILLUSTRATED.

COMPILED BY
E. FRANK PETERSON
3432 43rd St.
Sacramento, Calif.

1904

(page 128)

* * * *

CHARLES MIX COUNTY.

Population 8,498 *Area 1,123 square miles.*

Charles Mix county has an extreme length of over 75 miles and a Missouri river shore line of about 90 miles. The Missouri river falls from 1,280 feet at the northwest corner to 1,220 feet at Choteau creek, while the high ridge, near that stream are about 600 feet higher.

* * * *

The east half of the county formerly formed the Yankton Indian Reservation. More than three-fourths of this portion is land that has been allotted to the Indians.

About 20 per cent of the original allottees are now dead, and their allotments are being sold by the heirs. The Indians numbered 1,703 in 1902. They are generally self supporting, and most families farm at least a few acres. Some of them have large herds of cattle. Their number includes a large proportion of mixed bloods, many of whom can be distinguished from the whites only by their dark hair and eyes. They have quite generally taken on the habits and customs of the white race, and live as do their neighbors. An Indian agency and a government Indian school are maintained at Greenwood.

(page 129)

* * * *

The present population of the incorporated towns is approximately as follows: Platte 700, Geddes 800, Wagner 400.

* * * *

EXH 43

REPORT OF THE

COMMISSIONER OF INDIAN AFFAIRS

TO THE SECRETARY OF THE INTERIOR

1907

(page 32)

REPORTS CONCERNING INDIANS IN SOUTH DAKOTA.

* * * *

I think it is safe to say that there are 100 or more Yankton pupils in the public schools of this county, sixteen of which schools are located on what was the original Yankton reservation. These schools are built every year as white settlers come on the reservation and settle on lands purchased by them through the sale of Indian allotments. In a short time there will be sufficient of these district schools located at convenient points on the reservation to accommodate all the Indian pupils and it is with this end in view that the Government contemplates the abandonment of the agency boarding school.

* * * *

(page 33)

The Court of Indian Offenses has been in session regularly and has discharged its duties honestly and impartially. It disposes of many offenses and petty complaints and relieves the agent of much annoyance thereby.

It also hears and determines the more serious cases at times * * * * .

* * * *

EXH 664

Land-
Population.
I H C

Answers to Yankton Indians.

May 13 1910

William Bean, et al,
Yankton Indians,
Washington, D.C.

My Friends:

The following answers are presented to certain oral statements submitted to the Office by you:

1. Regarding the question as to who owns the land on which the Yankton Agency buildings stand – the Government or the Indians – you are advised that by article 1 of the agreement of December 31, 1892, ratified and confirmed by the Act of August 15, 1894 (28 Stat. L., 314), the Yankton Indians ceded and relinquished to the United States all their right, title and interest in and to all the unallotted lands of their reservation, and the land on which the Agency buildings stand, therefore, belongs to the Government, in accordance with the provisions of said agreement.

2. Who owns the land covered by fictitious allotments – the Yankton Indians or the Government? Those fictitious allotments have never been sold to the Government, and the Indians still claim them.

The agreement with the Yankton Sioux Tribe of Indians of South Dakota, of December 31, 1892, supra, provided in part as follows:

Article 1. The Yankton tribe of Dakota or Sioux Indians hereby cede, sell, relinquish and convey to the United States all their claim, right, title and interest in and to all the unallotted lands within the limits of the reservation set apart to said Indians as aforesaid.

Article 2. In consideration for the lands ceded, sold, relinquished and conveyed to the United States as aforesaid, the United States stipulates and agrees to pay to the said Yankton tribe of Sioux Indians the sum of $600,000, as hereinbefore provided for.

From the foregoing it will be seen that all the right, title and interest the Yankton Indians had, as a tribe, in and to the unallotted lands within their former reservation was ceded and conveyed to the United States.

* * * *

Very respectfully,

(Signed) R.G. Valentine
Commissioner

5-RES-12
10149

EXH 22

OFFICE OF INDIAN AFFAIRS
RECEIVED OCT 7 1913
119019-14-13
Yankton 310

5-374

INSPECTION REPORT

Report of ALBERT H. KNEALE
Agency or school YANKTON, S.D.
Date of report SEPT 3-19, 1913
Section 14 Subject
16 SECS.

LAND SALES

Action should be taken or memorandum prepared on each of the following matters referred to in the report:

Noted no action necessary Ess 10-23-13

It is mere repetition when I state that these Indians were originally allotted over 200,000 acres of land and that to-day they possess less than one-third of their original holdings; however I am glad to repeat it for I feel that it is something that should be impressed upon the minds of every person that has anything to do with the administration of their affairs. Two thirds of their heritage has already passed into the hands of the Whites. They possess to-day just about one-half the land they held 10 years ago. What will the next 10 years bring forth? Will we have fulfilled our obligations to these people, moral and civic, when we have permitted them to divest themselves of the last remnant of the American Continent? These are pertinent questions. 1800 of them to-day hold about

70,000 acres of land, an average of about 160 acres per family.

• • • •

Respectfully,
/s/ Albert H. Kneale
Supervisor.

Yankton Indian School, S.D.
Report Inspection, Albert H.
Kneale, Supervisor. September
3-19, 1913.

EXH 623

YANKTON AGENCY
SERIAL ONE

HEARINGS
BEFORE THE
JOINT COMMISSION OF THE
CONGRESS OF THE UNITED STATES

SIXTY-THIRD CONGRESS
SECOND SESSION

TO

INVESTIGATE INDIAN AFFAIRS

JANUARY 31 AND MARCH 9, 1914

PART 5

(page 456)

THE CHAIRMAN. What is the general character of the lands that are still Indian lands on the reservation?

MR. LEECH. [SUPERINTENDENT, YANKTON SIOUX INDIAN AGENCY] Senator, let me just make an explanation. There are 268,000 which were allotted to our Indians, and the remainder of the 400,000 acres, which comprised the original Yankton Reservation, was opened for homestead; and of that 268,000 acres, of the 400,000, which were allotted, it has all been sold until they have about 98,000 acres now.

SENATOR LANE. How long has that process been going on?

MR. LEECH. It has been going on about 10 or 12 years, ever since they have been settling the land.

THE CHAIRMAN. Has the allotment work on that reservation been completed?

MR. LEECH. Yes, sir; practically so.

THE CHAIRMAN. All the Indians have been allotted?

MR. LEECH. Allotments all closed June 18, 1892, since which time no allotments have been made.

(page 485)

YANKTON SIOUX AGENCY.

Mr. Leech.

* * * *

It does not make so much difference in a place like ours, because we only have a mile square there that is really a Government reservation. It would make a whole lot of difference on a place like Rosebud or Pine Ridge or large reservations not open for settlement, where all the business done on that entire scope of territory would be done under a license. All the towns where four-fifths of the merchandise is sold to our Indians, all the business houses there are conducted without a license. No one has a license except those who do business just on that agency reserve, in what we call the mile square, where the agency is located.

* * * *

(page 487)

* * * *

REPRESENTATIVE CARTER. How large did you say the reservation was?

MR. LEECH. About 20 by 35 or 36 miles.

* * * *

(page 507)

* * * *

Letter of J.F. Estes

* * * *

9. The Yankton Sioux Indians have been citizens for many years, exercising the right of franchise, holding office, and being subject to the civil and criminal laws of the State. They have been prosecuted and punished and imprisoned under the judicial authority of the State.

* * * *

EXH 665

(Excerpt from letter to Hon. Homer P. Snyder, Chairman,
Committee on Indian Affairs,
House of Representatives, from Secretary,
Department of Interior,
FEB-1 1921 copy initialed for file.)

My dear Mr. Snyder:

This will refer to your letter of January 24, 1920, transmitting, for report and recommendation, a copy of H.R. 15679, providing for the construction of a spillway and drainage-ditch to lower and maintain the level of Lake Andes, South Dakota.

Lake Andes is within the former Yankton-Sioux Indian Reservation.

* * * *

EXH 667

AUG 20 1930

Mr. Joseph V. King,
Clerk in Charge,
Yankton Agency.

Dear Mr. King:

We have your letter of August 13, 1930, transmitting resolution from the Commissioners of Charles Mix County, South Dakota, requesting that the copy of field notes of the Yankton Sioux Reservation on file in your office be transferred to the Register of Deeds of the county mentioned.

You report that the County Surveyor consults this record very frequently, and that the field notes are of no direct value to the agency, as matters pertaining to the survey are handled through the County Surveyor. For these reasons you recommend that the field notes be transferred to the office of the Register of Deeds for safekeeping and for joint use by the agency and the county authorities.

The originals of the field notes are on file in the General Land Office and are available for examination or copy as demand may require. The copy in your office would no doubt be more accessible to persons other than those of the agency, and probably receive better care, if made a part of the county records. It is realized that considerable of the land heretofore constituting a part of the reservation has passed out of Government control through the issuance of fee patents to allottees and purchasers, and that such land is now under the jurisdiction of the State and county authorities, which accounts for

the frequent use of the field notes by the County Surveyor.

No objection is seen to making the proposed transfer, with the understanding that the employees of the Yankton Agency shall have the privilege of consulting the record at will, and you are hereby authorized to proceed accordingly.

Sincerely yours,

C.J. Rhoads
Commissioner

Approved: SEP -2 1930
John H. Edwards
Assistant Secretary.

EXH 651

CONSTITUTION AND BYLAWS OF THE YANKTON SIOUX TRIBAL BUSINESS AND CLAIMS COMMITTEE

Article 1. This organization shall be known as THE YANKTON-SIOUX TRIBAL BUSINESS AND CLAIMS COMMITTEE, hereinafter called The Tribal Committee for the sake of brevity.

Article 2. The members of the Tribal Committee shall be elected to act for the Tribe only in an advisory and signatory capacity, and the power of rendering decisions for the tribe shall not be conferred upon them until after the views and sentiment of the tribe have been thoroughly established and determined; excepting, in minor cases not affecting Article 14 where questions of Departmental policy are involved, they shall have freedom and liberty, without consulting the Tribe, to act and pass upon such matters of a minor character as may be presented to them by the superintendent or the Commissioner of Indian Affairs.

The views of the Tribe having been determined, the Tribal Committee shall be elected with authority to act in any and all tribal matters, including tribal claims of every nature.

Regardless of their personal opinions, it shall be the express and explicit duty of the Tribal Committee to carry out the wishes of the majority of the Tribe in all cases; with the sole object of promoting the social, financial, industrial, and general welfare of the Tribe; and to make such recommendations to the Executive, Judicial, and Legislative Branches of the Government, or to any others,

as the Tribal Committee and the Tribe may deem advisable; and the Tribal Committee shall at all times diligently and wholeheartedly endeavor to co-operate with the Bureau of Indian Affairs.

Article 3. The Tribal Committee shall be composed of nine (9) enrolled members of the Yankton-Sioux Tribe, bona fide residents of Charles Mix County, South Dakota, and twenty-one years of age or over.

Under the peculiar economic conditions of the country and owing to acts of God in this particular region, it shall not be a bar to becoming a member of the Tribal Committee that any Indian residing in Charles Mix County has received charitable aid; however, their records must show that under past normal conditions of the country they were actively engaged in a gainful occupation in an effort to support themselves and their families.

Article 4. The election of members of the Tribal Committee shall be held at a general Tribal Council, as follows:

(a) A majority of the lawful votes present shall determine all questions referred to a general Tribal Council.

(b) A rising, or standing, vote shall govern all elections, unless otherwise ordered by vote of the Tribal Council.

(c) In electing members of the Tribal Committee, at least nine nominations shall be made; and after the Tribal Council has made all the nominations it may desire, the nine receiving the highest number of votes

shall be declared elected. In case of a tie, the Chairman shall have power to decide.

Article 5. The Indian Office shall instruct the Superintendent, or anyone else with proper authority, to make provisions for each election.

Notice of election stating the place and hour of voting shall be posted not less than two weeks in advance.

The Commissioner of Indian Affairs and all subordinate officers shall take extra precautions to insure a fair election.

Article 6. The first election of members of this Tribal Committee shall be held immediately upon adoption of this Constitution and By-Laws.

Thereafter, elections shall be held every two years in the month of September, the date to be designated by the Commissioner of Indian Affairs, at which time nine (9) committee members shall be elected according to the provisions of this Constitution, whose terms of office shall be for a period of two (2) years.

Article 7. Regular meetings of the Tribal Committee shall be held on the first Monday of the months of April, July, and October, at the Agency Headquarters.

Special meetings may be called by the Commissioner of Indian Affairs, either on his own motion or upon the written request of five (5) or more members of the Tribal Committee, such calls and requests to state the purpose of the meeting.

Article 8. If a vacancy occurs in the position of Committeeman, it shall remain discretionary with the Tribe to

fill out the unexpired term of such vacancy, or vacancies, at a special or general Tribal Council.

Article 9. Before assuming their places on the Tribal Committee, members elect shall subscribe to the following oath or affirmation of office:

> I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, and faithfully and impartially carry out the duties of my office to the best of my ability, and will cooperate with the Bureau of Indian Affairs in all proper efforts to promote and protect the best interests of the Indians of the Yankton Reservation, and to assist them in every way toward better citizenship and progress.

Article 10. At the first meeting following election the Tribal Committee shall elect a Chairman, Vice-Chairman, Secretary, Treasurer, or any other officers it may require to transact their business.

A majority of the members of the Tribal Committee shall constitute a quorum for the transaction of business.

Article 11. Any official or employee of the Bureau of Indian Affairs, or anyone else who may have business with the Tribal Committee sufficient to warrant his presence, may attend the meetings of the Tribal Committee to confer and advise with them on matters affecting the Tribe.

Article 12. The Secretary of the Tribal Committee shall keep the minutes of all regular and special meetings, and include therein all business transacted by the Tribal Committee.

He shall file one official copy of the minutes at the Agency Headquarters; and one copy shall be forwarded to the Commissioner of Indian Affairs.

Article 13. Any member of the Tribal Committee shall be subject to recall from office for reasonable cause upon investigation by the Commissioner of Indian Affairs or his representative.

The Tribe also shall have the right, by petition of over fifty (50) per cent of the adult resident members, to demand the removal of any committeeman for cause. The Commissioner of Indian Affairs shall act thereon in his discretion.

Article 14. Matters of great importance to the Tribe which the Commissioner of Indian Affairs or the Tribal Committee believes should be referred to a general Tribal Council shall be so referred.

Or, a Tribal Council shall be called upon petition to the Commissioner of Indian Affairs signed by not less than ten (10%) per cent of the adult members of the Yankton-Sioux Tribe resident in Charles Mix County, S.D.

Article 15. The office of Tribal Committeeman shall be strictly honorary and without compensation, except when valuable and meritorious services are rendered by any member of the Tribal Committee in the discharge of his duties as committeeman, in which case claim may be made for compensation.

Before payment, any such claim must be approved by a general Tribal Council as well as the Secretary of the Interior.

Article 16. This Constitution and Bylaws may be amended at any regular or special Tribal Council, subject to the approval of the Commissioner of Indian Affairs.

Article 17. This Constitution shall be in full force and effect to govern the Yankton-Sioux Tribe and Tribal Committee on and after the date it is approved by the Commissioner of Indian Affairs at Washington, D.C.

DEPARTMENT OF THE INTERIOR
Office of Indian Affairs

October 5, 1932.

The foregoing Constitution and By-Laws for the "Yankton-Sioux Tribal Business and Claims Committee" is hereby approved.

/s/ C.J. Rhoads,
Commissioner

JOINT

APPENDIX

VOL. III

No. 96-1581

Supreme Court, U.S.
FILED
AUG 7 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

STATE OF SOUTH DAKOTA,

Petitioner,

v.

YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,

Respondents,

and

SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX
VOLUME III, PAGES 489-725

MARK W. BARNETT*
Attorney General
State of South Dakota
JOHN PATRICK GUHIN
Deputy Attorney General
500 East Capitol Avenue
Pierre, SD 57501-5070
Telephone: (605) 773-3215
Counsel for Petitioner
State of South Dakota

JAMES G. ABOUREZK*
BOBBIE J. RASMUSSON
ABOUREZK LAW OFFICES, P.C.
P.O. Box 1164
Sioux Falls, SD 57101-1164
Telephone: (605) 334-8402
Counsel for Respondents
Yankton Sioux Tribe and
Darrell E. Drapeau

KENNETH W. COTTON*
WIPF & COTTON
P.O. Box 370
Wagner, SD 57380-0370
Telephone: (605) 384-5471
Counsel for Respondent
Southern Missouri Waste
Management District

Counsel of Record

Petition For Certiorari Filed April 4, 1997
Certiorari Granted June 9, 1997

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

United States District Court Docketing Statement .. 1

Eighth Circuit Court of Appeals Docketing Statement 14

Verified Complaint (September 28, 1994) 21

Answer by Southern Missouri Recycling & Waste Management District (October 4, 1994)..... 38

Third Party Complaint (October 20, 1994)..... 76

Answer to Third Party Complaint (November 4, 1994)..... 81

Answer of State of South Dakota (November 4, 1994) 84

District Court Judgment (June 14, 1995)..... 95

Instructions to Commissioners (July 27, 1892) 98

Report of the Commissioner of Indian Affairs (September 16, 1893) (EXH 10)..... 102

Report on Indians Taxed & Indians not Taxed in United States – Eleventh Census 1890 (Government Printing Office 1894) (EXH 610) 105

Senate Document 27, 53rd Congress, 2nd Session, Letters from Indian Commissioner concerning treaties with Yankton and Dakota or Sioux Indians, negotiations, and other papers (January 18, 1894) (EXH 605)..... 108

1. Letter from the Secretary of the Interior, Hoke K. Smith, transmitting Letter from Indian Commissioner concerning treaties with Yankton and Dakota or Sioux Indians, January 18, 1894.... 108

2. Letter from the Acting Commissioner, Frank C. Armstrong, concerning the Report to the Department of Interior, December 9, 1893 109

TABLE OF CONTENTS – Continued

Page

3. Report of the Yankton Indian Commission, March 31, 1893 122

4. Letter of Commissioner S.W. Lamoreaux, December 26, 1893..... 163

5. Draft of a Bill to ratify and confirm an agreement with Yankton tribe 166

6. Ratification of agreement by Congress..... 178

7. Report of John W. Cadman, United States Indian Inspector, regarding investigation into fraudulent methods or undue pressure against the Indians to sign the agreement, November 13, 1893 180

8. Articles of Agreement between the United States and the Yankton Sioux Indians, December 31, 1892 190

9. Report and testimony of Indians and Commissioners at the Council of the Yankton Indians to consider the question of selling their surplus lands, various dates, from October 8, 1892, through January 21, 1893 203

10. Letters from Missionaries John P. Williamson and Joseph W. Cook, to the Commissioners, January 3, 1893..... 317

11. Telegram sent to the Secretary of Interior from a Committee of Yankton Indians requesting recall of the Commissioners, December 27, 1892..... 319

12. Telegram sent from the Secretary of Interior, John W. Noble, responding to request for a recall of Commissioners, December 28, 1892..... 319

TABLE OF CONTENTS – Continued

Page

13. Report of meeting of Commissioners at the Council of the Yankton Indians to consider the question of selling their surplus lands, January and February 1893..... 321

14. Report and testimony of Commissioner Cole regarding obtaining the signatures of Yankton Indian soldiers..... 343

15. Report and testimony of meeting of Commissioners at the Council of the Yankton Indians to announce the completion of the treaty, March 2, 1893 343

16. Telegrams regarding Commissioner Cole's questions regarding signing and squaw men and Secretary Noble's response, January 23, 1893..... 352

17. Report of Commissioner Cole regarding agreement..... 352

18. Report on Council to examine signatures to the agreement, March 4, 1893..... 356

Letter to Chairman, Committee Indian Affairs, from Yankton Agency (March 2, 1894) (EXH 606)..... 359

Congressional Record 1894 (EXH 669)..... 362

Annual Report of the Commissioner of Indian Affairs (September 14, 1894) (EXH 11) 450

Letter to Secretary of the Interior from T.P. Smith, Acting Commissioner (March 29, 1895) (EXH 27)..... 451

Presidential Proclamation Yankton Sioux Lands (May 16, 1895) (EXH 602) 453

TABLE OF CONTENTS – Continued

Page

The State of South Dakota v. Andrew War, Information for Rape (September 21, 1895) (EXH 638) 458

House of Representatives report re: Homestead Settlers upon Yankton Indian Reservation (January 21, 1896) (EXH 611)..... 460

29 Stat. 16 (1896) (February 26, 1896) (EXH 18) 465

Twelfth Census of the United States (February 1, 1901) (EXH 612)..... 466

Letter to Secretary of the Interior (November 28, 1903) (EXH 29)..... 468

Historical Atlas of South Dakota 1904 (EXH 630)... 469

Report of the Commissioner of Indian Affairs to the Secretary of the Interior 1907 (EXH 43)..... 471

Letter to William Bean, et al, Yankton Indians (May 13, 1910) (EXH 664) 473

Inspection Report of Albert H. Kneale, Supervisor (October 7, 1913) (EXH 22)..... 475

Hearings before the Joint Commission of the Congress of the United States to Investigate Indian Affairs (January 31 and March 9, 1914) (EXH 623) 477

Letter to Chairman, Committee on Indian Affairs from Secretary, Department of Interior (February 1, 1921) (EXH 665)..... 480

Letter to Joseph V. King, Yankton Agency, from Commissioner C.J. Rhoads (August 20, 1930) (EXH 667)..... 481

Constitution and Bylaws of the Yankton Sioux Tribal Business and Claims Committee (October 5, 1932) (EXH 651)..... 483

TABLE OF CONTENTS – Continued

Page

Petition to the Chairman, Senate Investigating Committee, from Yankton Agency (December 3, 1932) (EXH 23)..... 489

M-27671 Letter to Department of the Interior from Nathan R. Margold, Solicitor (March 1, 1934) (EXH 627)..... 492

Amended Constitution and Bylaws of the Yankton Sioux Tribal Business and Claims Committee (July 2, 1962) (EXH 652) 493

M-36783 Authority of Yankton Sioux Tribe of South Dakota to Establish a Tribal Court (September 10, 1969) (EXH 628)..... 518

1990 Census of Population and Housing (EXH 614)... 527

58 Federal Register No. 194 (October 8, 1993) (EXH 661)..... 530

59 Federal Register No. 67 (April 7, 1994) (EXH 662)..... 532

A History of Yankton Tribal Governance (1995) (EXH 78)..... 534

Yankton Sioux Tribal Land History (1995) (EXH 31)... 545

Trial Transcript Excerpts (April 1995) 563

MAPS:

General Land Office map, Ex. 615 (1889)..... 712

Bureau of Indian Affairs map, Ex. 33 (1889) 713

Bureau of Indian Affairs map, Ex. 35 (1896) 714

Bureau of Indian Affairs map, Ex. 36 (1897) 715

Bureau of Indian Affairs map, Ex. 37 (1898) 716

General Land Office map, Ex. 620 (1901)..... 717

TABLE OF CONTENTS – Continued

Page

Bureau of Indian Affairs map, Ex. 39 (1901) 718

State map, County Atlas, Ex. 631 (1906)..... 719

Charles Mix County map, County Atlas, Ex. 631 (1906)..... 720

Bureau of Indian Affairs map, Ex. 43 (1907) 721

General Land Office map, Ex. 621 (1910)..... 722

Bureau of Indian Affairs map, Ex. 46 (1912) 723

State map, County Atlas, Ex. 632 (1912)..... 724

Charles Mix County map, County Atlas, Ex. 632 (1912)..... 725

TABLE OF CONTENTS – Continued

Page

The following Documents are printed in the Petitioner's Appendix and not reprinted in the Joint Appendix.

United States Court of Appeals for the Eighth Circuit; Opinion (October 24, 1996) .....App. 1

United States District Court, District of South Dakota, Southern Division; Memorandum Opinion and Order (June 14, 1995) .....App. 66

United States Court of Appeals for the Eighth Circuit; Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc (January 6, 1997) .....App. 98

Treaty with the Yankton Sioux, 1858 .....App. 99

Agreement with the Yankton Sioux or Dakota Indians, in South Dakota, 1894 .....App. 111

Opinion of the Supreme Court of South Dakota in *State v. Greger,* February 19, 1997 .....App. 125

The following Documents are printed in the Respondents' Appendix and are not reprinted in the Joint Appendix.

South Dakota Enabling Act § 10, 25 Stat. 676 (February 22, 1889) .....Resp. App. 1

Constitution of South Dakota, art. XXVVI, § 18 (Adopted October 1, 1889).....Resp. App. 2

EXH 23

Yankton Agency
South Dakota
December 3, 1932

To The Hon, Lynn J. Frazier, Chairman,
Senate Investigating Committee,
Washington, D.C.

PETITION

We, the undersigned members of the Yankton-Sioux Tribe, respectfully petition that the Honorable Commissioner of Indian Affairs and the Honorable Secretary of the Interior reconsider and recind [sic] their approval of a certain Council held at Yankton Agency, South Dakota on the 22nd day of September, 1932, on the ground said approval was made upon incomplete and misleading information as to how the results of the Council were wrongfully obtained. In support of this request we offer the following statements of facts indicating why it should be disapproved.

* * * *

(page 6)

* * * *

The records show there were 2,000 Yanktons at that time. The rolls of today show less than 2,000. We were allotted under the General Allotment Act whereby we all became citizens of the United States and have been voting ever since. Our allotment rolls were closed in 1894. Therefore all Indians 38 years old or less got no allotments and never will get any as no land is available. Our Boarding school was closed about 20 years ago. Our

children attend public school. We have no hospital, never did. We have no tribal funds. Our rolls were closed in 1920. There were only some 20 old people drawing rations up to 1930 when Superintendent Hickman took charge.

The records show today that there are about $50,000 Individual Indian Moneys on deposit, belonging mainly to the children of mixed-blood Indians who have been citizens for the last 40 years.

The records show the cost of administering to be about $55,000 a year. ABOLISH YANKTON AGENCY. We believe a Sub-Station on our 80 acre Tribal land, under the Rosebud jurisdiction; and a Farmer in charge would serve our needs better. This is not a new idea. The abolishing of Yankton Agency was under consideration during former Commissioner Burke's time.

(page 7)

THERE IS NO NEED OF A TRIBAL COUNCIL here at our Mile Square Agency Reserve. We had no Tribal Council in the 75 years of our establishment and today, when our reservation is reduced to A MILE SQUARE, we do not need a Tribal Council. It would be a greater economy to sell our MILE SQUARE and the 1000 acre-hills back of it. None of it is in demand for valuable leasing or other purposes that would require our attention.

* * * *

(page 10)

* * * *

/s/ Mr. James William Solomon St. Cloud
[and approximately 275 others]

EXH 627

MARCH 1, 1934

DEPARTMENT OF THE INTERIOR

YANKTON SIOUX SCHOOL LANDS

M-27671. *March 1, 1934.*

(page 390)

* * * *

DEAR MR. SECRETARY:

At the suggestion of the Assistant Commissioner of Indian Affairs my opinion has been requested as to whether certain buildings located on lands originally a part of the Yankton Sioux Indian Reservation in South Dakota belong to the Indians or to the United States.

* * * *

Nathan R. Margold
Solicitor

Approved: March 1, 1934
Oscar L. Chapman, *Assistant Secretary*

(Amended) (EXH 652)

CONSTITUTION AND BYLAWS
OF THE
YANKTON SIOUX TRIBAL BUSINESS AND
CLAIMS COMMITTEE

PREAMBLE

Whereas the Yankton Sioux Tribe of Indians have progressed in their association with other members of the community in which they live, and many members are educated and self-supporting, and trained in business, trades, skills and farming and Whereas, the Yankton Sioux Tribe of Indians adopted a Constitution and By-Laws on September 22, 1932, which Constitution provides for amendment of the same at any regular or special Tribal Council, subject to the approval of the Commissioner of Indian Affairs and the said Constitution failing to provide for business and Tribal affairs as they exist today, and a Tribal Council having been held at Greenwood, South Dakota, on August 3-4, 1961, after due notice was given and continued thereafter until the business of that Council was completed, at which Tribal Council at its meeting having authorized a resolution whereby a Constitutional Committee was elected on December 16, 1961, to draft a Constitution and By Laws and the Committee having duly considered the matter and having discovered that the Yankton Sioux Tribe of Indians has a Constitution, which Constitution was adopted on September 22, 1932, and approved by the Commissioner of Indian Affairs on October 5, 1932, and the original Constitution and By-Laws providing in Section 16 thereof that the Constitution and By-Laws may be amended at any regular or special Tribal Council, subject

(change of typographical error in original preamble) to the approval of the Commissioner of-Indian [sic] Affairs and which Constitution is now in full force and effect, the Constitutional Committee after due consideration being of the opinion that the said Committee is without authority to draft a Constitution and By-Laws, but is authorized to the drafting of amendments and bylaws to the original said Constitution at a Tribal Council held at Greenwood, South Dakota, on July 17 (correct date May 17, 1962) and in order to establish further a united Tribal organization to conserve and develop the common resources of our Tribe, to promote and advance the health, education and welfare of our selves and our posterity, to instill through education and industrial development on our reservation, a sense of responsibility and initiative both of which are necessary in a dynamic society, to ever hold before our Tribe the glory and heritage of our race, we do hereby amend our existing Constitution and By-Laws as follows:

ARTICLE I – AMENDED CONSTITUTION

Section 1. This is an amendment of the 1932 Constitution and By-Laws, which said Constitution is in full force and effect, as provided in Articles 16 and 17 thereof:

> Article 16. This Constitution and By-Laws may be amended at any regular or special Tribal Council, subject to the approval o~ [sic] Commissioner of Indian Affairs.
>
> Article 17. This Constitution shall be in full force and effect to govern the Yankton Sioux Tribe and Tribal Committee on and after the date it is approved by the Commissioner of Indian Affairs at Washington, D. C.

Section 2. It is specifically recognized by the Constitutional Committee and the Tribe at large that this Amended Constitution is not subject to the provisions of the Howard Wheeler Act of 1934, which is the Indian Reorganization Act Public Law No. 383, of the 73rd Congress o~ [sic] the United States of America S [sic] (3645).

ARTICLE II – NAME

Section 1. The Executive organization existing under this Constitution shall be known as the Yankton Sioux Tribal Business and Claims Committee wherever the word committee is used it shall mean the Yankton Sioux Tribal Business & Claims Committee, hereafter.

ARTICLE III – PURPOSE AND OBJECT

Section 1. To provide the Tribe with authority to protect their interest in the Tribal land and advise individual members of their rights, privileges and immunities as owners of allotted lands and to prosecute claims in the name of the Tribe for loss of Tribal lands to the United States of America and to retain counsel of their choice to represent the Tribe in suits for or against the Tribe regarding claims and to contract with counsel for such service.

(Pursuant to Bureau of Indian Affairs, Washington Office Letter of approval, of this Amended Constitution, dated April 24, 1963, "it should be understood that 25 USC 81 provides for the approval of all contracts by the Secretary of the Interior".

ARTICLE IV - MEMBERSHIP

(Section 1 changed in its entirety by Amendment No. I, effective June 16, 1975)

Section 1(a). The membership of the Yankton Sioux Tribe shall consist of the following:

1. All persons of Yankton Sioux Blood whose names appear or are entitled to appear on the October 6, 1972, Yankton Sioux Tribal Roll.

2. All children born to members whose names appear on the base roll of October 6, 1972, of the Yankton Sioux Tribe must possess at least one-fourth (1/4), degree Indian Blood of which one-eighth (1/8~ [sic] must be Yankton Sioux Indian Blood.

Section 1(b). The following persons shall not be eligible foe [sic] with the Yankton Sioux Tribe:

1. Persons who are enrolled with another Tribe of Indians and who have shared as members in allotments of land/or [sic] payments, excluding inherited interests, from any other tribe.

2. Children of Indian Blood of other tribes and non-Indian children who have been legally adopted by members of the Tribe.

3. Persons who are not citizens of the United States.

Section 2. The membership rolls shall be reviewed annually by the Committee in order to keep records up to date as well as make any necessary corrections, said corrections subject to the approval of the Tribe.

ARTICLE V - OFFICERS

Section 1. These shall be comprised of nine members consisting of a Tribal Chairman, Vice-Chairman, Secretary, Treasurer and five other members which members and officers shall be nominated by a petition signed by not less than 25 members of the Tribe and which petition shall designate the office for which the candidate is running, either Chairman, Vice-Chairman, Secretary and Treasurer, or members at large.

(Pursuant to Bureau of Indian Affairs, Washington Office Amended Constitution approval letter dated April 24, 1963, as a matter of clarification, "it is understood that the reference to 'Secretary and Treasurer' as used in the last line o~ [sic] this section is not to be construed that the secretary and treasurer is one office").

Section 2. The officers and Committee members shall be elected every two years on the first Thursday in September to hold office until their successors are duly installed, or as may be otherwise provided. Any Committee member or officer may be removed for good cause by a two-thirds vote of the members attending any regular Tribal meeting or any meeting called for such removal.

(As stated in Bureau of Indian Affairs, Washington Office letter of approval, of this Amended Constitution, dated April 24, 1963, "circumstances may, on occasion, warrant the removal of an officer or committee member of a tribe's designated tribal committee, and that the procedures for removal need to be clearly established in order to avoid excessive disruption of the tribal organization arising from charges for removal which may be made without specific-grounds [sic]. For this reason it should

be understood that the Committee of the Yankton Sioux Tribe, by resolution or ordinance, will establish an appropriate removal procedure. As a matter of information, the removal procedure could include such factors as malfeasance in the handling of tribal affairs, neglect of duty, unexcused failure to attend three regular meetings in succession, conviction of a felony in any county, state or Federal court while serving on the Committee, and refusal to comply with any provisions of the Constitution and By-laws of the Tribe").

Section 3. The judicial power shall remain in the Tribal membership upon request of five members for any just cause, such cause shall be submitted at any regular Tribal meeting for action. The legislative branch shall be comprised of the nine Committee members, however any legislative action shall first be submitted to a General Tribal Council and subject to Tribal amendment, repeal or ratification.

(As stated in Bureau of Indian Affairs, Washington Office letter of approval, of this Amended Constitution, dated April 24, 1963, "for the purpose of clarity, it is understood that the intent of this section is to allow the tribal membership a means of control over its officers and committee members through such actions as reprimand, censure, suspension and removal, and that there is no intent on the part of the tribe to establish any type of judicial proceedings either criminal or civil. Our comments on Section 2 of Article V with respect to the establishment of written removal procedures applies to this section").

Section 4. Compensation shall not be paid to any Committee member, Chairman, Vice-Chairman, Secretary,

Treasurer, or any member of the Tribe without the approval of the Tribe and the Secretary of the Interior.

(Pursuant to Bureau of Indian Affairs, Washington Office Amended Constitution approval letter dated April 24, 1963, "With respect to the language 'approval by the Secretary of the Interior' as it appears in this section and in other parts of this constitution, your attention is directed to the administrative procedures established by law which permits the Secretary of the Interior to delegate authority to subordinate officers. Therefore, for the purpose of clarity, it should be understood that when any reference in this Constitution is made to the 'Secretary of the Interior' it shall mean the 'Secretary' or his authorized representative").

ARTICLE VI – TERRITORY

Section 1. The territory under which this Constitution shall exist shall extend to all original Tribal lands now owned by the Tribe under the Treaty of 1858.

Section 2. All assignments of Tribal land heretofore made by the Bureau of Indian Affairs, prior to this amended Constitution, shall remain at the discretion of the Bureau of Indian Affairs.

(As stated in Bureau of Indian Affairs, Washington Office Amended Constitution approval letter dated April 24, 1963, "The language in this section could have been stated in a more explicit manner. It is not known whether the assignments made prior to this amended constitution were made only with the approval of the Bureau. Assignments of tribal land are the responsibility of the tribe, but

such assignments may be made subject to approval of the Secretary or his authorized representative. Therefore, it is understood that as a matter of principle, the provision of this section is interpreted by the Bureau to include the proprietary rights of the tribe in making assignments").

Section 3. All Tribal lands, and Tribal property thereon shall remain free from taxation and shall be exempt from and [sic] all forms of liens, and shall not be encumbered in any manner whatsoever.

(As stated in Bureau of Indian Affairs, Washington Office Amended Constitution approval letter dated April 24, 1963, "The language of this section implies that the provisions therein take precedence over the laws of the United States.

To avoid any false impression it is understood that the provisions of this section are subject to any valid law to the contrary. We do not believe the tribe intended that the word 'encumbered' be used is [sic] such a broad sense as to preclude the tribe granting assignments, permits, leases, and rights of way. This interpretation is made in order to provide clarity 50 [sic] the intent of the language contained in this section").

ARTICLE VII – CLAIMS AGAINST THE UNITED STATES

(The provisions of Article VII of the Amended Constitution were disapproved by Bureau of Indian Affairs, Washington Office letter dated April 24, 1963, and therefore are omitted from this text. The article number remains only to follow numerical sequence of the Washington Office letter of April 24, 1963).

ARTICLE VIII – HEADQUARTERS

Section 1. This organization shall have temporary headquarters at Yankton Sub-Agency, Wagner, South Dakota. This organization shall be at all times non-sectarian.

ARTICLE IX – DEMOCRATIC FORM OF GOVERNMENT

Section 1. All operations under this Constitution shall be free from. [sic] any system of collectives and/or socialism under any and 211 [sic] circumstances.

Section 2. This Constitution shall stress to the fullest extent of its authority at all times, recognition of and operation under the private enterprise system and democratic way of life.

ARTICLE X – HUNTING

Section 1. Hunting or fishing of wild game shall not be forbidden any Indian on Tribal lands.

(Pursuant to Bureau of Indian Affair;, [sic] Washington Office Amended Constitution approval letter dated April 24, 1963, "the provisions of this section as simply a statement of tribal policy that the tribe will not prohibit or otherwise attempt to keep Indians, whether tribal members or not, from carrying on hunting activities on tribal lands. And that it is not intended as an affirmative grant of right. It should be further understood that any such activity by Indians will be subject to applicable laws on the subject").

Section 2. Hunting or fishing shall be allowed on allotted or heirship land with permission of the land owner or owners.

(Pursuant to Bureau of Indian Affairs, Washington Office, Amended Constitution approval letter dated April 24, 1963, "From the standpoint of clarification and understanding we regard the provisions of this section as simply a statement of tribal policy that hunting and fishing activities by anyone, whether Indian or non-Indian, on allotted or individually owned land, will be a matter for determination by the individual owners and it is not intended as a grant of an affirmative right. As indicated above, such activities will be subject to applicable laws").

ARTICLE XI – AMENDMENTS

Section 1. An amendment to this Constitution may be proposed at any regular or special Tribal meeting by vote of majority of the members present at such meeting in favor of any proposed amendment. To officially adopt such proposed amendments there must be an election as to which there shall be written notices posted at proper places throughout the reservation at least thirty (10) [sic] days and not more than sixty (60) days in advance of the date of such amendment is to be considered, such notices to give the time and place of the meeting and also to specify what the pro posed [sic] amendment is.

(Pursuant to Bureau of Indian Affairs, Washington Office, Amended Constitution approval letter dated April 24, 1963, (it [sic] should be understood that the tribe will enact an ordinance governing the conduct of elections on

amendments. Such an ordinance shall provide all information pertinent to an election including voting on amendments by absentee ballots).

Section 2. All or any part of this Constitution is subject to amendment repeal or ratification subject to the approval of the Secretary of the Interior.

(Former Section 2 and Section 3 were deleted and Section 4 renumbered as Section 2 pursuant to Bureau of Indian Affairs, Washington Office Amended Constitution approval letter dated April 24, 1963.)

ARTICLE XII – LAW AND ORDER

(This is a new article added by Amendment No. II, effective June 16, 1975)

Section 1. To promulgate and enforce ordinances governing the conduct og [sic] members of the Yankton Sioux Tribe and providing for the maintenance of law and order and the administration of justice by the establishment of a reservation court and defining its duties and powers subject to the approval of the Secretary of the Interior or his authorized representative.

AMENDED BY-LAWS OF THE YANKTON SIOUX TRIBAL BUSINESS AND CLAIMS COMMITTEE

ARTICLE I – VOTING ON INDIAN LEGISLATION

Section 1. All Tribal Business other than of a routine nature which would involve Indian Legislation shall be voted on by secret ballot at a polling place, time and

place of such voting to be determined and designated by the Committee. Notice shall be posted at proper places throughout the reservation at least thirty (30) days and not more than sixty (60) days in advance of such voting. (Change of typographical error in original document – the word "and" preceding the word sixty changed to "than").

Section 2. All eligible voters may vote by presenting themselves at the polling place. Approval by majority vote shall be considered final.

ARTICLE II – ELECTIONS

Section 1. The first election of Committee members under this Constitution shall take place thirty (30) days after its approval by the Tribe and the Secretary of the Interior. Thereafter elections shall be held every two years on the first Thursday in September. Voting shall be by secret ballot cast at a polling place to be designated by an election board to be appointed by the Committee. The said election board shall have power to certify the election of any candidate elected in accordance with Tribal membership rights.

Section 2. All eligible members of the Yankton Sioux Tribe eighteen (18) years of age or older shall be eligible to vote in all tribal elections. (As changed by Amendment No. III, effective June 16, 1975)

Section 3. All elections shall be governed by Section 1 of Article III and ordinances establishing election rules and regulations promulgated by the Yankton Sioux Business

and Claims Committee subject to approval by the Yankton Sioux General Council. (This is a new section added by Amendment No. IV, effective June 16, 1975)

ARTICLE III – MEETINGS

Section 1. In addition to an annual meeting (3rd Tues. in Aug. of each year) regular Tribal meetings shall be called by the officers when the need arises or upon the request o~ [sic] ten members, and thirty (30) days notice designating the time and place may be posted throughout the reservation and must include the agenda.

Section 2. In the event of an emergency situation, or upon the request of fifteen members, the officers shall have authority to call a special meeting. Notice of such meeting shall be by best possible methods of communication available and can be by ~rd [sic] of mouth and television news broadcasts and etc.

Section 3. A majority of the members of the Tribal Committee shall constitute a quorum at Committee meetings and twenty members shall constitute a quorum at general meetings.

ARTICLE IV – MANAGEMENT

Section 1. The Committee shall have the authority to investigate and transact all Tribal business of a routine nature and Indian legislation including Industry, Sanitation, Housing Redevelopment and etc., and shall also act in the capacity of a liaison delegation between the Tribe and Federal, State and local governments, and such other agencies or parties that may offer opportunities for the

Tribe. It will be required of the Committee to keep the members of the Tribe clearly informed during the process of investigation. Indian legislation will be brought to the general Tribal council for the Tribe's consideration, 30 days prior to referendum vote by the Tribe.

Section 2. The Committee shall negotiate the terms of contractual agreements, said contractual agreements shall be subject to the approval of the Tribe. Approval to be made in accordance with Article I, Sections 1 and 2 of the amended By-laws.

(The spelling of the word "contractual" is corrected in the above section as provided in Bureau of Indian Affairs, Washington Office approval letter of the Amended Constitution and By-laws dated April 24, 1963.)

Section 3. All allotted lands, including heirship lands, belonging to any member of the Yankton Sioux Tribe of Indians shall continue to be held as heretofore by their present owners. It is recognized that under existing law such lands may be inherited by the legal heirs of the present owners, whether such heirs are members of the Yankton Sioux Tribe of Indians or not. It is also recognized that under existing law the Secretary of Interior may remove restrictions upon such lands, upon the application of the Indian owner, whereupon the land may be sold or mortgaged and in such event, will be subject to taxes. The rights of the individual Indians to hold their lands under existing law shall not be affected by anything contained in this Constitution and By-Laws.

(Pursuant to Bureau of Indian Affairs, Washington Office, Amended Constitution and Bylaws approval letter dated April 24, 1963, "it should be understood that lands

belonging to any member of the Yankton Sioux Tribe, whether allotted or heirship lands, and whether in trust or non-trust status, are governed by the laws of the United States").

Section 4. It is recommended by the Yankton Sioux Tribe that a majority of heirs or as many that may be available (51% or more) should constitute a lease. Every effort shall be made by the renter in order to obtain as many signatures as possible. This is in recognition of the democratic way of life, where a majority of individual Indians should have freedom in exercising their rights in negotiating a lease. In the process of negotiating a lease all heirs shall be notified thereby individual rights will not be violated.

(As stated in Bureau of Indian Affairs, Washington Office, Amended Constitution and Bylaws approval letter dated April 24, 1963, "Exception is not taken to the provisions of Section 4 of Article IV of the Bylaws, but it should be understood that the statute, 25 USC 380, as implemented by 25 CFR 131, will govern the execution of leases on inherited lands").

Section 5. Any business in the matter of Tribal claims shall be brought directly to a General Tribal Council for the Tribe's consideration, except in case of an emergency involving any attorney contract, then the contract shall be executed in accordance with the format used in the renewal dated February 1, 1957. This format was used again by the Constitutional Committee in an emergency involving attorney contract which expired in January 17, 1961 and in view of circumstances as stated in the letter of January 17, 1962 from the law office of Wilkinson, Cragun, and Barker, the Committee temporarily extended

the original attorney contract so that the Yankton Claims will not be lost by default.

(Pursuant to Bureau of Indian Affairs, Washington Office, Amended Constitution and Bylaws approval letter dated April 24, 1963, "it should be understood by the Tribe that when authority is not delegated to its representative body tribal council, committee, etc., to employ legal counsel, such authority rests with the Tribe. Approval of a contract for legal services, therefore, must be by resolution by the tribe in general council. Such resolution should designate the tribal officials authorized to execute the contract on behalf of the tribe").

Section 6. The format mentioned above is an exception to the regulations cited as 25 CFR Section 72. The specific authority as required in contractual agreement are from excerpts of Title 25 of the Code of Federal Regulations as follows: (a) Section 72.7 statutes governing the negotiation and execution of Tribal attorney contracts with Tribes not organized under the Indian Reorganization Act must be in strict accordance with the requirements of Section 2103 of the revised statutes of the United States. (25 U.S.C. 81) (b) Section 72.8 statutes governing selection of counsel, except as stated in sections 72.12-72.15, a Tribal attorney and Tribal delegates to execute a contract-shall [sic] be selected by a General Council or meeting of the Tribe, to be called by the Superintendent of the particular reservation. The Superintendent, or someone representing him shall be in attendance with a stenographer.

(Pursuant to Bureau of Indian Affairs, Washington Office, Amended Constitution and Bylaws approval letter dated

April 24, 1963, "it should be understood that our comments in connection with Section 1 of Article III of the Constitution concerning the approval of contracts likewise apply to this section").

Section 7. The rights of the individual Indians to hold their money shall not be affected by anything contained in this Constitution and By-Laws. All individually owned income such as wages, salaries, pensions, income from allotted lands and heirship and deeded lands and any other income of the individual shall be held by such individual.

(As stated in Bureau of Indian Affairs, Washington Office, Amended Constitution and Bylaws approval letter dated April 24, 1963, "it must be understood that where income is derived from trust sources and such monies are processed through the Individual Indian Money Accounts, the Individual Indian Money regulations shall govern").

Section 8. (Pursuant to Bureau of Indian Affairs, Washington Office, amended Constitution and Bylaws approval letter dated April 24, 1963, this section was disapproved and deleted from the tribal document.)

ARTICLE V – DUTIES OF OFFICERS

Section 1. Duties of Chairman: All duties normally applicable to the post of Chairman shall be required of the Chairman although he need not necessarily preside at General Council meetings. All official Tribal business shall require the signature of the executive Chairman.

(As stated in Bureau of Indian Affairs, Washington Office, Amended Constitution and Bylaws approval letter dated

April 24, 1963, we interpret the reference to "executive chairman" to mean the Chairman of the Yankton Sioux Tribal Business and Claims Committee.)

Section 2. Duties of Vice-Chairman: The Vice-Chairman shall assume and discharge the duties of the office of Chairman in the absence or disability of, or at the request of the Chairman. The Vice-Chairman shall administer oaths of office to all members who may be elected before such elected members take active part in the deliberations of the Committee.

Section 3. Duties of the Secretary: The Secretary shall have charge of and keep an accurate record of all proceedings of the meetings, keep such records as may be required by the membership, and keep the members of the Tribe clearly informed of the various accomplishments of the Committee, and shall handle the correspondence of this organization. All official Tribal business shall require the signature of the Executive Secretary.

Section 4. Duties of Treasurer: The Treasurer shall be responsible for maintaining the bookkeeping system and preparing the annual budget, financial statements, balance sheets, and profit and loss statements. The Treasurer shall sign all vouchers and make a full report to the Tribe on the financial reports as they are available and at the annual meeting, the Treasurer shall also be bonded.

Section 5. Duties of Chaplain: The Committee shall agree on selecting a Chaplain who shall give the invocation at all meetings.

ARTICLE VI – ELIGIBILITY OF OFFICE

Section 1. Any-member [sic] of this organization in good standing over the age of 21 years shall be eligible to hold office in this organization with the provision that he or she shall be a resident of the Yankton Indian Reservation of South Dakota for at least one year. This shall specifically exclude any employee of the United States Government.

ARTICLE VII – VACANCIES

Section 1. Any and all vacancies existing other than from the expiration of the term of office shall be filled by a majority vote of the membership acting at the regularly scheduled Tribal meeting, and such appointed person shall hold office for the unexpired term of the person he succeeds and until a successor is duly elected and installed.

ARTICLE VIII – OATH OF OFFICE

Section 1. All duly elected or appointed members of the Committee shall take an oath of office prior to assuming the duties of such office, pledging himself to support and defend the Constitution of the United States of America, the Constitution of the state of South Dakota and the Constitution of the Yankton Sioux Tribal Business and Claims Committee including the Bylaws thereof. The oath shall be in form as follows:

"I, ___, do solemnly swear to defend the Constitution of the United States of America, the Constitution of the State of South Dakota, and the Constitution and By-Laws of the

Yankton Sioux Tribal Business and Claims Committee against all enemies. I will carry out, faithfully and impartially, the duties of my office to the best of my ability, and protect the best interests of the Yankton Sioux Tribe of Indians in accordance with its Constitution and By-Laws. So help me God.

ARTICLE IX – UNDUE INFLUENCE ON CONTRACTS

(The provisions of Article IX of the Amended Bylaws were disapproved by Bureau of Indian Affairs, Washington Office letter dated April 24, 1963, and therefore are omitted from this text. The article number remains only for continuity of numerical sequence.)

ARTICLE X – MEMBERSHIP FILE

Section 1. Each and every member of this organization shall furnish the Secretary with his or her address for mailing purposes.

ARTICLE XI – QUASI CORPORATION

Section 1. This organization shall be in the nature of a corporation.

Section 2. This organization shall not be perpetual, but shall depend upon the sphere of its activity.

Section 3. This Quasi Corporation shall operate without a State or Federal Charter.

ARTICLE XII – RULES OF ORDER

Section 1. All proceedings of this organization shall be conducted under and pursuant to Roberts' Rules of Order.

ARTICLE XIII – AMENDMENTS

Section 1. The procedures for amending these By-Laws shall be in accordance with ARTICLE II of the Constitution.

(Pursuant to Bureau of Indian Affairs, Washington Office, Amended Constitution and Bylaws approval letter dated April 24, 1963, "It is, however, understood that amendments to the Bylaws shall be accomplished in accordance with the provisions of Article XI of the Constitution").

(Pursuant to aerie [sic] of Indian Affairs, Washington Office, Amended Constitution and By laws approval letter dated April 24, 1963, "The amended constitution of the Yankton Sioux Tribe is approved as set forth herein [sic].)

CERTIFICATION OF ADOPTION

THE ATTACHED AMENDED CONSTITUTION AND BYLAWS (1962) WERE adopted AT A MEETING HELD JULY 2, 1962, at GREENWOOD, SOUTH DAKOTA, by a vote of 77 for, and 35 against, of the approximately 175 persons in attendance.

APPROVAL

I, Harley D. Zephier, Area Director of the Aberdeen Area Office, Bureau of Indian Affairs, by virtue of the authority granted to me by 10 BIAM 3.1, hereby approve the attached Amendment No. 1, which amends Section 1 of Article IV, Membership, of the Constitution of the Yankton Sioux Tribe of South Dakota.

(Sgd) Harley D. Zephier
Area Director

Date: June 16, 1975

Aberdeen Area Office
Aberdeen, South Dakota

AMENDMENT
CONSTITUTION AND BYLAWS
OF THE YANKTON SIOUX TRIBE
SOUTH DAKOTA

AMENDMENT I

Article IV. Membership. Section 1, of the Constitution shall be amended to read as follows:

Sec. 1(a) The membership of the Yankton Sioux Tribe shall consist of the following:

1. All persons of Yankton Sioux Blood whose names appear or are entitled to appear on the October 6, 1972, Yankton Sioux Tribal Roll.

2. All children born to members whose names appear on the base roll of October 6, 1972, of the Yankton Sioux Tribe must possess at least one-fourth (1/4), degree Indian Blood of which one-eighth (1/8) must be Yankton Indian Blood.

Sec. 1(b) The following persons shall not be eligible for enrollment with the Yankton Sioux Tribe.

1. Persons who are enrolled with another Tribe of Indians and who have shared as members in allotments of and/or payments, excluding inherited interests, from any other tribe.

2. Children of Indian Blood of other tribes and non-Indian children who have been legally adopted by members of the Tribe.

3. Persons who are not citizens of the United States.

DELETE SECTION 3 OF ARTICLE IV, MEMBERSHIP.

APPROVAL

I, Harley D. Zephier, Area Director of the Aberdeen Area Office, Bureau of Indian Affairs, by virtue of the authority granted to me by 10 BIAM 3.1, hereby approve the attached Amendment II, which amends the Constitution of the Yankton Sioux Tribe of South Dakota by adding an Article XII, Law and Order.

(Sgd) Harley D. Zephier

Area Director

Date: June 16, 1975

Aberdeen Area Office
Aberdeen, South Dakota

AMENDMENT
CONSTITUTION AND BYLAWS
OF THE YANKTON SIOUX TRIBE
SOUTH DAKOTA

AMENDMENT II

Add an Article XII to the Constitution to read as follows:

Article XII. Law and Order

Section 1. To promulgate and enforce ordinances governing the conduct of members of the Yankton Sioux Tribe and providing for the maintenance of law and order and the administration of justice by the establishment of a reservation court and defining its duties and powers subject to the approval of the Secretary of the Interior or his authorized representative.

AMENDMENT
CONSTITUTION AND BYLAWS
OF THE YANKTON SIOUX TRIBE
SOUTH DAKOTA

AMENDMENT III

Article II, Elections. Section 2, of the By-laws shall be amended to read as follows:

Sec. 2 All eligible members of the Yankton Sioux Tribe eighteen (18) years of age or older shall be eligible to vote in all tribal elections.

APPROVAL

I, Harley D. Zephier, Area Director of the Aberdeen Area Office, Bureau of Indian Affairs, by virtue of the authority granted to me by 10 BIAM 3.1, hereby approve the attached Amendment IV, which amends Article II, Elections, of the Bylaws of the Yankton Sioux Tribe of South Dakota by adding a Section 3.

(Sgd) Harley D. Zephier
Area Director

Date: June 16, 1975

Aberdeen Area Office
Aberdeen, South Dakota

AMENDMENT
CONSTITUTION AND BYLAWS
OF THE YANKTON SIOUX TRIBE
SOUTH DAKOTA

AMENDMENT IV

Article II, Elections. [sic] of the By-laws shall be amended by adding a Section 3 as follows:

Sec. 3 All elections shall be governed by Section 1 of Article II and ordinances establishing election rules and regulations promulgated by the Yankton Sioux Business and Claims Committee subject to approval by the Yankton Sioux General Council.

EXH 628

Sep 10 1969-18
M-36783

AUTHORITY OF YANKTON SIOUX TRIBE OF SOUTH DAKOTA TO ESTABLISH A TRIBAL COURT

Indian Tribes: Generally – Indian Tribes: Organized Tribes – Indians: Law and Order – Courts – Act of August 15, 1894, 28 Stat. 314

The cession of unallotted lands by the Yankton Sioux Tribe by the Agreement of December 31, 1892, as ratified by the Act of August 15, 1894, 28 Stat. 314 diminished the area over which the tribe might exercise its authority but did not otherwise terminate legislative authority of the tribe; the tribe retained inherent authority to administer justice through a tribal court.

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

M-36783 SEP 10 1969

Memorandum

To: Commissioner of Indian Affairs

From: Associate Solicitor, Indian Affairs

Subject: Authority of Yankton Sioux Tribe of South Dakota to establish a tribal court

We have reviewed the attached proposed letter intended as confirmation of an interpretation of the Act of August 15, 1894, 28 Stat. 314, as related to Mr. Percy Archambeau, Chairman of the Yankton Sioux Tribe of South Dakota. Mr. Archambeau inquired whether the

tribe has authority to establish a tribal court. He was informed, as the proposed letter indicates, that the effect of the 1894 Act was to eliminate reservation boundaries and terminate the tribe's authority to establish a tribal court.

The Act of August 15, 1894, does not expressly provide for the termination of legislative authority of the tribe and in my view it cannot be so construed.

The Yankton Sioux Tribe, as a separate tribal entity, entered into a treaty with the United States on April 19, 1858, 11 Stat. 743, and was thus recognized as possessing internal sovereignty. See *Iron Crow* v. *Oglala Sioux Tribe*, 231 F.2d 78, 91-92 (8th Cir. 1956) and cases cited therein. With regard to sovereign tribal powers, it is said in *Federal Indian Law*, United States Department of the Interior (1958) at page 398:

> The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possessed, in the first instance, all the powers of any sovereign State. (2) Conquest rendered the tribe subject to the legislative power of the United States and, in substance, terminated the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but did not by itself terminate internal sovereignty of the tribe, i.e., its powers of local self government. (3) These internal powers were, of course, subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, many powers of internal sovereignty have remained in the Indian tribes and in their duly constituted organs of government.

Included among those powers of internal sovereignty is the power to administer justice with respect to all disputes and offenses of or among the members of the tribe, other than jurisdiction over crimes reserved to the Federal courts (Solicitor's opinion, 55 I.D. 15 (1934)) or which may have been transferred to the state pursuant to P.L. 280, Act of August 15, 1953, 67 Stat. 589, as amended, 18 U.S.C. 1162 and 28 U.S.C. 1360.[1] See also *Iron Crow* v. *Oglala Sioux Tribe, supra,* and *Colliflower* v. *Garland,* 342 F.2d 369 (9th. Cir. 1965). The question here is whether the

[1] The State of South Dakota enacted three statutes pursuant to P.L. 280: Chap. 319, Laws of 1957, provided for acceptance of criminal and civil jurisdiction in Indian country conditioned, however, on approval of county commissioners and tribal councils – neither of which gave approval; Chap. 464, Laws of 1961 provided for acceptance of civil and criminal jurisdiction in Indian country with a proviso that except for crimes or causes of action arising on highways the assumption would not become effective until the Governor by proclamation declared jurisdiction assumed; Chap. 467, Laws of 1963 provided unconditionally for the assumption of criminal and civil jurisdiction in Indian country in the state.

The Supreme Court of South Dakota in *In Re Hankins' Petition,* 125 N.W. 2d 839 (S.D. 1964), declared the action in assuming jurisdiction over highways only by Chap. 464, Laws of 1961, to be ineffective. the holding was based on an interpretation of P.L. 280. The court's interpretation of that statute was that it did not permit piecemeal assumption of jurisdiction. Whether this interpretation will be followed in the Federal courts remains to be seen. The Civil Rights Act of 1968, 82 Stat. 73, Title IV, amended P.L. 280 to provide for state assumption of piecemeal jurisdiction both as to area and subject matter.

Chap. 467, Laws of 1963, was referred to the people and in an election held in 1964, was rejected by a vote of 58,289 to 201,389. Session Laws of South Dakota 1965, p. 508.

Act of August 15, 1894, 28 Stat. 314, or any other act of Congress terminated that power.

The 1894 Act provided first for the acceptance, ratification and confirmation of the agreement dated December 31, 1892, between the Yankton Sioux and the United States. The agreement was negotiated on the part of the United States pursuant to authority contained in the Appropriation Act of July 13, 1892, 27 Stat. 137, which provided for "the Secretary of the Interior in his discretion to negotiate with any Indians for the surrender of portions of their respective reservations * * * ," subject to ratification by Congress. Provisions of the agreement pertinent to the question here are found in Article I and Article V. Article I provides:

> The Yankton Tribe of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said Indians as foresaid.

Article V provides in pertinent part:

> Out of the interest due to the Yankton Tribe of Sioux Indians by the stipulations of Article III, the United States may set aside and use for the benefit of the tribe, in such manner as the Secretary of the Interior shall determine, as follows: * * * *for courts of justice* and other local institutions for the benefit of the tribe * * * . (Emphasis added.)

After providing for the acceptance of the land ceded, the Act of August 15, 1894, *supra,* provided further:

> That the lands by said agreement ceded to the United States shall be subject to disposal only under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common school purposes and be subject to the laws of the State of South Dakota * * * .

A statute containing provisions in pertinent respects identical to that above quoted from Article I of the 1892 agreement and the 1894 Act was construed in *De Marrias* v. *State of South Dakota*, 206 F. Supp. 549, 551 (S.D. 1962), *aff'd*. 319 F.2d 845 (8th Cir. 1963). Also involved in that interpretation was the Enabling Act of February 22, 1889, 25 Stat. 676, which in part provides:

> That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States * * * .

Such Acts, the court said in *De Marrias*:

> * * * constitute explicit manifestations as of the effective dates thereof an intent by the Congress to restore to the public domain all unallotted lands within the Lake Traverse Reservation which were being opened for entry and settlement under the homestead and townsite laws of

> the United States and to make those areas subject to the laws of South Dakota.
>
> Equally well manifested by those Acts, though only implicitly inscribed, is a *congressional intent* to diminish the original area limits of the reservation, *to separate jurisdiction* and in the process and as an overall product of the entire arrangement to end 'Indian country' and the reservation status. *The unallotted lands thereafter ceased legally, to be a part of that reservation* * * * . (Emphasis added.)

Thus, it is the clear implication of that decision that though there was a dimunition [sic] of the territory over which the tribe might exercise its authority, there was no removal by this act of the tribe's authority over territory not ceded. See also *Beardslee* v. *United States*, 387 F.2d 280, 286 (8th Cir. 1967). In fact, as indicated by the provision for the expenditure of funds derived from the cession for "courts of justice," there was clearly an intent that the power of the tribe to enact laws and establish courts to enforce those laws was to continue. Even if this provision were construed as providing for an administrative court – i.e., a Court of Indian Offenses of the Federal Government – such establishment would not destroy or limit the legislative powers of the tribe. *Federal Indian Law*, *supra*, pp. 451-452.

The result of a cession of all unallotted lands was to leave in Indian control lands in a checkerboard pattern. The impracticality of such jurisdiction is recognized. See 61 I.D. 298, 304; *United States* v. *Black Spotted Horse*, 282 F. 349, 353-354 (S.D. 1922); *Seymour* v. *Superintendent*, 368 U.S. 351, 359 (1961). However, as stated in *De Marrias*, the checkerboard jurisdiction stems from the acts of Congress

and therefore had the approval of Congress. *De Marrias, supra*, 553. See also *State* v. *Barnes*, 137 N.W. 2d 683, 687 (S.D. 1965).

Having concluded that the Yankton Sioux Tribe would in legal theory have authority to establish a tribal court, we come to a question as to the extent that the tribe has exercised such authority. The tribe is not organized under the Indian Reorganization Act of June 18, 1934, 48 Stat. 988, as amended, though eligible to do so. It continues to operate under a constitution which predates the Indian Reorganization Act. Article V, Section 3 of that Constitution provides:

> The judicial power shall remain in the Tribal membership and upon request of five members for any just cause, such cause shall be submitted at any regular Tribal meeting for action * * * .

Whether this is intended to include criminal as well as civil matters is not clear. It is clear, however, that there is here manifest an intent to exercise judicial authority. Indeed, it appears to be the only substantive provision in the constitution, aside from the provisions on membership and claims, for the exercise of any tribal authority. Were the tribe to organize under the Indian Reorganization Act, *supra*, it presumably could include in a constitution those powers listed in the Solicitor's opinion, 55 I.D. 15, relating to powers of Indian tribes since this tribe is a previously recognized tribe as evidenced by its entry into the Treaty of 1858, *supra*, and the 1892 Agreement, 28 Stat. 314. *Federal Indian Law*, *supra*, p. 411, n. 36.

The provision in the constitution describing the territory over which the constitution will operate is ambiguous and probably does not encompass the entire area not ceded by the 1892 Agreement. It states:

> The territory under which this Constitution shall exist shall extend to all original tribal lands now owned by the Tribe under the Treaty of 1858.

In ordinary usage the words "tribal lands" would refer to lands owned by the tribe and not by members of the tribe. The reference to present ownership would also exclude authority over lands which were not included in the 1894 cession but which were subsequently alienated, i.e., prior to the adoption of the constitution on September 22, 1932. This, though it might affect authority of the tribal government as constituted, does not detract from inherent tribal authority which might be exercised by amending the constitution. We find no other act of Congress which diminishes or limits the inherent authority of the Yankton Sioux Tribe.

In summary, the Act of August 15, 1894, did not limit the authority of the tribe although it did diminish the area over which the tribe might exercise its authority. Authority of the tribe is limited to the areas not ceded by the 1892 Agreement, *supra*, as ratified by the 1894 Act, *supra*. Further, it is evident from the provision in Article V of the constitution that some provision, vague and cumbersome though it is, is made for the exercise of judicial authority. There is no legal impediment to modification by amendment of that authority. Accordingly, we do not endorse the interpretation the proposed letter

would relate to Mr. Archambeau. The letter is returned herewith for whatever further action you deem advisable.

/s/ Earle D. Goss
Earle D. Goss

Attachment

EXH 614

1990 Census of
Population and Housing

Summary Population and
Housing Characteristics

South Dakota

(page 175)

Table 17. Selected Population Characteristics for American Indian and Alaska Native Areas: 1990

[For definitions of terms and meanings of symbols, see text]

American Indian Area County	American Indian, Eskimo, or Aleut All persons	 Total
AMERICAN INDIAN RESERVATION AND TRUST LAND		
Cheyenne River Reservation, SD	7 743	5 100
Dewey County	5 523	3 680
Ziebach County	2 220	1 420
Crow Creek Reservation, SD	1 756	1 531
Buffalo County	1 495	1 365
Hughes County	171	129
Hyde County	90	37
Flandreau Reservation, SD	279	249
Moody County	279	249
Lake Traverse (Sisseton) Reservation, ND-SD (pt.)	10 496	2 820
Codington County	218	4

Day County	688	299
Grant County	260	-
Marshall County	1 246	256
Roberts County	3 084	2 261
Lower Brule Reservation, SD	1 123	994
Lyman County	1 106	987
Stanley County	17	7
Northern Cheyenne Reservation and Trust Lands, MT-SD (pt.)	-	-
Northern Cheyenne Trust Lands (pt.)	-	-
Meade County	-	-
Pine Ridge Reservation and Trust Lands, NE-SD (pt.)	12 189	11 166
Pine Ridge Reservation	11 385	10 455
Jackson County	1 483	1 081
Shannon County	9 902	9 374
Pine Ridge Trust Lands (pt.)	804	711
Bennett County	804	711
Rosebud Reservation and Trust Lands, SD	9 696	8 043
Rosebud Reservation	8 352	6 883
Todd County	8 352	6 883
Rosebud Trust Lands	1 344	1 160
Gregory County	135	122
Lyman County	-	-
Mellette County	759	648
Tripp County	450	390
Standing Rock Reservation, ND-SD (pt.)	4 195	2 034
Corson County	4 195	2 034

Turtle Mountain Reservation and Trust Lands, ND-SD (pt.)	-	-
Turtle Mountain Trust Lands (pt.)	-	-
Perkins County	-	-
Yankton Reservation, SD	6 269	1 994
Charles Mix County	6 269	1 994

(Breakdown of age and sex omitted in printing)

EXH 661

58 Federal Register No. 194, Friday, October 8, 1993

(page 52486)

* * * *

South Dakota; Final Determination of Adequacy of State/ Tribal Municipal Solid Waste Permit Program

* * * *

(pages 52488-52489)

* * * *

D. Decision

* * * *

Today's decision to approve the South Dakota MSWLF permitting program does not extend to "Indian Country," as defined in 18 U.S.C. 1151, including the following "existing or former" Indian reservations in the State of South Dakota:

1. Cheyenne River;
2. Crow Creek;
3. Flandreau;
4. Lower Brule;
5. Pine Ridge;
6. Rosebud;
7. Sisseton;
8. Standing Rock; and
9. Yankton.

Before EPA would be able to approve the State of South Dakota MSWLF permit program for any portion of "Indian Country," the State would have to provide an appropriate analysis of the State's jurisdiction to enforce

in these areas. In order for a State (or Tribe) to satisfy this requirement, it must demonstrate to the EPA's satisfaction that it has authority either pursuant to explicit Congressional authorization or applicable principles of Federal Indian law to enforce its laws against existing and potential pollution sources within any geographical area for which it seeks program approval. EPA has reason to believe that disagreement exists with regard to the State's jurisdiction over "Indian Country," and EPA is not satisfied that South Dakota has, at this time, made the requisite showing of its authority with respect to such lands.

In withholding program approval for these areas, EPA is not making a determination that the State either has adequate jurisdiction or lacks such jurisdiction. Should the State of South Dakota choose to submit analysis with regard to its jurisdiction over all or part of "Indian Country" in the State, it may do so without prejudice.

EPA's future evaluation of whether to approve the South Dakota program for "Indian Country," to include Indian reservation lands, will be governed by EPA's judgment as to whether the State has demonstrated adequate authority to justify such approval, based upon its understanding of the relevant principles of Federal Indian law and sound administrative practice. The State may wish to consider EPA's discussion of the related issue of tribal jurisdiction found in the preamble to the Indian Water Quality Standards Regulation (see 56 FR 64876, December 12, 1991).

EXH 662

59 Federal Register No. 67, Thursday, April 7, 1994

(page 16647)

* * * *

ENVIRONMENTAL PROTECTION AGENCY
[FRL-4860-7]

South Dakota; Tentative Determination of Adequacy of State's Municipal Solid Waste Permit Program over Non-Indian Lands for the Former Lands of the Yankton Sioux, Lake Traverse (Sisseton-Wahpeton) and Parts of the Rosebud Indian Reservations

* * * *

(page 16649)

* * * *

On review of the arguments presented and following consultation with the Department of the Interior, EPA believes that the State of South Dakota has sufficiently demonstrated that the former Lake Traverse reservation was disestablished by Act of Congress (26 Stat. 1039), as decided by the U.S. Supreme Court in *DeCoteau v. District County Court*, 420 U.S. 425 (1975).

The Yankton Sioux Tribe argued that the Act of August 15, 1894 (28 Stat. 286, 314) did not expressly disestablish the Yankton Sioux Reservation and that the Federal Court opinions relating to the issue are not controlling. On review of the arguments and consultation with the Department of the Interior, EPA believes that the State of South Dakota has sufficiently demonstrated that the Yankton Sioux Reservation was disestablished by the

Act of 1894. See *Weddell v. Meierhenry*, 636 F.2d 211 (8th Cir. 1980).

* * * *

EXH 78

A HISTORY OF YANKTON TRIBAL GOVERNANCE

Copyright 1995, Herbert T. Hoover, University of South Dakota, Vermillion, SD 57069

Officials representing the United States formally recognized the Yankton Sioux Tribe as a political entity through the negotiation of the Yanktons' first treaty in 1815.[1] They sustained the relationship through subsequent treaties in 1830, 1836, 1837, 1851, and 1858.[2] The latter treaty established two Yankton reservations, and during the summer of 1859 U. S. Agent Alexander at Redfield founded an agency on the larger reservation near Fort Randall, where he established formal relations with the principal chief, Struck By The Ree.[3]

On the reservation, tribal members gathered as eight bands. For approximately a quarter century, federal officials dealt with them through eight band chiefs, seven of whom had come to office through traditional means. The principal chief Struck By The Ree placed his Cagu Ospaye (band) near the agency. Upstream from the agency, three others settled their groups: Medicine Cow, the Ikmu Ospaye; Feather In His Ear (or Feather In The Ear, better translated as Feather Necklace), his Upper Ospaye; and White Swan, the Witanti Ospaye. Downstream from the agency, three chiefs settled their bands: Smutty Bear (better translated as He Paints Himself Dark Like A Bear), his Lower Ospaye; Francois (Frank) Deloria, the mixed-blood Ospaye; and Mad Bull, the Oyate Sica Ospaye. Northward from Mad Bull's group, along Chouteau Creek east of present-day Wagner, Pretty Boy placed the Waciumpa Ospaye.

On the Yankton as on other reservations during the last half of the nineteenth century, federal officials were reluctant to ignore tribal leaders who had come to power through traditional means, yet preferred to deal with tribal representatives somewhat more favorably disposed toward federal policies. As a method of participation in the selection of the men who represented Yankton people, federal officials first engaged in the practice of "chief making." Every time there seemed to be a need for the creation of a new band in a reservation district, or the chief of an existing band died or retired, the U. S. Agent nominated and the U. S. Commissioner of Indian Affairs "made" (recognized) a chief. Through recognition on the Yankton Reservation, for example, federal officials appointed Frank (Francois) Deloria as the founding chief of a new mixed-blood band; replaced Smutty Bear with Jumping Thunder; replaced Pretty Boy with his son, then with Felix Brunot, then Blue Cloud (William Bean); and replaced Mad Bull with John Ree then with Frank Jandron.[4] Agency personnel and missionaries publicized chief making with pageantry and feasts that featured gifts of presidential medallions and national flags. Episcopal missionary Joseph Cook described the recognition of John Ree in the Bad Nation Band: "John Ree came in with Pres[ident] Grant's medal around his neck, & very much delighted that he had at last been made chief – Chief at Chouteau Cree[k]. . . . The people at Choteau [sic] inaugurated John's reign among them."[5]

A council of chiefs with headmen (advisers) representing eight bands reluctantly accepted federal authority over its affairs very much due to the persuasive influence of head chief Struck By The Ree. People "implicitly

observed his commands," for he looked after the needs of the entire tribe, and accommodated the vital interests of groups such as the Yanktons, soldiers' society.[6]

U.S. Agent J. F. Kinney appointed a new Board of Advisers during the mid-1880s to challenge the authority of the chiefs, as Struck By The Ree grew old (and died in 1888). Kinney wrote his intention to "tolerate as best we can" the incumbent chiefs as long as they lived, but to usurp their authority by calling together the more compliant Board of Advisers.[7] Antagonists protested. Incumbent chiefs were enraged about the usurpation of their authority. The son of band chief Medicine Cow, William Selwyn, renounced the Board as the personal instrument of Agent Kinney, and called for the popular election of a "Board of Councillors."[8]

Kinney and his successors, agents Sam T. Leavy and E. W. Foster, weathered the attacks and sustained the Board of Advisers, which grew to a membership of 40 by the year 1890.[9] Soon after his arrival, in 1891 Agent Foster replaced the Board, much as Selwyn suggested, with a "Speaking Council" guided by a written constitution, with a preamble couched in hallowed phrases: "We the people of the Yankton Sioux Tribe. . . . in order to form a more civilize [sic], perfect and harmonious" government. After gaining approval from the U. S. Commissioner of Indian Affairs for the new constitution, Agent Foster called an assembly of adult tribal members on July 4, 1892, which chose a Speaking Council that comprised four representatives from each of the eight bands – one from each band being the incumbent chief, the other three being representatives elected by the band for terms of one year each.[10]

The process of change in tribal governance outlined above approximated one used by federal officials in many tribes across the West. In the Yankton tribe, chiefs who came to office by traditional means served to retirement or death. In their place, an appointed Board of Advisers followed by the elected, constitutional Speaking Council assumed authority to deal with internal affairs of tribal interest, and to represent the tribe in its relations with the United States.

The next stage in the pattern of federal administration was to form an executive, "Business Committee" to make decisions on behalf of the Speaking Council about urgent matters pertaining to land, tribal enrollments, etc. By that time, many prerogatives of reservation management had been taken over by the agency staff at Greenwood, which included the agency (tribal) police (established July 1, 1882) and the Court of Indian Offenses (September 11, 1884).[11] Into the twentieth century, these two groups and some part-time Indian employees reinforced a predominantly non-Indian agency staff that purported to assume administrative duties which were not considered to be functions of government retained by the tribe.

Through the first decade of the twentieth century, Greenwood agents (called superintendents after 1903) seldom if ever called the Speaking Council or the Business Committee into session. Yanktons protested, to no avail. Later on, the perceptive Clement Smith harkened back to the consequence: "factional groups" sprang up "here and there . . . over the entire reservation. . . . All of the organizations . . . utterly failed to recognize that inescapable law of mankind 'where there is unity, there is

power.' "[12] Political leaders in the tribe deserved more credit than Smith allowed them, in retrospect. More than failure by them to recognize a need for unity, subversion of traditional leadership and tribal structure by agency staff gave the impression that tribal membership might be in disarray.

Agency officials promoted the division with different treatment for "progressive" and "traditional" Indians. Leaders in both factions existed to promote the best interests of the tribe, as they perceived them. After 1900, Felix Brunot was the primary leader for "progressive" spokesmen comprising Alfred Smith, Peter St. Pierre, Moses Standing Bull, Robert Clarkson, Henry Stricker, and Philip Deloria (who lived on the Standing Rock Reservation). David Zephier spoke for the so-called "dancing gang" that better represented full-blood tribal members. Both groups purported to circumvent the encumbrance of tribal prerogatives by agency personnel with appeals for invitations to travel and represent the tribe in Washington, DC.[13]

For at least a decade, agents at Greenwood all but ignored tribal government, as much as possible. There existed a method for the selection of an executive "Business Committee" to represent the Speaking Council, but in 1903 Agent James Staley (who took charge in 1902) reported that there was no "business committee" to represent the tribe in such matters as land management and the distribution of annuities.[14] In fact, the Business Committee could meet for deliberations at Greenwood only when an agent or superintendent called it into session. Doubtless one reason that agents failed to call Business Committee meetings was a rapid turnover among agents

and superintendents at Greenwood. In the period 1859-1933 there were 29 agents or superintendents. Between 1894 and 1912 there were 8, no one of which remained in office for very long.[15]

Finally in 1912, an agent appeared who would last for a decade. Almost immediately A. W. Leech authorized the selection of a Business Committee to conduct tribal affairs. On April 6, voters gathered and chose a group with 12 members plus 2 officers. Unfortunately, officials in Washington, DC, declined to recognize this committee with the explanations that the voter turnout was inadequate, that voters elected "somewhat nonprogressive Indians," that the Business Committee did not adequately represent the entire tribe, and that it did not comprise mainly "progressive councilmen."[16] The committee of "somewhat non-progressive" members included: Reverend Pierre LaPoint (chairman), Alfred C. Smith (secretary), Simon Antelope, Eagletrack, Blue Cloud, Louis St. Pierre, Thunderhorse, Adam Sitting Crow, Isaac Omaha, Big Tobacco, John Jandreau, John Feather, Matthew Leed, and Felix Cetan. According to the memories of elders in recent years, this committee included some of the most able members of the tribe, but in the main they were traditionalists, and very much for this reason officials in Washington, DC, declined to deal with them. Nowhere in correspondence was there a hint of denial that Yankton tribal self government abided, however, or a suggestion that federal officials might not recognize a committee to carry on Yankton tribal governance. The issue was whether officials in Washington, DC, would deal with one particular group of elected tribal officials.

Agent Leech continued to sanction the election of tribal business committees – in 1913, 1914, 1918, and 1920. None accomplished very much in matters of general concern to the tribe, but their existence nurtured tribal governance and its recognition by federal officials.[17] During the period 1912-1920, most tribal business pertained to the replacement of trust patents with fee patents on allotments, sales of fee patent lands, and distributions of tribal funds, all of which were under the purview of agency personnel. Federally-recognized tribal government existed, nevertheless, but a pressing need for its services on behalf of all Yankton people did not return until 1920, after which date two congressional Indian claims acts (1920 and 1925) extended to Yanktons an opportunity to enter claims against the United States.[18] The act of 1920 evoked claims petitions from the Yankton with many other tribes regarding the loss of the Black Hills region. The act of 1925 called for judicial action regarding tribal ownership at the Yankton's Pipestone Reservation.[19]

Quickly in 1921, adult Yanktons assembled and chose Alfred Smith to present their claims against the United States. In 1924, they elected a 9-member "Yankton Sioux Claims Committee," which included fair representation for both "progressives" and "traditionalists." The Claims Committee contracted the services of attorneys Munn, Anderson and Munn in Washington, DC, to represent the tribe. The committee's first order of business was protest against past encroachment on the Pipestone Reservation, and next a decision about its sale to the United States. In

1929, Congress allocated $328,558.90, which federal officials distributed among Yanktons in per capita payments.[20]

The Yankton Sioux Claims Committee exercised other prerogatives of governance, the most important of which was leadership in a movement that led to the adoption and federal approval of the Yankton Sioux Constitution of 1932, which authorized the election of the Yankton-Sioux Tribal Business and Claims Committee. With abiding federal recognition, this constitution with by-laws has remained the organic law for the tribe, modified substantially only through a constitution reorganization process initiated in 1961. Yankton governmental officials dealt with federal officials through a sub-agency office under the Rosebud Superintendency from 1933 to 1969, since which time they have had the benefit of their own U. S. Superintendency at Wagner.

The experience of Yanktons with self-government and its relationship to federal officials, outlined above, was fairly typical of experiences for all Sioux in the United States, except the Dakotas (eastern Sioux tribes) who lived in Minnesota. Some of those west of Minnesota were more assertive than others, due to the pressures of tribal business. Through the period 1900-1933, all struggled for continuity in governance because of neglect by federal agents. In the case of the Yanktons, never did tribal leadership disappear, and never did a federal spokesman with authority suggest the withdrawal of federal recognition for this tribe. From the negotiation of the first Yankton treaty in 1815 to the present, there has existed a "government-to-government relationship" between the Yankton Sioux Tribe and the United States

Government. The condition of tribal governance in all federally recognized tribes – including the Yankton – recently was identified by spokespersons for the U. S. Bureau of Indian Affairs as being "what our courts have come to refer to as quasi-sovereign domestic dependent nations." Defended by the trust responsibility of the federal government, "Elected tribal governments run Indian reservations. The Bureau's main goal is to support tribal efforts to govern their own reservation communities." By implication, this prerogative calls elected tribal leaders especially to look after the interests of tribal members in all public affairs that affect them within the outer boundaries of their reservations.[21]

[1] 7 *Stat.*, p. 129.

[2] Charles J. Kappler (comp. and ed.). *Indian Treaties, 1778-1883* (New York: Interland Publishing, Inc., 1972): pp. 227-29, 250-255, 479-481, 496-497, 505-510, 594-596; 11 *Stat.*, p. 743.

[3] A general history of the management of land within the boundaries of the Yankton Sioux Reservation is available in the exhibit by Herbert T. Hoover entitled "A Yankton Sioux Tribal Land History."

[4] See Herbert T. Hoover. "Yankton Sioux Experience in the 'Great Indian Depression,' 1900-1930," *The American West* (Toledo: University of Toledo Press, 1980): p. 57.

[5] Joseph Cook Diary. 1875-1876. Episcopal Archives, The Center For Western Studies, Augustana College, Sioux Falls, SD.

[6] Father Pierre Jean DeSmet to the Commissioner of Indian Affairs, June 1, 1861, Desmetiana Microfilm Collection, St. Louis University Library.

[7] J. F. Kinney to A. B. Upshaw, November 18, 1885, Letters Received by the Office of Indian Affairs, National Archives [hereafter cited as Letters Received, NA].

[8] William Selwyn to the Commissioner of Indian Affairs, September 17, 1885, Letters Received, NA.

[9] Agent E. W. Foster to T. J. Morgan, December 1, 1890, J. A. Smith to Commissioner Browning, February 20, 1894. Letters Received, NA.

[10] Hoover, "Yankton Sioux Experience," pp. 61-63.

[11] *Report of the Commissioner of Indian Affairs* (1882), p. 49, (1886), p. 93, (1891), pp. 427-428, (1886), p. 99, (1888), p. 64, (1889), p. 171, (1896), p. 305, (1897), p. 282, (1898), p. 289, (1899), p. 349, (1901), p. 378, (1905), p. 351.

[12] Minutes of the Tribal Council, Yankton Sub-agency, September 22, 1934, Indian Central Classified File, National Archives [hereafter cited as ICCF, NA].

[13] R. G. Taylor to the Commissioner of Indian Affairs, January 16, 1905, David Zephier to the commissioner of Indian Affairs, April 6, 1906, Letters Received, NA.

[14] James Stanley to Indian Commissioner, May 12, 1903, Letters Received, NA.

[15] The succession of agents with dates of tenure for those of most consequence follows: Alexander H. Redfield, 1859-1861; Dr. Walter A. Burleigh, 1861-1865; Patrick H. Conger, 1865-1869; Captain W. J. Broatch; Major John M. Goodhue; S. D. Webster; Dr. Frederick G. Holmes; Reverend John G. Gassman, 1872-1878; John W. Douglas; W. D. E. Andrus, May 1, 1879-May 16, 1879; Robert S. Gardner; W. D. E. Andrus, August 14, 1879-1882; William M. Ridpath, 1882-1883; J. F. Kinney, 1884-1888; Sam T. Leavy; E. W. Foster, 1890-1893; J. A. Smith, 1894-1897; John W. Harding, 1898-1901; James Staley; A. O. Wright; R. J. Taylor; E. W. Estep; Walter Runge; A. W. Leech, 1912-1922; H. K. Meyer; R. E. L. Daniel, 1923-1930; J. V. King; C. C. Hickman, 1931-1933; Peyton Carter (School Superintendent) closed Yankton Agency and replaced it with a Rosebud sub-agency July 1, 1933.

[16] A. W. Leech to the Commissioner of Indian Affairs, May 10, 1912, Rev. Pierre LaPoint and Alfred Smith to A. W. Leech, May 15, 1912, C. F. Hanke to A. W. Leech, May 24, 1912, ICCF, NA.

[17] Alexander Horned Eagle to the Commissioner of Indian Affairs, January 11, 1913, E. B. Merritt to A. W. Leech, March 4, 1914, James McLaughlin to the Secretary of the Interior, January 12, 1915, Statement of Superintendent A. W. Leech, January 23, 1918, Hearing before E. W. Merritt, February 3, 1920, Cato Sells to Hollow Horn, et al., February 6, 1920, E. B. Merritt to A. W. Leech, September 7, 1920, Unsigned Letter to the Secretary of the Interior, March 5, 1921, ICCF, NA.

[18] 36 *Stat.*, p. 269; 53 *U.S. Court of Claims*, p. 67; 67 *Stat.*, p. 738; 43 *Stat.*, p. 730.

[19] See Herbert T. Hoover and Leonard R. Bruguier. "The Pipestone Reservation: A History." *Chouteau Heritage*, II, no. 1 (April 1989): pp. 9-11.

[20] Herbert T. Hoover. "Yankton Sioux Tribal Claims Against the United States, 1917-1975." *The Western Historical Quarterly*, VII, no. 2 (April 1976): pp. 131-132; "Yankton Sioux Experience," p. 65.

[21] *American Indians Today* (Bureau of Indian Affairs, 1991): pp. 1, 5.

EXH 31

YANKTON SIOUX TRIBAL LAND HISTORY

Copyright 1995, Herbert T. Hoover, University of South Dakota, Vermillion, SD 57069

In the year 1980, nearly 4,500 enrolled tribal members owned 34,802 acres of land within the boundaries of the Yankton Sioux Reservation – about 8% of the acreage set aside by treaty in 1858. On this limited acreage, the resident population struggled because of an unemployment rate of 76.9%. In 1987, some 5,200 were enrolled and at least 2,980 lived within reservation boundaries containing some 37,000 acres as tribal lands or individual allotments, where they continued to deal with a high unemployment rate. In 1993, approximately 6,000 people were enrolled, about 3,400 of whom lived on the reservation. In large part due to the addition of the Fort Randall Casino to tribal properties in 1991, tribal officials reported no unemployment among members who lived on the reservation, and expressed an intention to further enlarge tribal land holdings within reservation boundaries. In January 1995, tribal officials reported an enrollment of approximately 6,700, about half of them regarded as reservation residents. Bureau of Indian Affairs officials at the Wagner Superintendency reported nearly 38,000 acres of Indian land: 23,663 held as individual allotments, some 13,000 as tribal land, and at least 1,000 acres not yet in trust but soon to be added to the other holdings under the trust responsibility of the United States. This scattered information suggests that distinguishing features during recent years have been steady growth in the size of the tribal roll, corresponding increase in the size of the

tribal population living on or near the reservation, the disappearance of unemployment among Yankton reservation residents, a reversal in the historical trend of land loss with some increase in the number of acres within reservation boundaries classified as tribal or individual allotments under federal trust, and a growing propensity among Yankton Sioux to live and to earn a livelihood within reservation boundaries.

Yanktons belong to 1 of 14 tribes in the federation of Sioux that on the arrival of non-Indians during the seventeenth century comprised about 32,000 people who claimed use rights on approximately 100,000,000 acres. When during the eighteenth century members of the federation spread by tribes and bands to occupy this historic Sioux Country, (about 2,000) Yanktons took residence over the central portion between the Des Moines and Missouri rivers, south of the present boundary that divides South Dakota from North Dakota. By the outset of the nineteenth century, they possessed uncontested claim to more than 13,000,000 acres.[1]

Their first treaty with the United States came at Portage des Sioux, in 1815, where St. Louis U. S. Superintendent William Clark established formal relationships of "perpetual peace and friendship" with many tribes by treaties that placed them "under the protection of the United States" in the wake of the War of 1812.[2] By treaties dated 1830, 1836, and 1837, Yankton leaders relinquished approximately 2,220,000 acres in return for annuities plus rights for mixed-bloods in the tribe to settled on the Great Nemaha "Half Breed Reservation" in southeastern Nebraska.[3] Smutty Bear (Mato Sabi Ceya, or He Paints Himself Dark Like A Bear) represented Yankton people

when he signed the Fort Laramie Treaty of 1851, thereby laying partial claim to land west of the Missouri River.[4] Regarding claim east of the Missouri, by treaty in 1858 Yankton leaders ceded 11,155,890 acres, but retained two reservations: one for occupancy surrounding a new agency near Fort Randall comprising by treaty 400,000 acres (later surveyed to contain 430,405 acres); and the Pipestone Reservation (surveyed in 1860 at 648.2 acres).[5]

In return for the land cession, by treaty in 1858 the United States promised to pay $50,000 to facilitate settlement, $1,600,000 in annuities over 50 years, construction of schools and agency facilities, and an agent "for the special benefit" of the tribe plus "free and unrestricted use of the red pipe-stone quarry" (which Yanktons sold to the United States in 1929 for $328,558.90).[6] On July 10, 1859, U. S. Agent Alexander Redfield rode the steamboat *Carrier* out of Yankton city to found the agency between Chouteau Creek and Fort Randall. "Head Chief" Struck By The Ree followed, and within a few months some 2,000 tribal members pitched their tepees close to the agency. Yanktons entered a revolution in life style as they accepted confinement on the reservation. Seven band chiefs (soon enlarged to eight) settled tribal members, and attended to treaty terms that allocated special benefits to mixed-blood families in the tribe.[7]

In 1859, surveyors C. H. Snow and Henry Hutton marked the outer boundaries of the principal reservation and surveyed 166 rectangular lots for family assignment – 87 downstream and 79 upstream from the agency.[8] By 1860, there were 2,053 Yanktons on the reservation, segregated as seven bands.[9] Aside from comments about problems of administration, Agent Redfield complained only

that "whiskey sellers & other malefactors begin to afflict us."[10] Yanktons continued to hunt for a time, ranging along both sides of the Missouri River from the Platte River to the Canadian border. They faced drought with grasshopper plagues and struggled for livelihood with the help of treaty annuities under some fraudulent and incompetent agency administrations.

Missionaries appeared. The Episcopal minister Samuel D. Hinman stopped by in 1863, and Father Pierre Jean Desmid, S. J., visited to baptize a Catholic congregation. Episcopal layman Paul Malamute wintered over in 1863-1864. Presbyterian H. C. Cunningham worked around the Yankton's Greenwood Agency briefly in 1864, Presbyterian John P. Williamson arrived as the first resident missionary in 1869, and Episcopal Father Joseph Cook settled at Greenwood in 1870.

As mission and federal facilities came into place, agency personnel gradually replaced "recalcitrant" band chiefs with others more amenable to federal objectives; established in their place a "Board of Advisers" in 1885, which grew to include as many as 40 members by 1890; and replaced the Board with a "Speaking Council" in 1891, which comprised members elected by the general council of voting members in the tribe, and took guidance from a written constitution. The U. S. Agent formally organized the Speaking Council on July 4, 1892, with four members from each of the eight bands.[11]

By that time, agency officials had established reservation wide administration. Beginning in the 1860s, a "Chief Farmer" managed the 360.73-acre agency compound at Greenwood, while he supervised agricultural

development and acculturation across the reservation. The U. S. Agent founded a tribal police force on July 1, 1882, and started a Court of Indian offenses on September 1[illegible], 1884.[12]

With ample administrative control and support from mission staff, federal officials proceeded to dramatically change land ownership within reservation boundaries through individual allotment followed by "surplus-land" and fee-land sales. Yanktons entered the 1890s with 430,405 acres. By the year 1930, they had divested themselves of ownership on 387,047 acres and retained only 43,358.[13]

The key to this change was the allotment process, which on the Yankton reservation evolved through several stages. In 1869, Moses K. Armstrong conducted a second survey of family lots – 177 of 80 acres each. In 1874, J. W. Beaman surveyed additional lots of 40 acres each, to make one available to each family. Yanktons settled mainly close to the Missouri River or in the brakes of the Missouri Hills, where they erected log homes and began to ranch and farm.[14]

Then came the General Allotment (Dawes) Act of 1887, which negated previous family assignments and called for the individual allotment of land. When some Yanktons resisted, four companies of troops came down from Fort Randall to declare martial law and restore order. In 1889 Allotting Agent J. G. Hatchitt arrived to parcel out 160 acres to each family head, and 80 each to each single person over 18 years of age. Protests encumbered his work, but he reported the completion of the initial allotment process by the summer of 1890. Hatchitt

continued to refine his list, and by 1892 reported the assignment of some 1,700 allotments comprising approximately 262,000 acres. His report negated all previous land assignments, and called on tribal members to scattered [sic] on their new family farms.[15]

Non-Indians lobbied for the federal purchase of the "surplus land" (left over after allotment) and for its opening to homesteaders. The new South Dakota State Legislature memorialized Congress to accomplish this goal. Tribal member Andrew Jones gathered 370 tribal signatures to support the surplus land sale for funds to develop agriculture on restricted severalty lands. About half the members of the Speaking Council voiced their opposition, however, and called for a delay to determine the size of the proposed surplus-land sale.[16]

The quarrel brought negotiations to a halt, after opponents discovered that the amount of the surplus sale would be more than 150,000 acres. A federal commission of three members – John C. Cole, a Dr. Brown, and Colonel J. C. Adams – came to conduct hearings to determine tribal opinion. With hearings in progress until March 3, 1893, the commissioners isolated supporters, solicited their help by promising that no man's opinion would be made public, and evidently spread the word that a $20 gold piece would be awarded to every adult male if the surplus-land sale were accomplished.[17]

Presbyterian John P. Williamson, the most trusted among Christian missionaries on the reservation, became the custodian for land-sale agreement records, and reported assent from a clear majority for the sale of 168,000 acres at a fixed price. Former U. S. Army Scouts

in the tribe voiced their support when they heard that their claims for fair payment for services rendered during the 1860s would be honored only if the land-sale agreement went through.[18]

Protests continued. Finally, U. S. Indian Commissioner Thomas Morgan ordered an investigation by Special Agent James A. Cooper. Joined by Adams and Cole, he conducted hearings at Greenwood in the company of interpreters Charles F. Picotte, Henry Bonnin, and William T. Selwyn. An assembly of 176 aired views about bribes with the offer of $20 in gold for each adult male, and claims payments for the scouts, and heard threats regarding the probable suspension of annuity rations due them under the 1858 treaty if the surplus land sale did not go through. Protestors insisted that the land sale should not go through except by consensus, but Cooper stifled their orations. At length, the Indian Commissioner apprised the U. S. Secretary of the Interior about allegations of "fraud or undue pressure . . . used in securing the agreement" and ordered a second investigation. Indian Inspector John W. Cadman appeared on November 4 and heard testimonies from 79 or some 200 gathered at Greenwood. Cadman allowed open discussion, which revealed undue pressure and the offer of bribes. Some came forward to withdraw signatures previously affixed on the land-sale agreement. In the end, Cadman said he could not report that the land-sale proposal was popular in the tribe, but because he perceived the support of a majority he urged that the land-sale agreement should stand as previously negotiated.[19]

Although negotiated through considerable dispute, the Agreement of December 31, 1892, went before Congress and became law on August 15, 1894. Its terms called for the sale of "the unallotted lands" within reservation boundaries for $600,000. It also authorized the lease of allotment lands not useful to allottees, and included all of the payments perceived by opponents as bribes, together with special compensation for the interpreters.[20]

By the Agreement of 1894, Yanktons relinquished 131,736.56 acres set aside by treaty plus the 30,405 acres added through the correction of the original survey – a total of 162,141.56 acres. Yanktons retained 268,263.44 acres for allotments and other uses – approximately 150 acres per capita. (Their roll of 1895 included 1,725 members.)[21]

Several elements in the surplus-land sale Agreement approved on August 15, 1894, are revealing. Inducements regarded by opponents of the sale as bribes are included: in Article VII, the distribution of $20 coins among adult males; in Article XV, a payment of $225 to each of the Yankton scouts; and in the addendum, at minimal cost provision for patents to valuable home lots near the agency compound for interpreters Charles Picotte, Felix Brunot, and W. T. Selwyn. (Evidently, Felix Brunot had replaced Henry Bonnin in the staff of interpreters.)

Regarding congressional intentions about the retention of boundaries surrounding the two Yankton reservations, there is clear expression in Article XVIII:

> Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and

> the United States. And after the signing of this agreement, and its ratification by Congress, all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858.

This part of the Agreement clearly recognized "all provisions" in the 1858 treaty, and probably included specific reference to annuities because during negotiations tribal members were led to believe that their annuity benefits might have been suspended had not a majority in the tribe acceded to the terms of the 1894 Agreement.

Equally revealing is the proscription on future sales of spirituous beverages, in Article XVII:

> No intoxicating liquors nor other intoxicants shall ever be sold or given away upon any of the lands by this agreement ceded and sold to the United States, nor upon any other lands within or comprising the reservations [both reservations] of the Yankton Sioux or Dakota Indians as described in the treaty between the said Indians and the United States, dated April 19th, 1858, and as afterwards surveyed and set off to the said Indians. The penalty for the violation of this provision may prescribe in the act shall be such as Congress may prescribe in the act ratifying this agreement.

When examined out of historical context, on its face Article XVII might seem almost incidental. When perceived in the historical context of federal efforts to control the traffic of spirituous beverages and other "vices" (such

as prostitution and gambling), the Article reveals both congressional and federal administrative intent.

This issue has been explored under peer review in the article by Herbert T. Hoover entitled "Whiskey Trade in the History of Sioux Country."[22] The history of control over this problem extended from the outset of the nineteenth century to the implementation of Public Law 277 by the 3rd Congress in 1953, which legalized the sale of intoxicants on Indian reservations. Over approximately a century and a half, Congress legislated and federal administrators worked to curtail the problem of "vice" in two ways: sometimes by prohibiting the sales of spirituous beverages and other inducements to individual Indians, but more often by prohibiting their entry into Indian Country.

"Indian Country" was first defined by an act of Congress in 1797, which made specific reference to tribal boundaries and recognized the lands they contained as Indian Country within the United States.[23] Federal officials worked to control the whiskey traffic mainly by prohibiting sales to Indian people until 1832, when Congress passed and President Andrew Jackson signed on July 9 a more general law.[24] When the astute U. S. Superintendent at St. Louis William Clark received word of this from officials in the U. S. Department of War, he responded in correspondence that Congress had prohibited "The admission of the article in question ['ardent spirits'] under any pretense, into Indian country."[25] With an act of June 30, 1834, Congress strengthened its prohibition of ardent spirits in Indian Country, and authorized fines, seizures, and the revocation of trading licenses for violations.[26] Thereafter, the emphasis of control shifted

from the prohibition of sales to individual Indians to the prohibition of sales within boundaries containing Indian Country, although the control of sales to individual Indians continued. One important instance (included in the article cited above) was the annexation by President Ulysses Grant of several parcels of land to the Great Sioux Reservation and the Yankton Reservation as "Executive Additions." Along the Missouri River from the upper end of the Yankton Sioux Reservation to the Fort Peck region, and onto ceded land in Nebraska adjacent to Pine Ridge, the president temporarily extended the boundaries of the Great Sioux and Yankton reservations to control the sale of whiskey or the entry of other vices – not by prohibition of sales to individual Indians but by prohibition of sales in Indian Country.[27]

Taken in this context, congressional intentions while drafting Article XVII of the Yanktons surplus-land-sale agreement become more vivid. Congressmen recognized the boundaries of both Yankton reservations as borders containing parts of Indian Country, for administrative control. Any doubt that this was true is dispelled by the presidential proclamation of 1895 that opened Yanktons' ceded lands to non-Indian settlement. It said that: every person who shall sell or give away any intoxicating liquors or other intoxicants upon any of the lands by said agreement ceded, or upon any of the lands included in the Yankton Sioux Indian Reservation as created by the treaty of April nineteenth, eighteen hundred and fifty-eight, shall be punishable by imprisonment for not more than two years and by a fine of not more than three hundred dollars.[28]

Thereafter, both congressional and administrative controls shifted emphasis to the "sale, gift, barter, etc." of spirituous beverages and other intoxicants to trust-patent Indians of all blood quantums, but the proscription against sales within the boundaries of Indian Country remained. A case in point (included in the article cited above) was the confiscation by tribal police of 73 gallons of alcohol and other properties belonging to Lawrence Antoine and George White wing while they were en route across the Rosebud Reservation to a rodeo-fair at Parmelee.[29] The prohibition of sales within the boundaries of Indian Country remained (with modification by the Indian Reorganization Act of 1934) until the implementation of Public Law 277 in 1953. Included were both Yankton Sioux reservations until the sale of the Pipestone Reservation in 1929, and thereafter the Yankton Reservation near Fort Randall, with modification after 1934, until 1953. When perceived in the general context of federal controls over the whiskey trade and other vice traffic across Indian Country, the intention of congressmen to recognize and not to diminish the boundaries of the Yankton Reservation seems clear.

After the land sale agreement of 1894 and the opening of surplus lands for settlement by presidential proclamation in 1895, funds derived from the sale of the surplus lands plus allotments taken in fee-simple title generated funds that sustained the tribe for less than half a century. A new roll of tribal members published in 1921 facilitated the distribution of a balance of $103,611.87 in the land-sale tribal fund by per capita shares of $163.94 each.[30] Previous per capita distributions of interest from the tribal fund, proceeds from restricted allotment leases and

sales, and profits from the work of trust-patent allottees went into Individual Indian Money (IIM) accounts under bond at local banks. In 1910 there was an aggregate of $634,463.97 in 904 IIM accounts; and in 1921 an aggregate of $626,382.25 in 1,552 accounts.[31] But soon, in the absence of a substantial land base, these funds melted away mainly through expenditures on the necessities of life.

Meanwhile, federal officials and mission societies retained control over the acreages at the agency and on mission grounds. There also was Lake Andes Farm Station #2, set aside in 1894 by federal officials as an "Administrative Site" to house an Assistant U. S. Farmer to work among allottees at the upper end of the reservation. So it was used until April 18, 1932, when the farm station was disbanded as the Yankton Agency became a sub-agency under the Rosebud Agency (until 1969). Clarence Forman, Sr., occupied the Lake Andes Farm Station. Born on December 18, 1892, he had received an allotment, but had lost it through cancellation for reasons he never understood. In lieu of this as well as a reward for his services as a tribal spokesman, U. S. Superintendent C. C. Hickman offered him the use of the buildings and 84.90 acres without rental fee. Other tribal members complained. On February 28, 1946, the U. S. Secretary of the Interior turned control (not ownership) over to the tribe. In 1962 the tribal council ordered Forman's eviction, and on November 24, 1964, he moved to private housing in Lake Andes. Tribal officials took over the site on behalf of the tribe, and since there has evolved here a cluster-housing unit, a pow-wow ground, and other tribal facilities.[32]

A decline in land under trust within reservation boundaries from 43,358 acres in 1930 to 34,802 acres by 1980 came partly through the sales of fee lands by individual allottees or their heirs, and partly due to a loss of 3,349 acres to the Fort Randall Dam project.[33] In the same period, federal officials acquired by authorization from the Indian Reorganization Act of 1934 and transferred title under trust several acreages surrounding four communal colonies created under Indian New Deal management, the largest among which was the Rising Hail Colony west of Marty, SD. After this and the three other communal efforts collapsed, federal officials transferred some 1,700 acres in the Rising Hail project to the tribe, and far lesser amounts at the other three colonies.

A gradual decline in the aggregate of trust land continued until the 1980s, despite several additions to tribal properties. Since 1980, however, the land base of the tribe and its members has begun to grow, along with the size of the tribal roll and the number of Yankton Sioux with residence on their reservation. No official map of the Yankton Reservation discovered by this writer has presented a diminishment of its boundaries. Every map seems to contain outer boundaries as they were established by treaty in 1858 and surveyed prior to the surplus-land agreement, which indicated a total of 430,405 acres.

[1] Herbert T. Hoover. "Yankton Sioux Tribal Claims Against the United States, 1917-1975." *The Western Historical Quarterly*, VII, no. 2 (April 1976): p. 125.

[2] 7 *Stat.*, p. 129.

[3] Charles J. Kappler (comp. and ed.). *Indian Treaties, 1778-1883* (New York: Interland Publishing, Inc., 1972): pp. 227-229, 250-255, 479-481, 496-497, 505-510.

[4] *Ibid.*, pp. 594-596.

[5] 11 *Stat.*, p. 743; J. M. Armstrong to Commissioner of Indian Affairs Ezra A. Hayt, March 17, 1879, Letters Received by the office of Indian Affairs, National Archives [hereafter cited as Letters Received, NA].

[6] Herbert T. Hoover and Leonard R. Bruguier. "The Pipestone Reservation: A History." *Coteau Heritage*, II, no. 1 (April 1989): pp. 9-11.

[7] For general context, read Herbert T. Hoover. *The Yankton Sioux* (New York: Chelsea House Publishers, 1988).

[8] "Description of Original Plot of Yankton Reservation, 1859." M234, roll 959, NA. External boundaries of the reservation were surveyed again in 1864, valley lots again established in 1869, and the entire reservation re-surveyed for allotment and surplus land sales in the 1890s. Receipt for Exterior Boundary Survey signed by George A. Popper, September 30, 1864; Land Office Commissioner to Indian Commissioner Eli S. Parker, October 25, 1869. M234, roll 960, NA.

[9] *Report of the Commissioner of Indian Affairs* (1891), p. 424.

[10] A. R. Redfield to A. B. Greenwood, April 3, 1860. M234, roll 959, NA.

[11] J. F. Kinney to A. B. Upshaw, November 18, 1885, Agent E. W. Foster to T. J. Morgan, December 1, 1890, Letters Received, NA; Herbert T. Hoover. "Yankton Sioux Experience in the 'Great Indian Depression,' 1900-1930," *The American West* (Toledo: University of Toledo Press, 1980): pp. 61-63.

[12] *Report of the Commissioner of Indian Affairs* (1882), p. 49, (1886), pp. 93, 99, (1888), p. 64, (1891), pp. 427-428; "Special Report on the Yankton Agency from Inspection Held January 15-21, 1916," Indian Central Classified File, NA [hereafter cited as ICCF, NA].

[13] Kappler. *Indian Treaties*, pp. 776-777; "Report of the Yankton Indian Commission," March 31, 1893, Letters Received, NA: "Memorandum to Commissioner Collier," June 1, 1940, ICCF, NA.

[14] Agent Goodhue to Indian Commissioner E. S. Parker, September 9, 1870, Land Office Commissioner to Indian Commissioner Ely S. Parker, August 23, 1870, November 8, 1870, and November 23, 1870, Agent John G. Gassman to Commissioner F. A. Walker, July 26, 1872, M234, roll 961, NA; M. K. Armstrong to Acting Commissioner of Indian Affairs, January 24, 1873, Land office Commissioner to Indian Commissioner E. P. Smith, November 9, 1875, M234, roll 962, NA; *Report of the Commissioner of Indian Affairs* (1870), pp. 212-213; John P. Williamson to Father, September 25, 1874, Williamson Family Papers, Minnesota Historical Society Archives, St. Paul, MN.

[15] Agent J. F. Kinney to J. D. C. Atkins, February 6, 1887, J. F. Kinney to commissioner of Indian Affairs, April 22, 1887, Acting Secretary of the Interior to the Secretary of War, September 9, 1887, Inspector Banister to the Secretary of the Interior, September 13, 1887, Henry R. West to Commissioner D. C. Atkins, March 7, 1888, J. G. Hatchitt to R. V. Belt, July 10, 1889, Acting Secretary of the Interior to the Commissioner of Indian Affairs, August 26, 1889, J. G. Hatchitt to T. J. Morgan, September 7, 1889, September 28, 1889, J. G. Hatchitt to R. V. Belt, September 21, 1889, November 2, 1889, December 22, 1889, James G. Hatchitt to the Indian Commissioner, March 29, 1890, Agent E. W. Foster to Commissioner T. J. Morgan, April 30, 1890, April 18, 1891, March 22, 1892, J. G. Hatchitt to the Commissioner of Indian Affairs, July 14, 1891, December 28, 1891, June 24, 1892, Robert G. Clarkson et al. to Commissioner of Indian Affairs, December 1, 1891, Letters Received, NA; Secretary of the Interior C. Schurz to Commissioner R. V. Belt, April 2, 1887, M234, roll 260, NA; "Suggestions for the Rehabilitation of Yankton Sioux Indians, Submitted by Yankton Rehabilitation Committee, June 10, 1943," ICCF, NA; *Report of the Commissioner of Indian Affairs* (1887), pp. 58-59, (1888), p. 69, (1889), p. 172, (1891), p. 427; Winifred Williamson Barton. *John P. Williamson, Brother of the Sioux* (New York: Fleming H. Revell Company, 1919): pp. 156-157; *The Word Carrier*, February 1890; Special Case File no. 147, NA. Allotting Agent Henry E. West accomplished some work on allotment before Hatchitt arrived. Hatchitt reviewed the work of West and incorporated his accepted schedule of allotments into the final list, but the final list was developed by Hatchitt.

[16] "Memorial from Legislature of State of South Dakota to Congress to Open to Settlement the Yankton Indian Reservation Under the Homestead Law," February 21, 1890, J. A. Pickler to the Commissioner of Indian Affairs, n.d. [1890], Greenwood Government Indian School Superintendent W. Rich to the Commissioner of Indian Affairs, February 15, 1890, Letters Received, NA.

[17] "Report of the Yankton Indian Commission," March 31, 1893, Letters Received, NA.

[18] Yankton Indian Commission to the Secretary of the Interior, March 31, 1893, John J. Cole to Acting Indian Commissioner Frank C. Armstrong, August 1, 1893, Jumping Thunder, et al., to Indian Commissioner T. J. Morgan, February 8, 1893, Letters Received, NA.

[19] Report by Commissioners J. C. Adams and J. J. Cole, February 18, 1893, Council of Investigation called by James A. Cooper, February 21, 1893, James A. Cooper to the Commissioner of Indian Affairs, March 31, 1893, Council of Investigation, February 24, 1893, Letters Received, NA.

[20] 28 *Stat.*, p. 314.

[21] Agent J. Smith to Commissioner D. M. Browning, January 5, 1894, Letters Received, NA.

[22] *Platte Valley Review*, XIX, no. 1 (Winter 1991): 5-24.

[23] 1 *Stat.*, 469.

[24] 4 *Stat.*, 564.

[25] William Clark to Lewis Cass, December 30, 1832, M234, roll 750, NA.

[26] 4 *Stat.*, 729.

[27] Information about the Executive Additions appears in several places. For example, see Ulysses Grant's "Executive Mansion" orders of January 11, March 16, and May 25, 1875, in Cheyenne River Sioux Files; and Executive Order of January 24, 1882, Pine Ridge Microfilm Series, Federal Archive, Kansas City.

[28] 29 *Stat.*, 866.

[29] U. S. v. Elmer Hannum and Howard Munce to U. S. District Court, South Dakota, Western Division, ICCF, #162, NA.

[30] E. B. Meritt to Senator Ed. S. Johnson, February 11, 1916, A. W. Leech to the Commissioner of Indian Affairs, November 17, 1919, C. J. Roads to Senator Peter Norbeck, April 3, 1933, F. H. Daiker to Clarence Forman, et al., September 31, 1940, ICCF, NA; Laurence Schmeckebier. *The Office of Indian Affairs: Its History, Activities, and Organization* (Baltimore: Johns Hopkins Press, 1927): pp. 88-89, 144, 194.

[31] Inspector Report of Edgar A. Allen, January 21, 1910, Inspector Report of John W. Bale, May 22, 1920, ICCF, NA.

[32] Herbert T. Hoover. "Lake Andes Farm Station #2." 11 Manuscript in historical sites file of the author.

[33] Michael L. Lawson. *Dammed Indians* (Norman: University of Oklahoma Press, 1982): p. 50.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

The Yankton Sioux Tribe, a federally recognized tribe of Indians, and its individual members, and Darrell E. Drapeau, individually, a member of the Yankton Sioux Tribe, Plaintiffs, -vs- Southern Missouri Waste Management District, a non-profit corporation, Defendant and Third-Party Plaintiff, -vs- State of South Dakota, Third-Party Defendant.	94-CV-4217 COURT TRIAL Pages 1-987 (April 3-7, 1995)

BEFORE: The Honorable Lawrence L. Piersol
United States District Judge
For the District of South Dakota
Sioux Falls, South Dakota

APPEARANCES: Mr. James G. Abourezk
Mr. Robin Zephier
Mr. Michael Scarmon
Abourezk Law Offices
Rapid City, South Dakota
Attorneys for the Plaintiffs.

Mr. Kenneth W. Cotton
Wipf and Cotton
Wagner, South Dakota
Attorney for the Defendant and
Third-Party Plaintiff.

Mr. John Guhin
Deputy Attorney General
-and-
Ms. Roxanne Giedd
Ms. Diane Best
Assistant Attorneys General
Pierre, South Dakota
Attorneys for the Third-Party Defendant.

PROCEEDINGS: The above-entitled matter came on for trial on the 3rd day of April, 1995, commencing at the hour of 1:00 p.m. in the courtroom of the Federal Building, Sioux Falls, South Dakota.

* * *

Herbert Hoover Trial Testimony

[p. 16, ll. 1-9, 19-25]

Q For the record, would you please state your name and your address.

A It's Herbert Theodore Hoover, and my address is 401 Sunset Drive in Beresford, South Dakota.

Q What is your occupation, Dr. Hoover?

A I'm a professor of history at the University of South Dakota.

Q And how long have you been in that capacity?

A Approximately 27 years.

* * *

Q All right. And you say you've been teaching at USD for how long? Was that 27 years or –

A Since 1967. I taught for two years in Texas prior to my moving here.

Q All right. Do you have a particular specialty in your field of history?

A Yes.

[p. 17, ll. 1-16, 19-25]

Q What is that specialty?

A My formal training was on history of the American frontier with an interest in Indian history, but at that time there was no interest like that offered by any university in the country, and as a consequence I used that training in frontier history to develop what I like to very carefully define as a history of Indian/white relations. I'm not an expert on tribal anthropology or on tribal history per se, but on the history of Indian/white relations, and the primary interest within that specialty is historic Sioux country, which extends roughly from Madison, Wisconsin to the Rocky Mountains and from northern Kansas to the Canadian shield.

Q All right. Now, within that particular specialty, do you have any kind of subspecialty?

A My subspecialty is the history of Indian/white relations in the Sioux federation of 14 tribes.

* * *

Q Have you studied the Yankton Sioux Tribe?

A Their history of Indian/white relations, in particular, more than 25 years.

Q That you've studied the Yankton Sioux Tribe?

A Yes.

Q All right. Now, can you tell us something about the – any books that you've written, your publications?

[p. 18]

A About the Yanktons or other things?

Q Well, give us an overview, and then we'll talk about Yanktons as well.

A Okay. Well, I have now to my credit I believe approximately 20 titles in book form.

Q Twenty Books?

A Yes. And somewhere in excess of 40 articles in book chapters.

Q All right. Now, specifically on the Yankton Sioux Tribe, how many books have you written?

A Well, I have one entitled The Yankton Sioux from Chelsea House.

Q Has that been published?

A Yes. That was published in 1988. That's specifically on the Yankton tribe. About the Yanktons I have also published a major article on the history of the tribe's claims against the United States, and more than once have published profiles for publication, most recently in Chelsea

House's – or, yeah, in the Chelsea House publication entitled Native America In The 20th Century. In other words, I've addressed the tribe specifically in several publications, and in addition the Yanktons play very substantially in the two-volume bibliography that came out a couple of years ago from the Greenwood Press in Connecticut.

Q All right. As a result of your interest in the Yankton

[p. 19]

Sioux Tribe and that subspecialty, have you had occasion to spend time on the Yankton Sioux Reservation?

A Yes. I think so.

Q Can you give us an idea of how much time?

A Maybe the best way to come at this is to say that I – I decided very quickly when I moved to Vermillion to make the Yankton tribe and its reservation my model for several reasons. And as a consequence, I seriously doubt that I've missed any historical site on that reservation. There are a few sections that I haven't walked personally.

And that's a consequence of several things. One, of course, is the proximity of that reservation to my home. It's no more than an hour, an hour and ten minutes, to anyplace on the reservation. A second is that the tribe itself has the longest abiding and peaceful relationship with white people in all of Sioux country. And the third is that non-Indian relations with the Sioux tribes west of Minnesota really started with the Yankton reservation. That's the oldest uninterrupted agency in all of Sioux country, and because of that it becomes a model for almost any kind of study, agency development and land distribution, in missionary societies, and almost very

function of Indian/white relations the Yankton tribe has become a model. And the consequence is I have very frequently, in the presence of old-timers and some younger people, one in this courtroom from whom I've learned, have gone

[p. 20, ll. 1-4]

out to search for the sites and try to discover their meaning. I've been on 27 reservations in my life and worked for more than a few days, but on the Yankton reservation I've worked literally hundreds of days.

* * *

[p. 21, ll. 3-6]

* * *

Q My question was, Dr. Hoover, have you had occasion to interview tribal elders on the Yankton Sioux Reservation as a result of your extensive background on that reservation?

A Many, many times.

* * *

[p. 22, ll. 15-23]

* * *

Q To your knowledge, are there any other historians in the United States or anywhere else, for that matter, who have a specialty in the Yankton Sioux Tribe?

A Rather sadly, I say that I'm rather alone in the history profession. There are two anthropologists who spend quite a lot of time, but I know of no professional historian who has had more than a passing interest except for one

or two who have worked as researchers, but not as scholars who write or interpret the past in Sioux country.

* * *

[p. 30, ll. 23-25]

* * *

Q Now, Dr. Hoover, I'm going to ask you based on your background and your experience, your extensive study of the Yankton Sioux Tribe and your education, do you have an opinion

[p. 31, ll. 1-9]

As to whether the boundaries of the Yankton Sioux Reservation exist today as they were immediately after the 1858 treaty?

A I believe that's the case.

Q Well, you should say yes, and then we'll get –

A Yes. Okay. Yes. I believe that they do exist today as they existed as a consequence of the survey of the 1858 Treaty.

Q All right. And that is your opinion, correct?

A Yes.

Q All right. Upon what do you base that opinion?

* * *

[p. 32, ll. 3-16]

* * *

Q Now, would you tell us on what you base that opinion?

A The basis for the opinion is research, and here I want to be very careful to say that I excluded case law history from this and the question that Mr. Guhin is raising because I am not an attorney and I'm not an expert in those fields. My primary focus has been on Interior Department records, Record Group 75 in the National Archive System, in legislative records, those pertaining to congressional acts, in some cases land history, forest history, mission records, oral histories, and as is expressed through publications on bibliography abundant literature, and out of that I've got to say that I have never seen a shred of evidence to say, the legal interpretation aside, that this boundary has ever been diminished.

* * *

[p. 34]

Q Would you describe what this is?

A From work on legal claims against the United States, I learned that an aboriginal claim is one that can be proven in printed records to have existed for a century or more prior to any settlement on that – on that claim.

Q And what is a recognized claim?

A A recognized claim, on the other hand, is a claim recognized by the United States government.

Q All right. Does the Yankton tribe have either an aboriginal or a recognized claim?

A In my opinion, it possesses both.

Q And describe how that came about?

A Can I do this historically?

Q That's what we're asking, yes.

A Okay. If you go back as far as the records go, the printed records go, you can find evidence that the Yanktons as they were approached by white people controlled the area between the upper Des Moines River and the Missouri. It goes back farther than any other tribe in a specific sense that Pierre LeSueur, Pierre Charles LeSueur, that's L-E-S-U-E-U-R, identified a Yankton encampment at the Pipestone reservation as we know it today, or the Pipestone National Monument. That would be back to 1700. Subsequent records indicate again and again that Yanktons controlled this area. When you finally get down to the records left by Steven Long in 1820 and 1823, he's very

[p. 35]

specific about that. So there's little question that this region which comprised more than 13 million acres belonged to the Yankton tribe as far back as we can imagine.

Q That would be an example of an aboriginal claim?

A That's aboriginal, and that claim has never been officially surrendered.

Q Describe what you mean by that.

A When the treaty came in 1858, as I read it and as the documents speak to me and as I wrote it in the claim article, the federal government asked the Yankton tribe

twice to seed large blocks of land. The first time was in 1830 when the tribe relinquished 2.2 million acres, and that was on the eastern perimeter between the Big Sioux and the Des Moines River, and then again in 1858 when the tribe was asked to surrender somewhere in the neighborhood of 11 million, and that would be the southern quadrant of Old Dakota Territory or East River, South Dakota in the main. And a part of that treaty, the Yankton retained – the Yanktons retained two parcels of land, one estimated at 400,000 acres, its current reservation along the Missouri River, and the other the Pipestone reserve. And by doing that transaction, my reading of it is that the tribe never relinquished its aboriginal claim in either case, but –

Q Do you know of any – do you know of anything that would indicate that the aboriginal claim was adjudicated lost by the

[p. 36]

tribe or taken away from the tribe?

A I have never – I couldn't find any evidence of that, and I talked to the claims attorneys in the firm of Wilkinson, Cragun and Barker in Washington, D.C. about that before I went to press, and I could find no evidence that that aboriginal claim had been relinquished, but that the federal government had added this recognized claim through treaty.

Q So I wonder if you would give us a brief background of the circumstances which led up to the 1858 treaty then, very briefly?

A Very briefly, the tribe was under enormous pressure for several reasons. One was that the fur trade had

severely diminished the availability of food and supplies over all the Sioux country. The second was that there was a period of drought and shortage through the 1850s. It got much worse in the 1860s. The third was the pressure of settlement by white people, and yet another would be pressure from business interest, J.B.S. Todd, for example. And finally, a decision within the council of chiefs and head men who were I'm sure more diplomatically skilled and seasoned than that of any other tribe in Sioux country made the decision it would be better to make the cession than to fight.

Q And what gave the Yankton leadership the diplomatic experience that other tribes did not have?

A Because they had been on the front line of contact with

[p. 37, ll. 1-5]

white people all along, any white people who were approached across northern Iowa or up the Missouri River. Their first official diplomatic action came when Lewis and Clark showed up under Thomas Jefferson's order, and their first official treaty was in 1815 at Portage des Sioux near St. Louis.

* * *

[p. 38, ll. 1-12]

Q All right. Dr. Hoover, I've got a map on display here, which is Plaintiffs' Exhibit Number 67, would you once again identify what that is?

A Just overall?

Q I'm going to hand you the exhibit description, Exhibit 67.

A 67 is an 1858 map of the Yankton Sioux Tribe Reservation.

Q Is that – do you agree with that description?

A In every way except that it excludes the Pipestone area, otherwise this would be fairly accurate (indicating).

Q Do you have an idea of the approximate time when that map was created?

A It had to be created between 1851 and 1859.

* * *

[p. 39, ll. 22-25]

* * *

Q Okay. Thank you, Doctor. Now, I think that you testified that the impetus for the sale in 1858 which brought about the 1858 treaty was the U.S. Government?

A Yes.

[p. 40]

Q And commercial interests who were pushing the government? A That's true.

Q When you've – you've read the 1858 treaty, I take it?

A Yes.

Q All right. Now, in the 1858 treaty, just describe what kind of a new reservation was provided for in that treaty for the Yanktons.

A Could you be –

Q How many acres, where was it?

A Oh, okay. The treaty envisioned 400,000 acres, and as we know, it turned out to be slightly larger than that, and it ran between Choteau Creek and the Missouri River.

Q And how do you know that?

A Because it's described in the treaty.

Q And it's set out very clearly in the treaty, the description of the new reservation?

A Everything except the northern perimeter, which was erroneously I think defined by the first survey in 1859, but it's very clear about where the reservation is going to be.

Q It was erroneously surveyed. What happened to that erroneous survey? Was it corrected?

A Yes, it was. It was corrected at the time of the surplus land sale agreement and shifted upward as a consequence.

Q And that included 30,000 more acres then when it was shifted upward?

[p. 41]

A Yes.

Q Now, I think you testified that the Yanktons never surrendered their aboriginal claim over that 400,000 acres?

A That's my view.

Q Do you know of any contrary view at all?

A I've not been able to find one.

Q All right. So, after the Yanktons were limited then to 400,000 acres, after they sold the 11 million acres, tell us

then what happened after that treaty of 1858 was drawn and agreed to. What happened to the Yanktons then?

A In – in what sense?

Q Well, leading up the 1892 agreement.

A Okay. Are we talking about background for the agreement or the condition of the tribe?

Q Which would include the condition of the tribe.

A Yes.

Q Background of the agreement which would include the condition of the tribe, yes.

A Well, I've got to come at this from several different directions. Maybe we could start with the fact that mother nature was not kind. If you look back in the history of this region, you'd discover that we have cycles of drought interspersed with heavy rainfall and excess. And when this happens, you can suffer at either extreme, and that was probably the toughest period. And I make reference to

[p. 42]

An article I published on the history of ice jamming and flooding as evidence of this, that when the Yanktons moved on, they – the 1850s were fairly dry, but then they hit a real dry cycle in the 1860s. The 18 – the years 1865, '66 and '67 were years of grasshopper plague, and anyone who grew up in this area would understand that you get grasshoppers when you have extreme drought. They can't hatch when you have heavy rainfall. So that's a kind of a trigger to – to recognition, and they were all but paralyzed by this.

Then the rains came back in 1868 and kind of held tough until about 1872, and then we got another period, and by that time white people were being devastated as well, and that drought period lasted roughly from 1873 until, oh, 1877 or so. Then next we got the great flood of 1881 which wiped out the homes of the tribe. And then we went into a dryer cycle except for the great blizzard of 1888, and then another drought settled in in 1892, which was the very year that they began to negotiate for the land deal. So, as far as natural developments are concerned, I know of no period in the history of this region that was any worse than that.

The second was that they had an early run of bad luck with agents. The first agent, Alexander Redfield, was a former upper Missouri agent and I believe an honorable person. He has been somewhat maligned by other historians, but I think he was dutiful, and he was around for only two years. But in his

[p. 43]

place – Abraham Lincoln replaced him, because there was a fellow from Pennsylvania who was critical to the election of Abraham Lincoln to the presidency, and he knew it, and because of that obligation, that honest president gave us two people from Pennsylvania. One of them was named Walter Burleigh, who was a physician, and the other was Andrew Faulk, his father-in-law. And a consequence of that was the "Indian Ring" at Greenwood has made textbooks nationwide that search for prototypes of crooked Indian agents. He was investigated twice by the United States Senate and removed. In my opinion, the only other agent that came close was another physician named Henry Livingston, who was in charge of Crow

Creek and Lower Brule during 1870s. Subsequent to that, the Yanktons had a little better luck, but that was terrible shock in the beginning, a lot of physical loss and a lot of emotional shock.

Then the third thing that happened, which is, of course, partly at issue in this trial, was the coming of the Minnesota Sioux War and the disposition of Yankton people not to get involved. In fact, the Yankton tribe decided to take the route of peace officially. At least 30 Yanktons as individuals participated in the war, but on the other side we have evidence of 51 members of the Yankton tribe signed on as soldiers in the United States Army. There is evidence in records that the Yankton Sioux scouts that entered under General Sully with Walter Burleigh as their surrogate commander

[p. 44]

represented the first segregated Native American unit ever to join the United States Army. And the last one was disbanded in 1946. It started a whole new trend in military developments. That – that unit gained a lot of attention out in that region, and the tribe suffered an awful lot of anguish within. Some members were so angry with Struck By The Ree that they actually killed his cattle and horses and tore up his tent and fired blank cartridges in his face. The turmoil that went on within the tribe is very hard to describe. Then, in addition, the tribe, of course, had to face the great Sioux War and again stood aloof. This is a period of great distress.

Then finally there was pressure by the federal government for this tribe to get about the negotiation of land. The first thing that happened was a survey followed by another and yet another, three surveys, that laid out on

communal property rectangular lots abutting against the Missouri River full length. I've see that map in Washington. It starts at Choteau Creek, and it runs all the way to the upper end. These were set aside on communal property for families, and the families occupied them and began to farm.

In 1870, this is the earliest record that I can find, and it's included in the Annual Report of the Commissioner of Indian Affairs, a temporary agent, a soldier in the United States Army who was there temporarily made the suggestion that the tribe should sell all the rest of the land in a block to

[p. 45]

raise money to help support these family farms. And after that there's a kind of a blank, and I think it's in the records, and that's partly because of the coming of the great Sioux War and the Black Hills debacle.

But then subsequent to that after the Black Hills issue quieted down, federal officials began to talk about a land sale again, and during the 1880s there was considerable contention within the tribe about that. That resolves itself in the executive document we talked about where federal officials identified three general forces within the tribe; one that favored sale, one that was ambivalent, and the one that was decidedly against. When those three forces lined up, they were playing against more than 20 years of antagonism regarding this issue. They had been gnawing on that issue for twenty years.

Q On the sale of land issue?

A On the sale of land issue, by the time Congress approved it. So it's hard to make a comparative statement

because there are other tribes that are having trouble, too, but it's difficult to imagine a greater combination of factors as far as distress is concerned and over a long period of time, because this was the oldest permanent agency in all of Sioux country.

Q Was there a time, Dr. Hoover, when the federal government adopted a policy of allotting individual tracts of land to members of the Yankton tribe?

[p. 46]

A You have to be careful of terminology. What had been placed on the rectangular plots should be regarded as land assignments on communal land, and that policy –

Q Let me stop you right there. Land assignments on communal land?

A Yes.

Q In other words, assignments, but not allotments?

A Okay. When I say land assignment, it can go two ways. It can either be to communal land that belongs to the tribe, or during the same period, the Congress of the United States provided for land assignments for the Dakotas, the Minnesota Sioux, on government reservations. What that meant was the land would not belong to you as an individual, but will belong to some other political entity, and you may use it as long as you use it well. That's an assignment. The idea of the land allotment, of course, came with the Dawes General Allotment Act of 1887.

Q Tell us what that was, briefly.

A That was a law that consolidated a lot previous ideas regarding the transformation of Native Americans into

family farmers with a goal of ultimately having fee simple to land and – and engaging in I guess you could say agricultural capitalism like the immigrants who settled, the Czechs and the Norwegians and the Dutch and all the rest.

Q Now, this was an allotment, we're talking about allotments

[p. 47]

now, not assignments?

A Yes.

Q In 1889 there was a law passed that allotted – that would require allotments to individual Indians?

A That's when – when the allotting agent first came out to address this issue from the 1887 law to the Yankton tribe.

Q All right. Now, the land to be allotted, who owned that land?

A The land to be allotted, of course, belonged to the tribe.

Q And that was the 400,000 acres –

A Yes.

Q – approximately. So what the government did, in effect, was tell the Indians that they could no longer own it communally and that they had to take a certain amount of land out of that 400,000 and settle on that, is that correct?

A Yes.

Q How many acres did the government offer to each Indian?

A Okay. If I can look back a little bit from that period. When this first discussion – this was first discussed with tribal members, there was quite a violent reaction to it and – and the Yanktons had suggested that a family farm should be as great as 380 acres. And if you took 1900 or 2,000 people times 480 acres, that would be the engulfment of practically an entire reservation. But the Dawes Act played in different ways. On Yankton tribe it was to come out on or about 160

[p. 48]

Acres, a quarter section.

Q Per – per –

A Per individual, man, woman and child.

Q Per each – even children were getting –

A Yes.

Q – one hundred sixty acres.

A And it should be a matter of record here, and this is why I brought out the land assignment, that when the allotting agent got out there, you might recall from reading, those of you who have read the records, that there was a threat of violence and a need to call troops down from Fort Randall to quiet things down.

Q What was that violence about?

A It was about this very issue, about replacing the adjustment to assignments, the thought of going on to individual plots of land and then the prospect of possibly

selling land beyond that in surplus. And the consequence was that particular groups, and one that came out during the – the writing of the 1894 documents was the one that the tribes would have translated Feather Necklace, but which white people translated Feather In His Ear. People who surrounded him and several other leaders said that we'll not tolerate this, and there was a severe threat of violence. Part of that was that there wasn't room to allot all of these people, 18, 1900 people, and that varied from year to year along the Missouri

[p. 49]

River where the assignments had been. So somebody was going to get elbowed out and thrown up on top. The upshot was –

Q Wait a minute. What do you mean "up on top"?

A Up beyond the Missouri hills, up on the flat land, the prairie, where up to that point there were very few Yanktons settled at all. The consequence was and the only place that I know of in Sioux country with the Yankton tribe they had divided allotments. And if you look at the first allotment coming in across Choteau Creek, it belongs to the Stinger family. Still there. You can see where the buildings were, but obviously there wasn't enough land for the family. So they put farmland up on the top and began to divide them, and that negotiation took quite a long time. As you recall, there were two processes of allotments before they finally got it settled down, because there were understandable claims of preemption to particular sites along the Missouri River. And the – the tribe knew about the threat of flood plaining, of course, of the floods, but nevertheless the Missouri valley was the best place to settle from the tribal point of view.

Q All right. So once the land was allotted, tell us how many acres were allotted in total, if you can remember.

A The reason that that's blurry, of course, is allotment didn't stop in 1894, and I – you know, 160 some thousand acres that – I just don't recall the particular –

Q That's close enough.

[p. 50]

A I'm not quite sure.

Q In that vicinity, is that right?

A Yeah. And then there was a thought that they would have to have another 60 or 70,000 to accommodate additional allotments, and theoretically allotment could go on until 1934.

Q So that would leave about 235, 240,000 left over that was unallotted?

A Yes. Yes.

Q And your testimony is that the Indians wanted all of it allotted, but the government would not do so?

A That was their initial plea, yes.

Q All right. Now, what happened to the land that was not allotted?

A Some of it, according to this agreement, would be set aside for special purposes.

Q For example.

A One purpose was, of course, federally controlled administrative districts, and at that time that was the so-called mile square government reservation, which is

really only slightly in excess of 300 acres, and founded the very year the 80 some acre Farm District Number 2 at Lake Andes where, of course, the housing settlement and the chemical control center and all are today. Secondly, there was provision for missionaries who had been at work, not only because of their churches, but also because of their schools, and there was

[p. 51]

provision that they would be able to acquire their – their titles.

Q Their land titles?

A Yes, land titles from the tribe by purchase.

Q Weren't the missionaries also instrumental in convincing tribal leaders to sell the land later on?

A I think some of them were, and some of them were fairly silent. It's my opinion that John P. Williams and – probably applied very little pressure. I think that Joseph Cook did apply quite a lot of pressure. If you read his diary, you get this sense, and I've read it, but they – they should be maligned, because they believed this was the right thing to do. Most of the do-gooders at that time felt that the only hope for the tribe was in family farming, but overall I think that your supposition is probably correct that there was pressure to try to sell the land.

A All right. With regard to the sale of the 100 – what did we say, 140,000?

A Or more.

Q Or more.

A I would have to go back and get the statistics. I don't carry those in my head.

Q Well, the numbers are there, so we don't really need to – to be precise right now.

A Sure.

[p. 52]

Q But, what kind of pressure then came upon the Indian tribe, the Yankton tribe, to sell the unallotted lands to the government?

A Several types.

Q Could you describe what those are?

A Yes. I think in – in reading the documentation for the 1894 agreement alone, you can identify several levels of pressure on the tribe, and in that document the – I believe the acting commissioner had written to acknowledge the charge of fraud about this land sale. So – so the federal officials back in Washington are very nervous about what was going on out there.

One level of – of pressure that is rather subtle in the documentation, but was real, was – was availability of jobs. In order to get a government job, if you were a tribal member, you had to look like an accomodationist. You had to cut your hair, wear blue jeans and keep the weeds out of your corn, and if you did, then you were a prime candidate. And if you read the Interior Department records for very long, you can find plenty of documentation about this, that the dancing gangs, they called them, just didn't get jobs down at the agency.

THE COURT: Called them what?

A The dancing gang. Those who – and I'm not being judgmental here about what they did – those who did cut their

[p. 53]

hair and accommodate tended to get jobs. There is mention on one of these, a tribal policeman named Omaha who was front and center in voicing his opinion early on in favor. I have no idea how he felt, but I think that his proclamation in favor originally would have been in the preservation of his job on the police force, which was a pretty good job and hard to come by. There were not – there were only at that time eight policemen and a lot of people who would have applied for the work. That was one level of pressure.

A Another was a rumor as best I can find – nobody published a document to say – but a rumor that people believed that if they didn't sell the surplus land, the government of the United States was going to cut off their annuities.

Q They were getting annuities from where, now?

A From the 1851 Treaty, and more than that, the 1858 Treaty.

Q What did they consist of, the annuities?

A The annuities were complex. They from time to time would include some cash payment under distress, but in the main the annuities included, first of all, guns and amunitions [sic] for the Yanktons, because they were not considered to be a threat and the federal government for

a long time supported hunting and gathering, and then included the issue of clothing, most of which didn't fit, you know, you had two sizes of clothing and a lot of different sizes of people, but they were allowed to draw clothing, and then just a very large variety of food and – and

[p. 54]

domestic products, coffee beans, currants, flour, salt pork, which the Yanktons didn't like very well, things like that, and then household items that the women wanted, cooking pots, that sort of thing. And I get the feeling that the tribe had something to say about the order list, you know, they would talk to the agent and say, we'd like to have more of this, and it was the agent's job to decide every year what it would be. And then most of all fresh meat. Every two weeks, by some of the issue records, every person on the reservation got four pounds of meat.

So the – the annuities were material more than they were monetary, and they came primarily from the 1858 land sale, but somewhat from the 1851 Fort Laramie Treaty as well, and the threat now that they were going to cut off annuities had some plausibility, because the eastern tribes, Eastern Sioux, had lost all of their annuities as a result of the Minnesota Sioux War, and the Lakotas had had their annuities cut off as well because of Sitting Bull's war.

So there was a belief in the tribe that it's plausible the government might shut these down if we resist, because the resistance had led to the loss of annuities in the past. And one should not have the opinion that tribal members didn't communicate with each other, because Yanktons

ran a lot with government support to hunt west of the Missouri River. So it's my opinion that the Yanktons would have believed that the

[p. 55]

government might cut off the annuities, and that would have been disastrous.

Q Well, the annuities were promised to the tribe in exchange for their peaceful intentions for giving up land, et cetera –

A Yes, and –

Q – is that correct?

A – and by increments over 50 years.

Q And so they were – this was not a gift to them, this is something they were entitled to by treaty?

A Yes.

Q But nevertheless they were – you believe they were threatened with the loss of annuities?

A They believed – I believe that they believed that they were threatened by the loss of the annuities. Another thing that came up in the agreement, of course, was the veterans' benefit, I like to say, because these are members of the United States Army under General Sully.

Q You're talking about the Yankton scouts?

A And here we're talking about 51 scouts who had never been wholly paid, and I think they felt like most combat veterans, when they get back, they wanted their veterans' benefit. They had received some as the document indicates, in 1878, but they hadn't got the full

amount and were angry about that, and were assured that if they supported the land sale agreement and it went through that they would receive their benefit, and indeed

[p. 56]

they did.

And then finally, and I think when bribery was brought up, the officials must have had in mind the payment of the 20 dollar gold piece. Now, I've read that two ways. One was that you would get a 20 dollar gold piece if you actually signed the document, and another way was if you are an adult male, you get a 20 dollar gold piece if a majority signs. In the end it didn't matter, because we got 55.5 percent signing, and so they paid out gold pieces to the adult males.

Q Can you talk a little bit about the opposition to the sale of the unallotted lands within the tribe?

A If you just read the documentation, it seems like bedlam, but I think the officials got their finger on it when they talked about three different factions. There was one that was pretty much what some of the soldiers used to call hang-around-the-fort Indians. There were people who felt we might as well accommodate, and they were trying to do their best in that fashion; then there was a larger group that was ambivalent; and then there was a hard-line group that just wasn't going to play this game at all. I think that something ought to be brought out here, because it's real in that period. We shouldn't overlook the fact that the federal government was able to diffuse and dissolve the chiefs council by the time of this sale.

Q What was the chiefs council?

[p. 57]

A The chiefs council was the traditional leadership group within the tribe, and I have described in documents that have been entered here how the federal government went about that, not to try to fire the chiefs, but to diminish the number who were traditionalists to a point where they would succumb to the replacement of the chiefs council with a different kind of government, and that kind of government came into place on the 4th of July in 1892 called the speaking council.

THE COURT: The which council?

A The speaking council, which was a congress of many people. So what they were doing is replacing the traditional tribal government with a written constitutional representative congress, and when they did that, they invited the seven chiefs to belong. And I sat down within the last couple of days, because I was very curious, and discovered that five of those chiefs who sat on that council were opposed to the land sale, which means that the elders or traditionalists in the main were opposed to the sale, and a lot of that had to do with the hardship of going through this whole political process and resentment there about –

Q I don't know what you mean by that.

A Okay. What I mean by that is that if you had watched your own traditional kind of government disintegrate through pressure from federal officials, and let's be kind to the federal officials and point out that they didn't throw anybody

[p. 58, ll. 1-13]

out of office, but gradually they replaced the traditionalists with people who would accommodate, and then after Struck by the Ree died –

Q Who would accommodate the federal government?

A The plan. And it was after Struck by the Ree died – and it's my opinion they didn't dare to make the move until he died in 1888 – that the federal government then began to make its move to establishment of a written constitutional representative government and then allotment and then land sale, and all of that came after the – I had ran across the other day a federal inspector said he was practically venerated in his tribe, and they simply didn't dare to do that as long as Ree was alive, in my opinion.

* * *

[p. 59, ll. 1-6, 11-25]

MR. ABOUREZK: Your Honor, at this time I would like to say that the agreement between the tribe and the United Sates Government was 1892, but it was ratified in 1894. So for purposes of convenience, can we just say the 1894 agreement, and we know it's referring to the 1892 as well as the ratification?

* * *

Q Doctor Hoover, with respect to the 1894 agreement, would you describe the conditions of sale and what led up to those conditions. For example, the price and how it was sold.

A Well, the pricing from the standpoint of tribal members, as a matter of public record it talked about wanting in the range of six dollars an acre.

Q Would you – would you tell us the difference between what they called appraisal and sale method and the direct sale method.

A Okay. When they got around to evaluating the price, there were two ways that the federal government acted. And one I like to think of as being the real estate appraiser where you would appraise land and the federal government would be responsible for its sale to each purchaser. And some of the sales were handled that way. The other way to go about it was

[p. 60]

to try to find a block sale price, and then the buyer, the government in this case, had to decide how you would reach an equitable agreement about price, including the swampland and the rough land that you could use for nothing, the breaks and the draws.

And I gather from the documentation that the federal officials involved were saying to the tribe, you are going to be better off if we buy the whole thing in block and pay a fixed price. And the consequence was the government bought the whole unit, good and bad or arable or non-arable land, in one unit for about, what, three dollars and 60 some cents an acre. That was not more than about maybe 55 percent of what the tribe had requested, but in fairness to the people and the government, this would not have been a very – that would not have been a bad price to have paid for land overall at that time in this region.

They are buying in the middle of the depression. And the land prices ranged from the government standard price of the 19th Century dollar and a quarter up to about ten dollars. And they were evaluating the land as buying quite a lot that was in the Missouri breaks, which would be grasslands to pastureland, and paying it – so much an acre for all acres, including the block sale.

Q That's the direct sale method?

A Yes.

Q What would be the appraisement and sale method then?

[p. 61, ll. 1-14]

A Well, appraisement and sale method would be to appraise each unit that you are going to sell at a different price, according to its productivity, and then sell that individual tract for a certain price.

Q Why did the government – if you know, why did the government insist on the direct sale method?

A Well, the government – in the face of it, the government is saying you are going to come out better this way. If you looked at the worst scenario, you are trying to say that the federal government is trying to get as much land as possible, as quickly as possible, and open it up for immigrants who are pounding on the door to get in.

Q There was pressure from white settlers –

A There was a lot of pressure from whites.

* * *

[p. 62]

Q So they eventually settled on which method?

A They settled on the block sale or the standard price for all.

Q That method then was included in the 1894 agreement?

A Yes. You were asking about pressure.

Q Yes, correct. Now, in the 1894 agreement, were there any new boundaries drawn as there were in the 1858 agreement?

A No new boundaries. They were assuming the boundaries would say [sic] as they were in 1858. And that was, in my opinion, written into this agreement; that the treaty would not be violated, but I do remember that in the survey, the northern boundary was angled upward to include more land.

Q To include more land for the Indian tribe?

A Yes. So it actually enlarged the reservation in that sense.

Q Well, this is a – this is a critical area now, Doctor Hoover. In the 1858 agreement, there were new boundaries drawn, is that a fair statement?

A There were boundaries drawn around the land retained by the tribe for itself.

Q And that was a clearly agreed upon diminishment of the reservation as it existed prior to the 1858 treaty?

A Well, you could put it that way, or the way I thought of it is that the tribe relinquished its aboriginal claim to everything except the two reservations it retained.

[p. 63]

Q Of the 400,000 acres plus Pipestone?

A Right.

Q In the 1894 agreement did the tribe relinquish anything except in a land sale context? Did they relinquish the reservation?

A My view of it is that they relinquished neither the aboriginal nor the recognized claim.

Q And –

A So anything –

Q Do you know of anything –

A Go ahead.

Q Do you have any document, any – sorry. Do you know of any document anywhere that would say to the contrary?

A I have not encountered one which, in my way of interpreting it, that would say to the contrary.

Q You said it was written in the 1894 agreement. Which part of it was written? Where was that written?

A Where was which? The –

Q That they retained their – they wanted to retain the 1859 Treaty.

A Well, it was written as Article XVIII.

Q And do you have that in front of you?

A Yes.

Q Would you read that article in the record, into the record, please.

[p. 64]

A "Nothing in this agreement shall be construed to abrogate the Treaty of April 19th, 1858 between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement and its ratification by Congress, all provisions of the said Treaty of April 19th 1858 shall be in full force and effect, the same as though this agreement had not been made. And the said Yankton shall continue to receive their annuities under the said Treaty of April 19th, 1858," end of quote.

Q That's the extent of Article XVIII?

A Yes.

Q All right. Now, would you explain your interpretation of Article XVIII.

A My interpretation of it is that the tribe had given up certain things here by the 1894 agreement. They had, first of all, given up a land mass in return for some cash to support themselves. And, secondly, they had given up the – the isolation from neighbors other than themselves. They were asking to come in among them in unknown quantities of Czechs and Dutch and Scandinavians.

Q In fact, if I might stop you there, was not that part of the incentive that the negotiators for the government offered to the tribe during the negotiations?

A Of getting white neighbors?

Q Yes.

[p. 65]

A Yes. This was the part –

Q And didn't they tell them that land would be valuable if they had white neighbors?

A The land would be more valuable, and you will be more successful farming if you have white neighbors to emulate.

Q Okay. Please continue.

A And so – and this was – this notion that we just talked about, of the value of selling land on reservations by tribes to immigrant white, was something that pervaded not necessarily enemies of Indians, but the friends of the Indians. The Indian Rights Association, for example. This was the mood of the whole country. So they were using that as incentive. The tribe was giving up land, the tribe was giving up its own isolation which would be a defense of its own culture, and fully understood that, but wanted to make sure that it wasn't going to give up something else.

There are two things that come out in the agreement that suggest that there are things bothering tribal members and tribal leaders, and one of them was annuities which we already covered here in the courtroom. There

was deep concern, for good reasons, that the annuities might be cut off if they didn't sign the agreement. That was fairly important. And the other, of course, was in a different article, the whiskey issue, which was a big problem across Sioux country. And to me they are trying to assure people in the Yankton tribe that you

[p. 66, ll. 1-3, 13-25]

are giving up these things that we can define, but you are not giving up anything else, including your boundary, in my opinion.

* * *

Q All right. Professor Hoover, tell me the difference between the 1858 Treaty and the 1894 agreement with respect to retention of land, et cetera.

A The 1858 Treaty defined boundaries for the reservation that the tribe wanted to retain for itself.

Q For a new reservation?

A Yes. Or I should say diminished because they were giving up land beyond the boundaries. And this article is saying that nothing in this agreement shall be construed to abrogate the Treaty of April 19th, 1858. In then a historical sense, I would have difficulty understanding why a professional historian would not take that to include the boundaries as they –

[p. 67]

Q But as you said, there were no boundaries drawn in the 1895 agreement, were there?

A No, as far as I could tell, there weren't.

Q All right. Now, I'm going to ask you about the – what you understand to be the contemporary understanding of the various parties at the time of the negotiation of the 1894 agreement. Would you describe, if you know, the contemporary understanding of treaty negotiators who represented the administration.

A Well, obviously they were very nervous because there were two – there were – there were really two investigations of this whole issue. And the correspondence surrounding that, some of which comes out in these documents and a considerable amount which also exists in the letters received by the Office of Indian Affairs, would indicate that there is a lot of ambivalence about it. And in this documentation which is entered as Exhibit Plaintiff Number 5, you have a statement that there is a charge of fraud, that people out there don't believe that we are playing a fair game here of negotiations.

So I think it's fair to say that – that the administrators are very deeply concerned. And I have to paraphrase, I can't quote from memory, but I remember that at some point in this documentation, says the federal official, that we are going to proceed with this nevertheless as though people were demanding that we buy their land, that there be a

[p. 68]

land sale. They were going to buy it.

They also make very clear here that the tribe was subdivided over the issue. And as I said earlier, you can account for five of the seven chiefs in the new speaking council who are either against it or very ambivalent.

There are only two of them who spoke out in favor of it. The group around Feather in His Ear never said that it would accommodate this. And in the end we had approximately 55.5 percent of the family heads, which would be adult males making an agreement, meaning that we had 44.5 percent against.

Q Well, in terms of Indian attention to all of the boundaries, do you know what the contemporary understanding of treaty negotiators were at the time?

A Of what they were doing in 1890 –

Q '92, when they were negotiating.

A '92. When they were negotiating, they were simply trying to buy as much surplus land as possible after the initial allotment process, first of all, to generate funds for the – for the tribe in fairness to the federal officials. But on the other hand, I don't believe that we should fail to notice that several things happened in 1894 almost simultaneously. The completion of this agreement was one. The opening of the Lake Andes farm station was another, but the founding of Ellis Island was a third. The United States –

Q What was that last one?

[p. 69]

A Of Ellis Island. The United States is coming very close now to a time when it is taking on approximately a million immigrants a year, and the arrival of that flood of immigrants had an impact on Indian negotiations in the west. You have to look to a broader picture. But the pressure to open land right at that time was very critical all across the arable west. And we have documentation to

show that Senator Pettigrew was among those who was applying pressure to try to get this done.

Q Well, do you know of any – any documents that would indicate that the negotiators wanted to diminish or disestablish the size of the reservation when they negotiated this agreement?

A I have no inclination of that myself.

Q Have you ever seen any documents?

A No. I have not seen any documents to say that.

Q Have you heard of any?

A No.

Q All right. Now, with respect to Congress, at the time –

A Let me qualify and say that –

Q Yes.

A – if we are over into the legal definition where I claim no expertise, I have heard an argument from Mr. Guhin, but – it would be unfair for me to say that I haven't heard an argument, but in looking at the records from the perspective of a professional historian, I found not one shred of evidence.

[p. 70]

Q All right. Now, with respect to Congress at the time of the passage of the ratification of the 1892 agreement in 1894, have you seen any evidence of documents contemporary at that time that there was any intent to alter the boundaries by Congress?

A Not by Congress. Not by the federal administration.

Q And Article XVIII was included in the ratification by Congress?

A Yes. Congress – this is a congressional document, not simply an administrative policy statement.

Q All right. Now, do you know of – what might be the contemporary understanding of the Yankton Sioux Tribe at the time they negotiated this agreement in 1892?

A It seems to me that that is pretty clear because of the statement about the treaty, that nothing else would be changed. And also I think that they – the whiskey issue was a pretty substantial one and federal administrators recognized that, that this tribe was afraid, and had very just cause to be afraid of the whiskey issue.

Q Describe that a little more in detail, please.

A Okay. On my curriculum vitae you will discover last summer I became the primary author of the History of Bon Homme County, Next Door. And with Sunshyn Thaler from Avon, I authored a piece on the Bon Homme Tackett Station.

Q The what station?

[p. 71]

A Tackett. That is T-a-c-k-e-t-t. He was sheriff and – excuse me, Your Honor – a hanging judge at that place. And –

THE COURT: Mere figure of speech.

A And this was known at one point in the late 19th Century as the Honolulu Ranch. There was a steamboat

landing about 1.4 miles down the creek, an estuary of Stone Creek where the steamboats pulled in and brought up cargo because it was a station for the stage coaches and the wagons on the Fort – on the Fort Randall Trail. But it was also a place where ladies of the night, if I can put it that way, stopped by in cycles of about two weeks at a time. And on the second floor, there were very small rooms with numbers on the door. When you checked in, you could go up and gamble, and then accommodate one of the prostitutes. This is very well-known and documented.

Q You don't have to be defensive about it.

A In addition, in the front – and I almost broke a leg on this one. The hotel burned down about two years ago, and I was running around trying to get a proper angle with my camera, and suddenly the ground gave way beneath me and I fell about six or seven feet and began to injure a knee that has been a problem ever since. And as I shook myself off – I was with a tribal member. He began to chuckle. He said feel around the darkness, and I did. So I found a tunnel that went into the basement of the hotel. This was a whiskey cache. Very few –

Q Can you give us a description of the – I mean how do we

[p. 72]

find it?

A Okay. How do you – well, Tackett Station is right across the bridge on the low road out of the reservation off to your right under some tall trees. And I knew a number of elders down there, whom I talked to, and they

said that it was well known that it was true, that into the 20th Century you could buy booze there. That's station number one.

Number two, across – directly across from Greenwood in the Missouri hills there was a well-known whiskey cache where the steamboats landed. This is recorded by the agents. And they had to smoke that out. The third is the Schmoll farm. The sign has gone down, but if you drove onto the reservation on the low road maybe four, five miles, there used to be a mailbox that says Schmoll, S-c-h-m-o-l-l.

And I stopped there one time with a tribal elder. We drove up on the hill and found somebody who looked like he would have played Tobacco Road in Hollywood. He was a wonderful guy who was well known for having been kind to Indians. And as we looked down the draw, he and my companion, Joe Rock Boy, began to laugh. And he said, Joe, when you were a youngster, I sold you a lot of rye whiskey here. That was a well-known whiskey cache.

And then there was still another just west of Marty. When you drive to Seven Mile Creek, there is a farmstead right on the top of the bluffs. And I'm not going to bring up the name

[p. 73]

of the family, but it was pretty well-known that you could buy liquor there. The booze traffic was a very big problem. And in addition, those allotments butted against the Missouri River.

So the tribe – this should be taken as – as historical background. This tribe is having a real hard time with that. And it wasn't just the fear of child neglect or wife beating. It was the fact that people who got inebriated would trade in their plows, you see; that the farm business would diminish because of that.

So when I read that piece the first time, I thought this – they are very serious about that. Why else would you bother to write into this and then –

Q Into the 1894 agreement?

A Yes. And then again mention this in the land opening, that we don't want alcoholic beverages sold anywhere within our reservation, which is a declaration of the tribe's beliefs that there was a reservation with boundaries. It says specifically that it won't be sold either on the land sold to white people or on the land retained by Indians.

Q Well, wasn't the sale of alcohol illegal in Indian country at that time?

A From 1832 until 1953, anyplace in Indian country.

Q Why would then the tribe need another section in there prohibiting the sale of alcohol if indeed there already was a

[p. 74]

prohibition?

A Because the people who were selling whiskey really didn't care about that. The stakes are pretty high financially. I have, as you know, published an article that

shows up on my curriculum vitae on the history of the whiskey traffic in Sioux country. This was a very, very lucrative business because you are selling not only whiskey; you are also trafficking in the machines to gamble, and you were carrying prostitutes.

Q Did the Congress in fact codify that section into a criminal prohibition later on?

A You are talking about the section on –

Q Article XVII, the alcohol prohibition.

A Yeah.

Q If you know. If you don't know –

A Yeah. I'm – that is a legal issue that I better not answer.

Q Okay. So the – do you know of any understanding on the part of the tribe, contemporary understanding that the reservation boundaries were to be diminished?

A None to my knowledge.

Q And do you know their understanding whether they would be the same, they would remain the same, untouched?

A They would have to assume that except for the survey we talked about, which actually enlarged it by 30,000 acres or so.

[p. 75]

Q All right. Now, you talked earlier about the Lake Andes farm station. Would you tell us when that was formed, what it was about, et cetera?

A We talked about the Mile Square which was the government reservation, as they called it, which was part of the reservation that belonged to the tribe, but was used by the federal government to manufacture the agency of Greenwood. And Greenwood at one time became a small city as a consequence. But on the year of the land sale, in 1894, the agency, with approval from the Commissioner of Indian Affairs, opened Farm Station Number 2. And that draws me into the system of the acculturation. And I have to go into that.

Q What year was Farm Station Number 2 established?

A In 1894. In 1894.

Q I think if you can look at that, you might find it was in 1895.

A The farm station?

Q Yeah. Well, anyhow, I think it's in the documents, so go ahead.

A Well, I would be glad to look it up, but I wrote an article on this.

Q You may not have to look it up.

A Okay. I believe in fact that I could, if I went back to my materials, I could give you the date in 1894 when this was set

[p. 76]

aside officially. But, that's a pretty small point. The reason this is so well documented is that the federal government is trying to install a help system for adaption to agricultural. On this reservation in 1861, the agent

appointed a person called the U.S. farmer whose job it was to not only help people learn how to do family farming, as opposed to casual farming, but also to simply accommodate to the lifestyle and the acceptance of family farming as a way of life. And this happened in all the Indian agencies in the country.

And I believe the year was 1881 when someone wrote back to the Commissioner of Indian Affairs and said that we need some additional help out here with the farmers, and so the government, with its imagination, created a second office called the additional farmer. And then people called for assistance, and so they added the assistant farmer. Before they were done, they had six categories of people which I believe was by far the largest bureaucratic network in the Indian service.

It had several jobs to do. First of all, to help people make the adaptation. Secondly, to accommodate to a non-Indian lifestyle. And a third – and I had included a map of the original placement of the bands in this tribe, thinking we might want to make this point. They also tried to divide the traditional brand structure with new farm districts. So the people in a single band would relate to different officers. It

[p. 77]

was a difference of sociological realignment. And in order to get this done to accommodate this system of farmers – and they had, as I remember, about ten for a time – they had to have a second farm station to make that work.

This also indicates that the federal government intended that there should be considerable agcultural

[sic] activity on the upper end of the reservation, else they would have probably tried to run the whole thing out of Greenwood. And my imagination tells me that that Lake Andes farm station probably served people down to Seven Mile Creek. And that would have involved two different band structures, the one of White Swan and the one of Feather in his Ear.

Q Doctor Hoover, in any event, if the government established a farm station two years after the negotiation of the agreement selling the unallotted lands, does that tell you anything about the government's intention with respect to the boundaries?

A I want to go back and say that they founded this administrative district in '94, the year of the agreement. The reason I remember that so well was that Clarence Foreman talked to me about it and talked about the year of his birth. He was born in '92, and somehow they didn't allot him. And then he talked about how that allotment should have been given to him in 1894, and in lieu of that, later on. So all this came about simultaneously. And I have to believe that it was to assist people in their accommodation to agriculture.

[p. 78]

Q What does it tell you about the continuation of the reservation up in that area?

A Well, it tells me that the federal government assumed that it continued to exist, else there would have been no reason to create a farm station.

Q All right. Now, you talked about the one mile square reserve. Some people think that that was the reservation

boundaries after 1892, the one mile square. What can you tell us about that?

A Well, I was a little perplexed the first time I heard that word, too. I remember the first time I drove into Greenwood with an old timer, and he said we are now at Mile Square. And I said you mean 640 acres, and he said not quite. He said we all understand that Mile Square is the agency compound, and it was attached to a place that they kept elders for a long, long time. Nearly 75 years, small homes there. That was called Mile Square Elder Housing. That term applied specifically to the, what, 300 – I don't have the figure at hand, 360 some acres as I recall, that was taken I like to think on loan by the federal government to run an agency, but when finally all of this shut down, it was simply delivered back to the tribe.

Q Do you know what year the Mile Square was established?

A Well, Mile Square was established in 1859 because that is when the agency was set up there.

[p. 79]

Q Okay. So certainly it wouldn't have been involved in any diminishment at that point?

A Oh, no.

Q What year was the farm station shut down by the –

A In 1932 in anticipation of the Yankton being a subagency under Rosebud the following year.

Q Have you ever in your experience seen the Bureau of Indian Affairs install a farm station off of the reservation or outside of a reservation boundary?

A No.

Q What about the lake and – the lake itself, Lake Andes, how was that formed?

A The lake itself?

Q Yes.

A That was a natural lake.

Q Did there come a time when the government drilled wells to pump water in there?

A Yes.

Q Tell us about that.

A Well, I – the record is very indistinct about that, but it came shortly after the time, as I recall, when they established Farm Station 2, in a period of drought. We want to remember that there was drought and depression from 1893 to 1896 during this period. And I don't know about the timing of the drilling, I have got to say, because I could never find out for

[p. 80]

sure, but what they decided to do was to drive artesian wells, which they did to replenish the lake, to bring it back to normal state.

Q And was this done, do you know, after the 1894 agreement?

A My belief is it was done after, yes. If you will just give me a second, there is an exhibit in here about that.

Q Yeah. Look at Exhibit 24. Can you tell us what that exhibit says, Doctor Hoover, or just describe what it is?

A Well, the exhibit simply opens with "This reservation is badly in need of artesians [sic] wells." And they talk about the drought over the last six or seven years, and how the lake has dried up. This is October 29th, 1895.

Q 1895. All right. So the government was then doing work in what they believed to be the Yankton Sioux Reservation a year after the ratification of the agreement of sale of land, correct?

A Well, they do say specifically "This reservation is badly in need of artesians [sic] wells," yep. And they are trying to help out by bringing the lake back.

Q Have you ever known in your experience of the government drilling wells off a reservation?

A No. No, I don't. I'm not clear about Fort Peck. That is a long ways away, but there was other well drilling within South Dakota, and none off the reservation to my knowledge.

Q But was it BIA well drilling?

[p. 81]

A There was some activity around Holy Rosary Mission, but that is on Pine Ridge. Otherwise I can – nothing off the reservation I know of.

Q That was my question.

A Yeah.

Q Do you – do you – have you studied the current demographics of the Yankton Sioux Reservation?

A Yes, I have.

Q And do you have any statistics you can give us on those?

A Yes. And I should – I should preface this by saying that there are three sets of statistics about contemporary tribal demographics. One comes from the annual census – or I'm sorry, the federal census every ten years. The second is issued by the Bureau of Indian Affairs which stresses people who live on the reservations are close enough for employment. And the third you can acquire by calling the tribal office.

In the exhibits that are entered, I have reported those statistics that I received from the tribal office. But out of curiosity, I went to the federal census records and I have in hand, and I brought along a copy for Mr. Guhin if he would like to have one, of what the federal census records have to say.

Q Okay. Would you tell us what you have discovered about demographics of the Yankton Sioux Reservation?

A What I discovered here, and we are looking at recent years,

[p. 82, ll. 1, 23-25]

According to the federal government –

* * *

A Well, I was curious about what has happened over the last quarter century. And I discovered that according to the federal census, which counts Native Americans much lower than

[p. 83]

the tribe does itself as far as reservation residence is concerned, that the census records say, and these are the ones that come out every ten years for anybody defined, in 1970 here they counted 926 in Charles Mix County. In 1990 –

Q 926 what?

A Native Americans, Indians, in Charles Mix County. 926. And in 1990 they counted 2,002, which would be an increase of 116 percent. I was curious about what had happened to the non-Indian population in that time, and discovered that that dropped from 9,063 to 7,123 which would be a reduction of 21.4 percent.

Q Between 1970 and 1990?

A Yes. In 20 years, the Indian population increased by 116 percent and the non-Indian population declined by 21.4 percent.

Q Are you able to tell us when the Indian population began increasing in that period?

A I couldn't find a clear record prior to that time in federal census, but if you looked at the documents that are entered by exhibits, you will discover that the first dramatic leap came between 1960 and on or about 1980. By that time it was beginning to climb.

Q Doctor Hoover, have you had an opportunity to observe religious sites on the Yankton Sioux Reservation in your time as an expert on that reservation?

A Yes, I have.

[p. 84]

Q Do you know the approximate location of the landfill proposed site?

A Yes, I visited that within the last couple of weeks.

Q The site itself?

A Yes.

Q All right. What do you know about the proximity of religious sites to that landfill, proposed site?

A I know about three sites, two of which I've visited many times myself, and one that I haven't. I'll mention the first – or the last of these first. There is a sundance site close by, which should be attested to by other people. But in talking to Indian department personnel at the superintendency in Wagner about this issue, the ones that I do know about, we agreed that as the crow flies, it would be no more than a mile from this site, proposed, and a very well-known fireplace in the Native American church.

Q What significance does a fireplace have in the American Indian American church or is it Native American –

A Yes, Native American church. A fireplace is a place of religious worship. And that place happens to belong to a relative of some people in this courtroom named Quenten Bruguier. That's Q-u-e-n-t-e-n B-r-u-g-u-i-e-r. This is very well-known in the tribe, and it would be approximately a mile away.

Then the other one is approximately a mile and a half

[p. 85, ll. 1-17]

south of Lake Andes which is, oh, maybe a quarter to a third of a mile east of the highway that runs down to – to Fort Randall. That's a very prominent hill that was very well-known among old timers as a fasting site.

Q And is that of religious significance?

A A fasting site is – had the same meaning to this tribe that the wilderness would have had to Jesus Christ or to Moses. It's a place where people go to pray and to refresh themselves and to find truth.

Q And how close is this to the proposed landfill site?

A And it was difficult to measure as the crow flies there. What I'm saying is that that was, as I checked the description at the time that we nominated this to the Historical Register of National Sites, it – it was about a mile and a half south of the City of Lake Andes, so I'm guessing at the very maximum it would be maybe two to two and a quarter miles from this proposed dump site.

* * *

[p. 86, ll. 10-25]

* * *

Q Take a look at Plaintiffs' Exhibit 70, and describe this for the record, please.

A This says Indian Land Areas Judicially Established in 1978.

Q Well, the map was made up when?

A In 1978.

Q All right. And do you see the Yankton reservation on this map?

A The Yankton is identified right here (indicating.) This is the section.

Q In other words, it's identified on the map itself, is that correct?

A Yes.

Q All right. Now, if you would take a look at Plaintiffs' Exhibit 68, can you describe what that exhibit is?

A This is an official map issued by the Department of the Interior, Bureau of Indian Affairs.

[p. 87]

Q What year?

A In 1969.

Q And what does it show?

A What it shows is the outline boundary of the reservation, and it represents the placement of allotments within those boundaries.

Q Is there a legend on this map?

A Yes, there is.

Q Can you describe for the record what that legend says?

A The legend identifies in red the allotted land, in green the tribal lands, and it looks like red and blue, tribe owned an interest, and finally what appears to be a blue legend, FHA and tribe.

Q Thank you. You can take a chair. Now, Doctor Hoover, have you had occasion to read other agreements between the government and an Indian tribe which would cede Indian land to the government?

A Yes.

Q What were those agreements that you read aside from the Yankton agreement?

A Well, the one most vivid in my memory, because of recent, it was the land cession agreement by the Lower Brule Tribe that was made explicitly to raise money to help Brules move from the Lower Brule up to the Upper Brule or Rosebud Reservation. And so the tribe sold and the federal government used money to

[p. 88]

Acquire land, and what that did was actually reduce the size of the Lower Brule Reservation.

Q Was there a judicial determination on that particular sale?

A There was congressional, and the judicial I don't want to interpret because – but I can say that this was congressionally approved.

Q It was congressionally approved. Were the boundaries diminished?

A The boundary of that reservation was diminished, yes.

Q And all sides understood that?

A To my knowledge.

Q Now, do you have an opinion with respect to comparison between the Yankton Sioux Agreement of 1894 and the Lower Brule agreement that you just described with respect to the intent of Congress vis-a-vis reduction of the boundaries?

A Well, those two on their face – and administrative and congressional records would say different things. They – in the case of Lower Brule, everybody agrees that they're actually shrinking the reservation to sell a block of land to raise money. In the case of the Yankton, from historical records, I can find no evidence that they were shrinking the size of the reservation. What they are doing is accommodating white people for settlement within boundaries.

Q Doctor Hoover, would you look at Exhibit Number – Plaintiffs' Exhibit Number 31 which has not yet been admitted

[p. 89, ll. 1-9]

into evidence, and describe that again for us. Or I guess for the first time.

A Exhibit Number 31 is entitled Yankton Sioux Tribal History, and it is under declared copyright to myself in 1995.

Q Who authored that document?

A I was the author.

Q And was that as result of the research you have done on the Yankton Sioux Reservation?

A Yes.

* * *

[p. 92, ll. 18-24]

* * *

Q Would you describe Exhibit Number 78, Doctor Hoover.

A Exhibit Number 78 is entitled the History of Yankton Tribal Governments, copyrighted to myself and authored by myself in 1995.

Q All right. Does this document describe the history of the government of the Yankton Sioux Tribe?

A Yes, it does.

* * *

[p. 96, ll. 23-25]

* * *

Q Good afternoon, Professor Hoover. I would like to start with a factor that I think you may have alluded to already. Is it true that the use of the term "reservation" has different

[p. 97]

Applications depending upon who's using it and how they might be using it?

A Yes. In my – in my experience, that's true.

Q And can you tell me what different applications the use of the word "reservation" might have?

A It has cultural meaning.

Q Go ahead.

A Which I hear frequently among students and others that going back to the reservation means going back to more than simply a place. So in a cultural sense, that's true. And now days of course, going to the reservation means going to the community or going to the casino and spending money. The reservation also means a place that is contained by boundaries. And, finally, I suppose the reservation means a place where tribal members as individuals or tribes collectively own land. Those are the ones I can think about, that come to mind offhand.

Q And some of those definitions or some of those uses of the word "reservation" have a legal connotation and some do not, is that correct?

A I want to repeat that I'm not an attorney, and so I – I will give you the judgment of a professor/historian, but not of a lawyer. And legal connotation asks me, does it not – if I understand your question correctly, Mr. Guhin, that does ask me to respond as an attorney. You said legal connotations.

[p. 103, ll. 18-25]

* * *

Q Is it true you can't always tell if the use of the word "reservation" by a federal officer means legal office – means a legal reservation and boundaries or simply a home for Indians?

A Without context, you wouldn't know.

Q And that's true of documents generated by the Office of Indian Affairs, isn't that, Professor?

A What is the question?

[p. 104, ll. 1-10]

Q It's true that you can't tell how a federal official is using the term "reservation" simply by looking at the document, is that right? And that includes documents of the Commissioner of Indian Affairs, Bureau of Indian Affairs?

A Unless he defines it.

Q Unless he defines it?

A If he gives you context, then you would know.

Q Context like perhaps description of boundaries?

A Or a discussion of activities. Without a context, you cannot know. This requires qualification.

* * *

[p. 108, ll. 17-25]

* * *

Q Professor, let's move on. Did you rely upon population statistics, present or past, in making your analysis of whether the reservation was diminished or disestablished?

A No.

Q You did not. Did you rely upon case law in making your analysis of whether or not the reservation was diminished or disestablished?

A No.

Q So specifically you did not rely upon United States Supreme

[p. 109, ll. 1-20]

Court decisions including the Dakota [sic] case?

A I have read the Dakota [sic] case.

Q Did you rely upon the Dakota [sic] case in making your determination of whether the Yankton reservation has been diminished and disestablished?

A No.

Q Did you make any analysis of cases from the state civil and criminal courts in determining whether or not the reservation was diminished or disestablished?

A The Yankton?

Q Yes.

A No.

Q Did you make any analysis of cases from a tribal or a CFR court in determining whether the Yankton reservation was disminished [sic] or disestablished?

A No.

Q Did you make any analysis of the practices of federal courts in making your determination of whether the Yankton reservation had been diminished or disestablished?

A No.

* * *

[p. 115, ll. 15-22]

* * *

Q Sure. Did you consider the statement of the Acting Commissioner Frank Armstrong found at Page 7 of that document where he discusses the liquor provision? Right at the top of the page, Professor.

A Uh-huh, yes.

Q And did you consider why the acting commissioner cited the case of United States versus 43 Gallons of Whiskey?

A I just hadn't thought about why he cited it, no.

* * *

[p. 118, ll. 15-24]

* * *

Q – at Page 38 which says "22 new names are added to the number and the treaty is gaining friends every day. And so far as I find (except in the case of Samuel Pickard it is very doubtful if he is there) that no undue pressure was used or improper methods resorted to by the commissioners or any other persons last winter to secure signers." Mr. Cadman decided, Mr. Cadman the investigator, decided there wasn't anything to the charges being made, isn't that true?

A Well, evidently he doesn't account for the fact that only 55 point, what, 5 percent signed it.

* * *

[p. 124, ll. 19-25]

* * *

Q Professor, can you tell us what year the speaking council was formed?

A The constitution was written in 1899. The speaking council was organized on July 4th, 1892.

Q Can you tell us why it was formed – excuse me. Can you tell me who formed the council, who was responsible for it?

A Agency personnel, I suppose, and a succession of several

[p. 125, ll. 1, 10-14]

Agents.

* * *

Q Is it accurate to say that Foster designed the speaking council as an instrument of government thereby agency personnel could easily solicit popular endorsement for economic and cultural change?

A Yes.

* * *

[p. 126, ll. 17-25]

* * *

Q And does part of that constitution say that we establish this council, having for its executive officers the Honorable Commissioner of Indian Affairs and the United States agent in charge, will have the sole power to

approve or disapprove any decision that may have been made by the council?

A It say – that says to me that those two must approve, but we were talking about the speaking council and the business committee which was chaired by the Indian superintendent. These are two different things. That's a categorical statement

[p. 127]

that says that the tribe lives under the power of the federal government to me.

Q Is the categorical statement found in the constitution of the speaking council?

A Yes. And it reads very much like the Wheeler-Howard Act in that regard.

Q Is it true from 1903 to 1912 that there was no effective business committee?

A I couldn't discover the existence of a business committee during that period.

Q And is it accurate to say that in 1912, a business committee was selected, legislated, but not recognized by federal officials in the District of Columbia?

A Yes, because they were too traditional.

Q And also because the voter turnout was inadequate, is that right?

A Yes. That's in the larger document we have not entered I believe in evidence.

Q Only about 50 people that showed up?

A You are taking from something that hasn't been entered into evidence here.

Q I'm simply asking you questions about history.

A Yes. Okay.

Q Is that right or not?

A In other words, we are not talking now about Exhibit Number

[p. 128, ll. 1-7]

78, are we?

Q Well, I believe we are, Professor.

A Well, this is a narrow version, and you were quoting from a larger document. But what you have quoted is right.

Q Okay. Is it true that in 1914 there was an attempt by Alfred Smith to organize a business committee which failed?

A That's correct.

* * *

[p. 129, ll. 13-25]

* * *

Q "Although legal mechanism existed to allow the operation of a business committee, none functioned to serve the general interests of the Yanktons except a delegation from the tribe to look after its interests at the intertribal treaty council at Fort Thompson in 1920."

A I believe that that is roughly true. What that gets around to summarize, from 1903 to 1920 you would find the election of business committees, but you cannot find evidence what they were doing until 1920. Then, of course, a whole new system took off under the authorization of the speaking council constitution.

Q In 1924 then, an executive council, executive committee was formed, it that right?

[p. 130]

A In the larger document you haven't handled, you will discover one person was chosen in 1921 and a larger committee soon thereafter, and then finally the executive committee that was in continuous session was chosen in 1924.

Q Okay. And what were the responsibilities of the executive committee?

A Its primary responsibility was claimed – was claim – its primary responsibility at that time for, I should say, for probably any Sioux tribe at that time, was the claims issue. Because of the Omnibus Act, on claims of 1920, and the fact –

Q Excuse me.

A Excuse me. The fact that the – the federal government was distributing tribal funds and establishing roles and trying to dissolve the past difficulties of the tribes. I think it's true what you say, but I wanted to make sure the context is right. Claims became a very big issue across Sioux country with the formation of the treaty council and the intertribal agencies.

Q Is it accurate to say that the executive committee did not have the authority to do the business of a general business committee?

A In the 1920s?

Q Yes.

A No, it's not really true, although that statement was made

[p. 131, ll. 1-19]

in 1932, because I know that this committee dealt with other matters; for example, with tribal enrollments.

Q In your document Yankton Governmental History, did you write "Executive committee established during August, 1924 worked with the specific charge of dealing with tribal claims against the United States"?

A Yes.

Q Although the general council of adults could at any time have used the 1891 Constitution as authority to enlarge its role into that of a general business committee?

A Yes.

Q It did not do that, did it? It did not enlarge its role into a general business committee?

A That committee had to deal with – with some issues. I do know that. And specifically I remember enrollments, but the – what I was getting at in that statement, Mr. Guhin, is that the 1891 Constitution, to my knowledge, unless you have discovered something that I don't know, was never negated. Not until 1932.

* * *

[p. 133, ll. 6-25]

* * *

Q Moving to the 19 – the period of the 1930s, 1932, I understand the agency was moved from Yankton to Rosebud and became a subagency?

A No. The – the Yankton tribe lost its agency status and became a subagency under Rosebud, and the subagency was headquartered in Greenwood.

Q And what year was that?

A That took place in 19 – I think the – the real transformation was 1933.

Q Okay. And when was the farm station disbanded?

A In 1932 in anticipation of that. That – that change was anticipated and announced during 1932.

Q Professor, on Pages 4 and 5, you cite the perceptive Clement Smith.

A Yes.

Q And Mr. Smith evidently was a perceptive observer of the scene historically, is that what you are telling us?

A In the larger document you hold, you discover that Clement Smith became a very bitter man, as did Clarence Forman, but at that time it would be defensible to say that Clement Smith and

[p. 134]

Clarence Forman, among those who wanted to promote a new constitutional form of government, were perceptive. Yes.

Q Did Mr. Smith – I know you quote a 1934 statement of his. That statement is longer than actually appears in the Document 78, isn't it?

A Well, I think so, but you're – it's geting [sic] late in the afternoon here. You are pushing me pretty hard, John. Okay. What page are we on?

Q Pages 4 to 5 of Exhibit 78.

A Okay. And what are we –

Q Did Mr. Smith in 1934 actually in that same – that same time, also say that for more than a half century, they – "they" being the Yanktons – have been floundering and have totally failed to bring themselves into one unified body, and also said all the organizations, all their organizations have failed to accomplish anything?

A I believe that when I presented that as a preview in writing, what I said was that Mr. Smith was trying to get people to cease to be segregated into the divergent groups of types that are represented in one of the exhibits, and that I thought that he was overstating his case.

Q He actually didn't say that, though, did he?

A Yes, he did. I quoted him, and I –

Q And you call him perceptive?

A I think he is very perceptive, but I think he's standing up

[p. 135, ll. 1-8]

and speaking, if I may, like Newt Gingrich, saying that life is bigger than it really is. I think that people tend to do that in political situations. This is a very able person who should be remembered well.

Q Do you – do you recall labeling him in 1934 as a prominent Yankton leader and a careful student of tribal history?

A Absolutely. I think he was simply exaggerating in this case.

* * *

[p. 190, ll. 3-25]

* * *

Q And Commissioner Rhoads states that – in that letter that the county and state have jurisdiction over non-Indian lands within what was, quote, heretofore a part of the reservation, end quote, does it not?

MR. ABOUREZK: I renew my objection, Your Honor, on the grounds – on the grounds that he's trying to get it in by a backdoor, not allowing me to object because he's not introduced it, but he's attempting to get the entire text read into the record before he introduces it, and I object on those grounds.

THE COURT: Overruled.

BY MR. GUHIN:

Q Do you need the question reread?

A Yes.

MR. GUHIN: Could you read me the question, please.

(The question on Page 190, Line 3 read back by the reporter.)

A Well, I can quote from this document which says " . . . through the issuance of fee patents to allottees and purchasers, and that such land is now under the jurisdiction of the state and the county authorities. . . . " Is that the passage we're referring to?

Q Yes.

A Okay.

[p. 191, ll. 1-22]

Q Do you draw any significance with regard to the disestablishment question from Defendants' Exhibit 667?

A Regarding the disestablishment of what?

Q The disestablishment of the Yankton Sioux Reservation.

A No.

Q Is this – does this constitute evidence that the reservation has been disestablished?

A Historically, it doesn't to me.

Q Does the fact that the – that the Yankton Agency is going to be deprived of the field notes for the, quote,

reservation, unquote, does that constitute any evidence of disestablishment of the reservation?

A Well, it seems to me if we – we are – we are considering these together, are we not?

Q Yes.

A And on 668 it says, "For joint use of the county surveyor and the Indian office." So I take this to mean that it says that both jurisdictional entities would have access to the records. Is that not true? This is a request from – from the chairman of the county board. And I'm quoting here, "For joint use of the county surveyor and the Indian office," end of quote. That's his request.

* * *

[p. 197, ll. 22-25]

* * *

Q You have before you Exhibit 651, do you not?

A Yes, I do.

Q There is no – is it accurate to say there is no provision within the Constitution of 1932 which claims jurisdiction over

[p. 198, ll. 1-10, 14-25]

Any specified territory?

A I have been using a digest of this constitution. I would have to go back and read it again, if you want to take the time.

Q You're not prepared to say yes or no right here? And that's fine if you can't.

A I would have to refresh my memory.

Q Do you know whether Article 3 of that constitution says that a tribal councilman could be from anyplace within Charles Mix County?

* * *

Q Okay. So there was no – and – and what has been described as the Yankton Sioux Reservation under the Treaty of 1858 is only about half of Charles Mix County, is that right?

A I have no breakdown on percentage, Mr. Guhin. You can help me there.

Q Okay. You don't know if it's about half?

A That seems to be a little too small an estimate, because it's all of lower Charles Mix County.

Q Okay. After the Tribal Constitution of 1932 allowed the selection of a business claims committee, is it accurate to say that the federal government suspended that Yankton Sioux Business and Claims Committee in about 1936?

[p. 199, ll. 1-7]

A In our deposition I described the circumstances under which the activity of the business committee was suspended, but then I went on to indicate to you in correspondence that actually involved President John Kennedy that in retrospective it was acknowledged that that business committee had never ceased to exist and that the government had abided even though it had been inactive, and you have that material in your possession.

* * *

[p. 201, ll. 10-18]

* * *

Q Professor, can you answer that question? Can you answer the question: Was there an operating business and claims committee from 1936 to 1965?

A There was a business committee whose operation was suspended.

Q Okay. There was no operation of the business committee for the 30 years, 29 years, from 1936 to 1965. Okay.

A The only answer – honest answer is that that power was transferred to special committees.

* * *

[p. 205, ll. 3-25]

* * *

Q Okay. Well, let's get to that. I'll now turn to the new constitution. The genesis of the constitution, I suppose you could put it, was in October of 1960 when there was a committee of some young men formed, isn't that right?

A This is not a new constitution. This is a process of amending the constitution of 1932.

Q Okay. For the revision of the constitution of 1932, there was a committee of young men formed, is that right, in 1962?

A Yes.

Q And these were identified as progressives, is that correct? Well, let me ask the question this way: These

young men could be identified, should be identified as progressives?

A Well, in that context I'd rather not make the determination, because I know some of those families, and I wouldn't quite agree with that characterization.

Q Okay.

A I think they were responsible tribal leaders.

Q Okay. So these were responsible tribal leaders who knew what they were doing, is that what you're telling us?

A They knew what they wanted to do in their own constituencies.

Q And one of the things that these responsible people did was to study copies of the constitution of other tribes?

[p. 206, l. 1]

A Correct.

* * *

[p. 207, ll. 1-9]

Q Okay. But in this – in this case the tribe looked to constitutions of other tribes, is that right, the young men apparently did examine copies of constitutions of other tribes?

A Yes.

Q Okay. And this constitution was then submitted to Washington, D.C.? Excuse me. The constitution was then

adopted and then it was submitted to Washington, D.C., is that right?

A Yes.

* * *

[p. 208, ll. 11-25]

* * *

Q So you don't know the tribal constitution well enough to say whether or not this is the language?

A If I had my copy, I could compare it.

Q But you don't know sitting here whether or not it is or it isn't, is that what you're telling us?

A That's correct.

Q Do you know whether the United States Government attempted to or suggested or demanded that the tribe amend this section like it did certain other sections of the constitution?

A Pardon me?

Q Well, Professor, I understand that the constitution was written, and then it was submitted to Washington, D.C. Excuse me. It was written and adopted and then it was submitted to Washington, D.C., is that right?

A It had to be adopted by the tribe before it was accepted by

[p. 209, ll. 1-13]

the Secretary of the Interior.

Q And then it went to the Secretary of the Interior, and the Secretary of the Interior sent back a number of corrections or a number of revisions that the Secretary thought was appropriate – were appropriate, is that right?

A As always, yes.

Q Okay. And do you know whether the Secretary of the Interior suggested or demanded any change to Article VI, Section 1?

A I don't recall. I have been through the file in Kansas City, but that fine point I don't recall.

Q In fact, it didn't – he didn't, did he?

A I don't recall.

* * *

[p. 220, ll. 10-25]

* * *

Q You talked about the one million immigrants a year as being part of the overall congressional – what the congress had in mind at the time of the 1894 act, is that right?

A The context of my statement there is a matter of public record in immigration history. In anticipation of approaching a million a year, congress authorized the opening of Ellis Island as a center that would accommodate more immigrants, and in fact in the years 1901, 1902, 1903, we took on a million a year, which was the peak prior to the last year when we believe with both legal and illegal immigrants we've now exceeded a million a year. So in all of American history, my point was that we're taking on more immigrants than we ever had, and the

first restriction against immigration by congress was in 1875. So there was nothing to slow it down. And the point of the presentation was that there was great pressure to find places for people to go, including Charles Mix County, which had been

[p. 221, ll. 1-6]

established in 1879.

Q Okay. And is it your view that congress meant to send these – these immigrants, these poor oppressive peoples from overseas, to another place where they could not govern themselves?

A I don't remember ever reading that in immigration history.

* * *

[p. 240, ll. 11-25]

* * *

Q Now, Professor, yesterday you testified, if I recall correctly, that there were in 19 – excuse me. In 1990 there were 2002 Native Americans in Charles Mix County. Do you recall giving that testimony?

A I testified that I had checked the federal census and had discovered in the census report that I examined that it listed 2002 persons who were Native American in Charles Mix County, and during the same year 7,123 that were Caucasian.

Q So you offered that testimony yesterday. In Plaintiffs' Exhibit 31 I notice it states that there are 2,980 – excuse me, that there were 2,980 enrolled members who live

within the reservation boundaries in 1987 and 3,400 in 1993. Is that right?

A What is your question?

Q Did you set that out in Plaintiffs' Exhibit 31, Page 1?

[p. 241, ll. 1-5]

A Yes.

Q And it's a fact that those two numbers are not consistent?

A That's correct.

Q And you accept the U.S. Census statistic number?

A No.

* * *

[p. 242, ll. 20-25]

* * *

Q So you got the Census Bureau, the area office and the tribe?

A That's correct.

Q And the number that we have in Plaintiffs' Exhibit 31 is from the tribe?

A Yes, sir.

[p. 243, ll. 1-7]

Q Why didn't you tell us that in Exhibit 31?

A I could see no reason to do it.

Q And you couldn't see any reason to tell us that the Census Bureau thought it was an erratically different number?

A I used this in publications, and some of this I simply took the statistics that I thought was the most accurate, and that should be the one that is kept by the tribe.

* * *

Darrell Drapeau Trial Testimony

[p. 278, ll. 11-15]

* * *

Q Okay. Mr. Chairman, what is your educational background?

A I have a Bachelor of Arts degree in prelaw, political science. I've got a parallel diploma. And I attended the special scholarship program in law for American Indians at the University of New Mexico.

* * *

[p. 293, ll. 19-25]

* * *

Q So, irregardless of who has been regulating these areas, the tribe has not been regulating the environmental concerns up to this point in time that you're talking about today, have they?

A No, because they haven't been regulating them, no.

Q But you'll admit that somebody has been regulating them, will you not?

[p. 294, l. 1]

A Yeah, somebody has been regulating.

* * *

[p. 299, ll. 18-25]

* * *

Q You mentioned, Chairman Drapeau, that the tribe currently has an environmental section, is that correct?

A Yes.

Q And how many people are currently working in that section, if you know?

A There's one for sure that I know of, and there is three others who help out in that area.

Q Okay. Are any of these people working in the environmental

[p. 300, ll. 1-13]

section of the tribal government at this point in time registered engineers?

A Registered engineers?

Q Yes.

A No.

Q Have they had any experience in monitoring or administering environmental protection programs?

A No. No.

Q Does the tribe own any of the specialized equipment necessary for testing and – and properly monitoring some

of these environmental programs that the tribe would like to take over regulation of?

A Not at this time, no.

* * *

[p. 303, ll. 1-10]

Q Good afternoon, Mr. Drapeau. Dropping back to your background, I think you said you had a degree in prelaw, political science, is that right?

A Right.

Q And you were involved in a program entitled Law for the American Indian at the University of New Mexico?

A That special scholarship in Law for American Indians.

Q And in that – in that course you became familiar with concepts in Indian law, is that right?

A Yeah. Yeah.

* * *

[p. 304, ll. 4-10]

* * *

BY MR. GUHIN:

Q And did you testify under oath before the South Dakota Board of Minerals and Environment?

A Yes.

Q And when you testified, you were representing the tribe as chairman, is that right?

A I was there as chairman, yes.

* * *

[p. 306, ll. 6-15, 22-25]

* * *

BY MR. GUHIN:

Q Referring you to page 556 and Line 10, if you recall this testimony: "Q. Are you familiar with the former boundaries before that area was opened up of the Yankton Sioux Reservation?" By Mr. Drapeau: "Yes. Q. Was that land within the former boundaries of the Yankton Sioux Reservation? A." Again, by you: "Yes." Do you recall giving that testimony?

A I remember that, yeah.

Q And is that testimony correct?

A It's correct as written.

* * *

BY MR. GUHIN:

Q Mr. Drapeau, is it your view that Mr. – Mr. Drapeau, you testified on direct that there was a reservation at Yankton, didn't you?

[p. 307]

A I testified here –

Q Yes.

A – that there was a reservation at Yankton.

Q Yes. Did you?

A Yes, I think so, yeah.

MR. GUHIN: I'd submit the matter as impeachment, Your Honor. At a former hearing under oath he agreed that there was former boundaries of the reservation. It's clear impeachment.

THE COURT: Let me look at the testimony since you haven't provided me with a copy.

MR. GUHIN: Yes, Your Honor.

THE COURT: Page 558?

MR. GUHIN: 556, Your Honor.

THE COURT: Line what?

MR. GUHIN: Line 10.

THE COURT: Taken within the context of the hearing where you were on one subject and went to another subject for those two questions and onto another, I don't believe that's impeachment.

MR. ZEPHIER: Move to strike then, Your Honor, the questions.

THE COURT: Beg your pardon?

MR. ZEPHIER: Move to strike the questions concerning that prior testimony.

[page 308]

THE COURT: No. The attempt to impeach stands, and it's just that I'm the finder of fact as well as the applier of the law in this case, and I'm just telling you right now it's not impeachment under the setting in which it was asked and the sense in which the response was given. But the attempt stands. It's just that I'm telling

you right now as a finder of fact it doesn't get anyplace. Go ahead.

BY MR. GUHIN:

Q Do you agree that the Yankton Reservation has former boundaries, Mr. Chairman?

A I agree that it has boundaries, yeah.

Q Do you agree that it has former boundaries that existed in 1858?

MR. ZEPHIER: Objection. Asked and answered.

THE COURT: What's the objection?

MR. ZEPHIER: Asked and answered.

THE COURT: Overruled.

A Am I supposed to?

BY MR. GUHIN:

Q Yes.

A Oh, okay. Yeah, I believe the reservation has former boundaries that existed prior to 1858.

Q Do you believe that the boundaries as they exist today are the same as they existed in 1858?

A I – I believe they're the same as they – as they were in

[p. 309]

1858, yes.

Q Why did you agree that the McBride land was within the former boundaries of the reservation at the administrative hearing?

MR. ZEPHIER: Objection for the same purposes as before, Your Honor, improper impeachment.

THE COURT: Well, I'll – it's a proper question on cross-examination. I'll allow him to inquire into it.

A State your question again, please.

Q Why did you agree at the administrative hearing under oath that the McBride land was within the former boundaries of the reservation?

A I think that prior to – at that time, that I – that I wasn't clear on the – on the questioning before me and – and there – I could have clarified what it was I really meant to say as opposed to what came out and was printed on – on paper.

Q Are you telling me that you didn't understand the question that was asked you?

A It could have been at the time, yes.

Q And there were two questions. I'll just repeat them: Was that land within the former boundaries of the Yankton Sioux Reservation? Are you familiar with the former boundaries before that area was opened up by the Yankton Sioux Reservation? Are those the two questions you didn't understand?

[p. 310, ll. 1-11]

A Okay. Now, that's where I get hung up on, because to me the boundaries of the 1858 Treaty are intact, and former boundaries would be anything prior to 1858.

Q Well, the land that we're talking about, the land that was talked about at this administrative hearing was the

McBride land. The McBride land hasn't moved. It's always been in the similar position, isn't that right?

A It's still in the same place, yes.

Q And so it's always been within the boundaries of the reservation as it existed within 1858?

A Within 1858, yes.

* * *

[p. 311, ll. 10-25]

* * *

Q Okay. Presumably, the – or the McBride land is within the boundaries of the reservation as defined by the Treaty of 1858, is that right?

A Okay. That's right.

Q And when you testified at the administrative hearing, you talked about the land, you agreed that the land was within the former boundaries of the Yankton Sioux Reservation?

A Okay.

Q Is that right?

A I see that, yes.

Q And you meant by that – did you mean by that, that that land was within the former boundaries of the Yankton Sioux Reservation as set out in the Treaty of 1858?

A See, in these – these questions, though, what's throwing me is that there is no reference to 1858. All it's saying is within the former boundaries of the Yankton Sioux Reservation,

[p. 312]

and what I'm saying is that the former boundaries of their Yankton Sioux Reservation were those boundaries prior to 1858, boundaries that would have reduced the – reduced the reservation boundaries to the 1858 boundaries.

Q Are you telling – are you telling the Court and us that you were thinking the question referred somehow to what the boundaries of the Yankton Sioux Reservation were in 1840 or 1830 or 1820?

A I'm saying that I didn't – that I didn't understand fully that – that question at the time it was – it was asked of me, and I'm saying that because of my belief that the – the boundaries of the '58 Treaty are intact and reference as to former boundaries are pre-1858 boundaries. There was a –

Q Just once more. The McBride land is not within the former boundaries pre-19 – 1858, is it, I mean, it's within the 1858 boundaries?

A It's within the 1858 boundaries, yes.

Q When you – when you say you were confused by these questions, did you – did you stop the hearing and say, I don't understand your questions like you're doing today?

A No, I didn't.

Q Why didn't you do that, Mr. Drapeau?

A I don't know. I just didn't.

Q So the – the issue of whether or not the reservation was a former reservation wasn't serious enough for you to stop?

[p. 313, ll. 1-2, 11-25]

A It was serious, but obviously I didn't stop the proceedings at that time and –

* * *

Q Could the witness be supplied with Exhibit 614, please. I think those are numbered at the side there, and I'd like you to turn to Table 17. It's the second page where it says "Selected population characteristics for American Indian and Alaska Native areas, 1990," and it has entries of the Lake Traverse Reservation, but at the bottom is the Yankton Reservation. Do you see that, Mr. Drapeau?

A Yes.

Q And do you see the total of American Indians listed?

A Okay.

Q 1,994, I believe?

A Right.

Q And your figure is, well, either – okay, I guess 3,000 for two to three years later. How do you account for that difference?

[p. 314]

A The figure I'm based on – I'm stating is a rough figure provided by the enrollment office. Every time anyone is to ask, you know, how many members live on the reservation, then the – the easiest response, whether it's totally

accurate or not, is for us to say, well, there's roughly half. That's what it's been in –

Q Okay. So the basis of your figure is to take the total enrollment and divide by two?

A Well, at one time – at one time somebody had to come up with the figure of 3,000 tribal members living, and it's kind of always carried forward since then.

Q Somebody did. Do you know how somebody might have done that?

A Well, I assume it was somebody that worked with the enrollment office.

Q So somebody did something with the enrollment office. Do you know when that somebody might have done their something?

A No, I don't, no.

Q And you don't kow [sic] what they did, do you?

A No. I just know that that's the figure we use, and roughly half of the members live on the reservation, yeah.

Q And you're telling us it's not based upon an actual count like the United States Census is?

A I wouldn't know for sure, no.

Q It is not based on –

[p. 315, ll. 1-4, 18-25]

A I assume it probably isn't.

Q It's just divided by two for the total, is that right? Is that right?

A Yes.

• • •

Q Can you tell me, does the tribe do any regulation of drinking water sources for public water systems?

A Not at present, no.

Q Does it do any regulation of underground storage tanks?

A Not presently, no.

[p. 316, ll. 1-7, 17-25]

Q Does it do any regulation of discharge in the surface water territories?

A Not presently, no.

Q Does it regulate emissions into the air?

A No.

Q Does it do regulation mining?

A No.

Q Has it taken any enforcement action against any hazardous waste generated?

A No.

• • •

BY MR. GUHIN:

Q Do you know whether the tribal court has ever taken jurisdiction of a criminal case against a tribal member for a violation which took place on nontrust land?

MR. ZEPHIER: I'll object to that, too, Your Honor, as calling for a legal question and on relevance.

THE COURT: For a violation of what?

MR. GUHIN: For violation of any criminal ordinance of the tribe.

[p. 317, ll. 1-9]

THE COURT: How does the criminal jurisdiction play in this?

MR. GUHIN: The tribal chairman has announced that one of the things that he is here for, has told us that one of the things he is here for, that he represents the tribe for, is to look after the interests of the tribe, and I'm simply examining on what the tribe does.

THE COURT: Well, all right. Overruled. Go ahead.

A I don't know of any, no.

• • •

[p. 318, ll. 12-25]

• • •

Q Mr. Drapeau, I'm going to ask you a slightly different question than we had on the table when we left. Do you know whether the state court has undertaken the prosecution of tribal members in state court for offenses not on trust land but within the 1858 boundaries?

A I think they have, yes.

Q And has the state court done that on a regular basis?

A Yeah, I would say so.

Q Do you know of any case in which a federal court has taken jurisdiction of a serious crime committed by a tribal

member not on trust land but within the 1858 boundaries?

A I don't recall. I don't –

Q Do you know if the tribe has done game and fish enforcement on nontrust lands within the 1858 boundaries?

[p. 319]

A I don't know. I don't – I don't think so, no.

Q You don't think it has undertaken any –

A Right.

Q – game and fish enforcement. Do you know whether non-Indian – non-Indians or nonmembers are now forced into tribal courts under any circumstances?

MR. ZEPHIER: Objection, Your Honor, on relevance.

THE COURT: Overruled, but the question is compound. Why don't you rephrase it.

MR. GUHIN: Yes, Your Honor.

BY MR. GUHIN:

Q Do you know whether non-Indians are now forced into tribal courts against their will?

A No, I don't know of any.

Q Are they forced – do you know – are non-Indians forced into tribal courts against their will now?

A No, they're not being forced at all.

Q Okay. And is the same true of – well, is the same true of nonmember Indians?

A Once again, I don't know. I don't know.

Q Is it true that the tribe has not sought general civil and criminal jurisdiction to date over non-Indians.

MR. ZEPHIER: Same objection, Your Honor.

THE COURT: Overruled.

A I don't think it has, not that I can remember.

[p. 320]

BY MR. GUHIN:

Q Would you agree that it would make a lot of difference if the 1858 boundaries were found to be intact in this litigation?

A Would it make a lot of difference, is that what you're –

Q Yes.

A I think it would, yes.

MR. ZEPHIER: Objection, Your Honor. That's a vague question and calling for a conclusion, and I believe it would be terribly misleading.

THE COURT: Overruled.

BY MR. GUHIN:

Q Assuming the tribe is successful in this litigation, does it intend to regulate drinking water and public water supplies of all Indian and non-Indians within the 1858 boundaries?

MR. ZEPHIER: Objection. Speculation.

THE COURT: Overruled.

A I think that, let's see, as it pertains to tribal members, yes. As it pertains to non-Indians, I wouldn't know. That's up to the tribe.

BY MR. GUHIN:

Q You speak for the tribe, don't you, Mr. Chairman?

A When I have the authority to, yes.

Q Do you recall a deposition taken on January 26th, 1995?

A Yeah.

Q And were you under oath at that deposition?

[p. 321]

A Yes, I was.

Q And do you recall a question as follows: "Q." – this is a question I asked you. This is on Page 44, Line 19, if you'd like to look at your deposition.

MR. ZEPHIER: I'll object, Your Honor. Does this witness have a transcript?

MR. GUHIN: Yes, he does.

A No, that's not the one.

MR. GUHIN: Oh, he doesn't. I'm sorry. Your Honor, if I may go get the deposition?

THE COURT: Certainly.

BY MR. GUHIN:

Q There you go. Sorry. Again, I'd like to refer you to Page 44, and you'll notice the pages are snug on that version of the transcript. Page 44 at Line 19 is where I'd like to start to make the inquiry.

A My response is still yes as its [sic] pertains to Indians, and once again, as far as the non-Indians, if I was to say, and which – if I was to say pertaining to non-Indians, I don't think I would – I have that authority from general council to.

Q Do you recall this testimony starting at Line 19: "Q. We talked about several environmental programs. Assuming the tribe is successful in this litigation, does it intend to regulate drinking water and public water supplies of all Indians and non-Indians within the 1858 boundaries? A. At

[p. 322]

some point, yes." Was that your testimony?

A Yes.

Q Are you now changing that testimony?

A Not changing it in the sense that I needed to clarify, which I didn't at this time here, that it would be regulate – regulating drinking and – and drinking water, public water, as it pertains to Indians, the tribe – the tribal members.

Q So – so you are changing your testimony that – and you do not – and the tribe does not intend to regulate non-Indians, is that –

A I can't – I can't say. I can't testify to that until – the general council can only make that decision.

Q Does the tribe intend to – and that is a change in your testimony, isn't it, Mr. Chairman?

A Yes.

Q Does the tribe intend to regulate all solid waste of Indians and non-Indians within the 1858 boundaries, assuming it's successful in this litigation?

A My response is the same thing to that one.

THE COURT: Well, what is that response? I don't know.

A That it – we would regulate those areas as it pertains to the tribal members.

BY MR. GUHIN:

Q Do you recall your testimony starting on Page 44, Line 25:

[p. 323]

"Q. And does it intend to regulate all solid waste of Indians and non-Indians within the 1858 boundaries? A." Your answer: "Yes."

A Yes. That's right.

Q Did you give that testimony? Are you now changing that testimony?

A I'm trying to clarify my responses to those questions. Obviously, I didn't clarify it at this time here. I just gave a yes or no answer.

A [sic] And it, once again, it would – the tribe would seek to regulate these areas as it pertains to tribal members?

A Yes.

Q How about your intention as tribal chairman, do you as tribal chairman intend to seek authority for the tribe to regulate –

MR. ZEPHIER: Objection. Irrelevant, Your Honor.

BY MR. GUHIN:

Q – all solid wate [sic] of Indians and non-Indians within the 1858 boundaries?

THE COURT: Overruled. Go ahead.

A My opinions as chairman are not really binding unless – until general council, the tribe as a whole –

Q That's not my question, Mr. Chairman.

A Okay.

Q My question, Mr. Chairman, is whether you intend to seek

[p. 324]

it. We all know that presidents and chairmen seek things that they don't get. What's your intention as tribal chairman, what are you telling the Court today? Do you as tribal chairman intend to seek regulation of all solid waste of Indians and non-Indians within the 1858 boundaries?

A Only over the part that pertains to Indians, yes.

Q Okay. Are you telling me as tribal chairman you do not intend to seek regulation of solid waste of non-Indians within the 1858 boundaries?

A Over non-Indians, I couldn't say right now. Me personally, probably not. That –

Q And does the tribe intend to seek regulation of pesticides, discharges in the surface water, air quality, mining and hazardous waste?

MR. ZEPHIER: Objection. Compound, complex, and speculative, Your Honor.

THE COURT: Overruled, unless it was asked some other way in the testimony that you're looking at from the deposition.

MR. GUHIN: It was asked exactly that way, Your Honor.

THE COURT: I assumed so. So I'll overrule it so we can get on with it.

BY MR. GUHIN:

Q The precise question asked before, and I'll just be frank,

[p. 325]

and the same thing with regard to pesticides, discharges into the surface water, air quality, mining, and hazardous waste?

A My response is the same way as it applies to the Indians.

Q Okay. And so what you're telling us is you're changing your testimony with regard to non-Indians, but with

regard to non-Indians you don't know, and with regard to Indians your testimony would stand as put out in the deposition?

A Correct.

Q Why – why are you changing your testimony, Mr. Drapeau?

A Well, see, at the time when I made these comments, I was speaking primarily for myself, what I, Darrell Drapeau, would probably like to do, and I wasn't really at the time speaking on behalf of the tribe.

Q Well, Mr. Chairman, didn't you just tell us that you as Darrell Drapeau, tribal chairman, didn't know whether you would seek jurisdiction over non-Indians with regard to solid waste and these other matters, solid waste and underground storage, and now you're telling us at the deposition you were speaking as Darrell Drapeau. Which is it?

A See, at the time of this, of this deposition, I made the comments I did, but since then I am able to – I was able to – I acknowledged the fact that only general council can authorize some of the things that I said I would like to do.

Q Well, that doesn't answer my question. In your previous testimony just a few – just a few minutes ago you said, when I

[p. 326]

testified at the deposition, I was talking for myself, apparently, as tribal chairman, and now you're denying

that what you said as tribal chairman is what you said as tribal chairman.

MR. ZEPHIER: Objection. Asked and answered, Your Honor.

THE COURT: Overruled. Go ahead.

A Yes. At that time, I – I was – I said I was speaking at – as tribal chairman, which I am. Yet, even that – even though I'm tribal chairman, I still don't have that authority to speak on behalf or say what the tribe would or would not do unless I had a general council resolution authorizing me to – to do or not do something. And on these, quote, questions here there has never been a general council resolution passed authorizing me to say this. So that's why I'm saying that I was speaking for my own personal point and not from a – a – a tribal point.

BY MR. GUHIN:

Q Well, let's talk about solid waste. Is there a solid waste ordinance of the tribe, Mr. Chairman?

A Yes, there is.

Q And does that solid waste ordinance of the tribe purport to control the activities of non-Indians within the 1858 boundaries?

A I don't know if it pertains to non-Indians. I do know it's

[p. 327, ll. 1-17]

within the 1858 boundaries.

Q Well, let me ask you, Mr. Chairman, does that solid waste ordinance purport to affect the landfill at issue in this case?

A I don't –

Q Does the solid waste ordinance apply to the landfill that we've been talking about here today?

A I don't know.

Q You don't know?

A No, I don't.

Q So you don't know whether the tribe has an ordinance which is – which is relevant to or involved with the landfill that's at issue in this litigation, is that what you're telling us?

MR. ZEPHIER: Objection. Asked and answered.

THE COURT: Overruled.

A What I'm saying is that our ordinance, I do not know if it's, you know, if they're applying it to this specific landfill that we're talking about.

* * *

[p. 328, ll. 8-25]

* * *

BY MR. GUHIN:

Q Does the – is the tribe contending or are you as tribal chairman contending that the people that want to build the landfill on Mr. McBride's property are – will be in violation of some tribal ordinance?

A They'd be in violation of a tribal general council resolution.

Q So they would be in charge – are these people Indians or non-Indians who want to build this landfill?

A Non-Indians.

Q So is the tribe attempting to regulate non-Indians in the handling of solid waste within the 1858 boundaries as we stand here today?

A Based on the wording of that resolution, I think that's – it's possible to say that it is trying to regulate, yeah.

Q And so when I asked you the question, does the tribe intend to regulate all solid waste of Indians and non-Indians within the 1858 boundaries, what is your answer?

[p. 329, ll. 1-8, 13-25]

A My answer is that we're trying to regulate within the 1858 boundaries as it applies to Indians.

Q But not as to non-Indians?

A I can't say.

Q That's why – are non-Indians exempt from the – from the tribal ordinance regarding – regarding landfills within the 1858 boundaries?

A Yes. I think so, yeah.

* * *

BY MR. GUHIN:

Q Mr. Drapeau, has the tribe submitted an application to the EPA for solid waste enforcement within the 1858 boundaries?

A Yes, it has.

Q And is that limited to tribal or Native American solid waste facilities?

A I think it is, yes.

Q Can you tell me whether the – is it your intention following this litigation that the tribe will prosecute non-Indians for criminal violations on nontrust land in tribal court?

MR. ZEPHIER: Same objection on relevance, Your Honor. Speculation.

[p. 330]

THE COURT: Overruled.

A I can't say for certainty if we would or not.

BY MR. GUHIN:

Q Mr. Drapeau, referring to your deposition at Page 49, Line 15 – Page – Page 49, Line 8, do you recall this exchange: "Q. Is it your understanding that if you are successful in this litigation, a crime by a non-Indian against an Indian which is now heard in state court would go to federal court? A. No, it would go to tribal court. Q. The crime of a non-Indian? A. Right. Q. Does the tribe expect to prosecute non-Indians in its tribal court? A. Yes, we will. Q. You would? A. Yes." Do you recall that testimony?

A Yes.

Q And does that reflect what your present understanding of what the tribe's intentions are?

A The – the present intention, once again, is – is left up to general council of the tribe.

Q And so you're changing your testimony with regard to Page 49, Lines 8 through 16 at the deposition, is that right?

A I'm trying to clarify them, yes.

Q It's more than a clarification, isn't it, Mr. Chairman, it's a change?

A Right. Right.

Q And is it your intention that the United States would

[p. 331]

prosecute federal crimes of non-Indians against an Indian if the tribe is successful, major crimes?

A For major crimes?

Q Yes.

A That would be a federal court.

Q Have you discussed that matter with the United States Attorney?

A No, I haven't. No.

Q Do you know where the United States Attorney is in this litigation?

A No, I don't. No.

Q Do you intend the tribe take jurisdiction of tribal members driving on nontrust lands within the 1858 boundaries if successful in this litigation?

A Did you say tribal members or –

Q Yes.

A Yes. Yes.

Q Is it your intention that the state not have jurisdiction of tribal members driving on lands which are not trust lands but within the 1858 boundaries if the tribe is successful?

A Yes.

Q Do Indians within the 1858 boundaries on nontrust land presently pay a state sales tax?

A I think they do, yes.

Q Is it your intention that after the litigation that the

[p. 332]

Indians would not pay that sales tax?

A Once again, what I want may not be what the tribe says, so it's –

Q Is it the intention of the tribe that after this litigation that the Indians would not pay the sales tax?

A I couldn't say. So –

Q Mr. Drapeau, referring to Page 51 of your Deposition, Line 12: "Q. You don't know. How about taxation, is the tribe going to claim that tribal members can't be, aren't subject to sales tax on nontrust lands within the 1858 boundaries if it's successful? A. I think that's been our position all along, yeah. Q. And at present, though, when you go into a store in Lake Andes you pay a sales tax,

don't you? A. Right. Right. Q. You do pay a sales – state sales tax? A. Right"

And so you testified before that it's been your position all along – it's been our position all along that the – that the tribal members should not pay the sales tax?

A Yeah, on that one I can answer in the affirmative, yes, based upon my discussion with other tribal members who are opposed to paying sales taxes, yet they go ahead and pay them.

Q Okay. You've – you've said that you've discussed that with other tribal members. Is there a general council meeting and general council resolution on which you can base your opinion?

A Not within my – you know, since I've been in office, I

[p. 333]

haven't seen any, but once again, it's based on discussions with tribal members.

Q Okay. So when you told us earlier that the only way that the tribe could have a position is through the general council meeting, that's not true, is it?

A What's that?

Q When you told us earlier that the only way that the tribe had a position, the only way you were willing to say the tribe had a position is after there had been a resolution of the tribal council, the tribal – yeah, the tribal council, that's not true, is it?? [sic]

A That is true. That – because that general council resolution is the official statement of the – of the tribe.

Q But there is no official position with regard to the state sales tax, is that right?

A On this one, not that I can recall. I'm certain that they would pass one, though, if they wanted to.

Q But they haven't?

A Not that I know of, no.

Q Is it appropriate to say that assuming the tribe is successful in this litigation it is going to claim general civil and criminal jurisdiction over non-Indians within the 1858 boundaries?

A Probably civil jurisdiction. The criminal, I really don't know.

[p. 334]

Q So the – so the tribe probably will claim general civil jurisdiction over non-Indians within the 1858 boundaries if this is successful?

A In the areas where it could, yes.

Q What do you mean "in the areas where it could"?

A Meaning that something coming from general council.

Q Do you recall your testimony on January 26th, Page 55 of your deposition, Line 7, the question: "Would it be appropriate to say that assuming the tribe is successful, it's going to claim general civil and criminal – general civil jurisdiction over the non-Indians within the 1858 boundaries? A. Right. Q. And criminal jurisdiction except that it goes to federal court? A. Right. Q. That being over

nonmembers again and within the entire 1858 boundaries? A. Right"

Were those your answers?

A Those were my answers, yes.

Q And are you changing your testimony?

A As it applies to suing tribal members.

Q Has the tribe made any – have you made any estimate of how many additional – of the additional costs it would take to cover all the environmental regulations, law enforcement, civil and criminal jurisdiction and all the other responsibilities that the tribe may undertake if it's successful?

A I personally haven't made a – a – an estimation of that, no.

[p. 335]

Q Well, as tribal chairman, do you know whether the tribe has made any such estimate?

A There's been one – one estimate from the EPA in – in regards to the cost of, you know, of recycling program, that type of thing.

Q So for one part of one environmental program there has been one estimate made?

A Yeah, yeah. that's –

Q And with regard to the other matters we've been talking about, underground storage tanks, pesticides, discharges into surface water, air quality, civil jurisdiction and criminal jurisdiction and so on, there is no estimate at all, is that right?

MR. ZEPHIER: Same objection under relevance, Your Honor, to the whole line of questioning here.

THE COURT: Overruled.

A There's been an estimate, and that estimate was given as part of a – as I remember, it was a – progress report, and at that point I was informed by our tribal EPA person that there was a 600,000 dollar figure is what was – was told to me.

Q An EPA – excuse me, an EPA figure – an EPA person told you that?

A A tribal EPA person.

Q A tribal EPA person?

[p. 336, ll. 1-23]

A Yeah.

Q And what was the tribal EPA person estimating?

A What it would cost to do like a recycling program and –

Q Okay. And with regard to those other programs we just talked about, there has been no estimate, is that right?

A No, not that – no.

Q Do you know how many police officers the tribe now has?

A We've got roughly four or five.

Q And do you know how many police officers the tribe would need if it got the jurisdiction it is seeking here?

MR. ZEPHIER: Same objection.

THE COURT: Overruled.

A Probably not much more than what we have now. I know that in the past we discussed, you know, figures and numbers of what we thought the number of police officers would be needed to provide adequate law enforcement protection, and I think at one time the tribe even talked about having two officers in each community.

Q Is that two per shift?

A Yeah.

Q And that comes to about 30 people total, doesn't it?

A Yeah. I think – I think that's what we talked – we discussed, yeah.

* * *

[p. 339, ll. 16-25]

* * *

Q Has the – has the casino erected signs telling people where the casino is so they can get to it?

A Yes.

Q And the tribe wants people to know where the casino is, doesn't it?

A That's right.

Q Does the tribe have any signs on any highways to show that a non-Indian is entering the boundaries of a reservation?

A There's none.

Q We've had some discussion about the term "reservation."

[p. 340, ll. 1-5, 10-22]

What meaning does the term "reservation" have to you?

A Reservation, it's a homeland.

Q And the Yankton area is your homeland whether there are legal boundaries there or not, is that right?

A Yeah.

* * *

BY MR. ZEPHIER:

Q Mr. Drapeau, you are not a legal expert, are you?

A No.

Q You don't have any special training in interpretation of any legal ordinance as such, do you?

A No.

Q Much of what you've said today or at the deposition which Mr. Guhin – Guhin has referred to were actually statements made on your own behalf, is that correct?

A That's right.

Q Regarding the solid waste land ordinance that was referred to by Mr. Guhin, have you actually read that ordinance, sir?

A I've – not thoroughly, no. No.

* * *

[p. 344, ll. 24-25]

* * *

Q And you understand your tribal solid waste ordinance not to affect non-Indians, is that right?

[p. 345, l. 1]

A I don't believe it does, no.

* * *

Titus Marks Trial Testimony

[p. 347, ll. 19, 23-25]

* * *

BY MR. ABOUREZK:

* * *

A My name is Titus Marks, and I live in Aberdeen, South Dakota. . . .

Q And where do you work, Titus?

[p. 348, ll. 1-8, 22-24]

A I work for the Bureau of Indian Affairs, Aberdeen Area Office.

Q What is your responsibility there?

A I am known as a realty specialist, and it is part of my duties to provide real estate management duties whether it be tenure management, acquisition, disposal or anything associated with the right-of-way for the Indian tribes under the Aberdeen Area Office.

* * *

Q How long have you worked as a real estate specialist with the BIA?

A About 18 years, approximately.

* * *

[p. 349, ll. 2-11]

* * *

Q What tribes do you have responsibility for at the Aberdeen Area Office?

A There's about 15 tribes, but those that I am responsible for, Yankton Sioux Tribe would be one of them.

Q So, in – in your capacity as realty officer, you deal with real estate on the Yankton Sioux Reservation?

A Yes, I do.

Q Okay. Are you aware of the current boundaries of the Yankton Sioux Reservation?

A Yes, I am.

* * *

[p. 355, ll. 17-25]

* * *

Q Now, are you aware of the – how did you become aware of the boundaries of the Yankton Sioux Reservation?

A It's part of my duties as a realty specialist to know the boundaries of a particular reservation that I serve.

Q And what duties require you to know the boundaries?

A We will take land into trust, "we" meaning the Bureau of Indian Affairs and United States, for that tribe, and there are certain regulations that are applicable to a reservation that will either permit us or not permit us to take land into trust

[p. 356, ll. 1-8, 25]

for that particular reservation.

Q So because of that you have to know which – what is outside of the boundaries and what's inside?

A Yes. We have to know where the exterior boundaries of that reservation is at.

Q Does the Bureau of Indian Affairs then consider the 1858 boundaries to still be intact today?

A We still recognize it as being intact, yeah.

* * *

Q Okay. Is it the position of the Aberdeen Area Office of

[p. 357, ll. 1-2, 8-16, 22-25]

the Bureau of Indian Affairs that the boundaries of the Yankton Sioux Reservation exist today as they did after 1858?

* * *

You can answer that, Titus.

A Yes, we do.

Q Now, let me ask you one other question. If the Washington office of the Bureau of Indian Affairs had a different opinion about the boundaries, would they allow your office to say what these boundaries are?

A No, they wouldn't.

Q They wouldn't let you disagree with them, would they?

A No, they wouldn't.

* * *

Q When you worked for the Yankton Sioux Tribe before your entering into the BIA, did you become familiar with the boundaries of – the 1858 boundaries of the Yankton Sioux Reservation?

[p. 358, ll. 1-12, 17-25]

A Yes, I did.

Q And how so? What was – under what conditions?

A Like I said before, I worked with the employment assistance program, and it was the tribe's policy at that time that the tribal members residing within their exterior boundaries of that reservation would get prior service, and if something was left over, then those that lived outside the boundaries what was designed as a service area within be serviced.

Q And, Mr. Marks, if congress told you through legislation that these were not the boundaries of the Yankton Sioux Reservation, would you still be treating them as boundaries?

A No, we wouldn't.

* * *

Q Mr. Marks, good afternoon. Is it accurate to say that your views reflect only the views of the realty office of the Aberdeen BIA?

A Only the realty office?

Q Yes.

A To some extent, yes.

Q Can you answer that with a yes or no?

A Yes.

Q It is accurate to say that your views here today reflect

[p. 359]

only the views of the realty office of the Aberdeen BIA, is that correct?

A The Aberdeen BIA?

Q Yes.

A Yes.

Q And you don't know anything about how the BIA treats its Yankton area otherwise, do you?

A In what way?

Q Beyond the realty, do you know anything?

A You mean do I have any other expertise in other areas of the Bureau of Indian Affairs, is that the question?

Q That's right.

A I have no expertise in other areas.

Q And when you – when you said that it's the view of the realty office that the Yankton Reservation was not disestablished in 19 – or by the act of 1894, what did you base that on?

A When –

Q What did you base that on?

A Could you repeat the question.

Q Sure. When you – when you indicated that the – that the Yankton Reservation still exists as it did in 1858, what did you base that on?

A We haven't seen anything to the contrary.

Q You haven't seen anything to the contrary?

[p. 360, ll. 1-12]

A Right.

Q Are you familiar with the case of Perrin versus United States?

A What is the case?

Q Perrin versus United States.

A No, I'm not.

Q Are you familiar with the cases of State v. Williamson or State v. Thompson?

A No, sir.

Q Are you familiar with any case law on the subject of the diminishment or disestablishment of the Yankton Reservation?

A No.

* * *

[p. 365, l. 22]

* * *

BY MR. GUHIN:

* * *

[p. 367, ll. 19-24]

* * *

Q Did you rely upon anything else – did you rely upon anything else to determine that the Yankton Reservation has not been disestablished?

A I have reviewed a couple of field solicitor's – and we have been assured by our Washington office that the Yankton Sioux Reservation has not been disestablished.

* * *

Ken Kredit Trial Testimony

[p. 581, ll. 11-25]

* * *

Q You indicated that the Yankton Sioux Tribe had a representative at the first organizational meeting of the Southern Missouri District. How long, if you can tell, from your records, did the Yankton Sioux Tribe have an individual present at Southern Missouri Association meetings?

A Yes. We had a representative from the Yankton Sioux Tribe at our meetings until May of 1993. So about 15 months, they were very active members.

Q Okay. And was the person that was there on behalf the Yankton Sioux Tribe up until May of 1993 allowed to vote in association meetings?

A Yes.

Q And during this time, did the association vote on selecting the Ken McBride site as the site for this proposed landfill?

A Yes.

[p. 582, ll. 1-7]

Q And do your records indicate that the person from the Yankton Sioux Tribe voted in favor of this particular site?

A Our minutes record either unanimous vote or there was nobody abstaining.

Q And at the time that that particular vote was taken, was there a representative of the Yankton Sioux Tribe there?

A Yes.

* * *

[p. 584, ll. 13-18]

* * *

Q If you know, Mr. Kredit, do you have a figure as to approximately how much money the Southern Missouri District has spent to date in building this proposed facility in round numbers?

A Round numbers, I think we have spent approximately 250,000 to 300,000 dollars.

• • •

[p. 589, ll. 11-25]

• • •

Q You were aware at some point, weren't you, that the tribe was opposed to the Ken McBride site?

A In my minutes, May of 1993, when Paula Butler was still a delegate from the Yankton Sioux Tribe, we did not know about it.

Q You did not know they were opposed to it?

A At that time we never –

Q At some point you became aware of it?

A At that time, yes, at that particular meeting.

Q In May of 1993?

A Yes.

Q When you said somebody was there from the tribe voting for the McBride site, do you know who that was?

A Paula Butler.

Q And you – was that vote recorded or was it a voice vote

[p. 590, ll. 1-19]

or –

A Voice.

Q Voice vote?

A Yes.

Q You don't know how she voted then?

A No, I don't.

Q You don't know if she kept her hand down?

A No, I don't.

Q Do you know if she had a resolution from the tribe authorizing her to either vote or not vote?

A No, I don't.

Q Do you know if she had a resolution from the tribe to attend the meetings?

A No, I don't.

Q How did you know she was a representative of the tribe then?

A For one thing, she said so.

Q She only told you?

A She told us.

• • •

Jack Soulek Trial Testimony

[p. 645, ll. 8-25]

• • •

Q Okay. Do you know how many acres of trust – trust land there are within Charles Mix County?

A I think there are probably – approximately 40,000 acres of trust land.

Q Does Charles Mix County have a zoning ordinance?

A Yes. It was just put into effect.

Q Okay. And can you tell us what land the Charles Mix zoning ordinance covers?

A Only state land.

Q You mean only – are you speaking in relation to Indian, non-Indian land?

A We have no jurisdiction over tribal trust lands.

Q Okay. Does the Charles Mix zoning ordinance, is that enforceable and enforced against non-Indian land within Charles Mix County?

A Yes.

Q Is it – is the Charles Mix zoning ordinance enforced against trust land in Charles Mix County?

[p. 646]

A No.

Q In your capacity as county commissioner, do you know whether or not the county and city officers enforce state criminal law on non-trust land?

A Yes.

Q And is that within the 1858 boundaries?

A Yes.

Q And do they enforce that state criminal law against both tribal members and non-tribal members on non-trust land?

A Yes.

Q And so that would be true, for example, with a stop of a DWI – excuse me. Driving while intoxicated suspect who is a tribal member and on non-trust land, where would that person be prosecuted?

A In state court in Lake Andes.

Q Okay. Do you know whether the tribe enforces any of – do you know whether the tribe enforces its criminal ordinance against tribal members on non-trust land within the 1858 boundaries? Would you like me to repeat that?

A Yes, uh-huh.

Q Do you know whether the tribe enforces its criminal ordinances on non-trust land?

A No.

Q It does not?

A No. Not on non-trust land.

[p. 647]

Q Is that the kind of thing that if the tribe were doing that, were taking that action, would you find out about it as a county commissioner?

A Immediately.

Q With regard to game and fish regulations, do you know whether the state enforces its regulations on tribal members within non-trust lands?

A On non-trust lands? Yes, uh-huh.

Q Does it?

A Yes, it does.

Q Do you know whether the tribe has ever attempted to enforce its game and fish regulations off of trust land within the former boundaries?

A No.

Q It hasn't?

A No, not – on state land, no.

Q Do you know – can you tell me who provides fire protection in the county?

A There are districts.

Q Special governmental districts?

A Yes.

Q Okay. And fire districts?

A Fire district.

Q Do you know how many districts there are within Charles Mix County?

[p. 648]

A I think there is five districts in Charles Mix County.

Q And do those districts provide fire protection to trust land and non-trust land?

A Yes. Yes, they do.

Q Do you know whether any of the fire districts have made any special provisions with regard to the tribal casino?

A Talking to the fire district, they have went on to inspect the casino of where the outlets are, exits, what is in there in case a fire broke out to – to – to go up there and help fight that fire.

Q Do you know how many uniformed county law enforcement officers there are?

A County?

Q Yes. Uniform county law enforcement officers.

A We have a sheriff and three deputies.

Q Do you know how many uniformed officers there are at Lake Andes, for the City of Lake Andes?

A Two.

Q And Platte?

A I believe it's two in Platte.

Q And at Wagner?

A Three, if not four.

Q And do you know how many – how many officers of the highway patrol are stationed within or operate within Charles Mix County?

[p. 649, ll. 1-9]

A I believe two.

Q And if the county needs assistance, can it get assistance from neighboring counties?

A Yes.

Q County law enforcement?

A Yes, uh-huh.

Q And do your county officers provide assistance to BIA officers on request?

A Yes, on request.

* * *

[p. 652, ll. 15-24]

* * *

Q How would your [sic] characterize the relationship of the tribe and county prior to this litigation?

A My feelings with the tribe have been a close relationship. We have to work together.

Q And has the county attempted to enter into a cross deputization agreement with the tribe in the past?

A It was talked about, yes.

Q Does the tribe – is it your understanding that the tribe wants or does not want such a –

A Did not want it at the time.

* * *

[p. 656, ll. 20-25]

* * *

Q Was Steve Cournoyer chairman of the tribe at the time?

A I – I just can't tell you for sure, Jim, if he was or not.

Q Okay. You said that one time you talked to Steve Cournoyer when he was chairman about site selection for the landfill. Now, tell me again what he said to you, Jack.

A He said that they did not want a landfill built on tribal

[p. 657, ll. 1-18, 24-25]

land – and I appreciated Steve being honest with me – of the tribal land that was owned at this – at that time.

Q You said that Paula Butler and Louis Archambeau had come to the water association meet – or the landfill association meetings. How many times did Louie come?

A Louie came – I recollect twice for sure that I knew Louie was there.

Q And he was a member of the tribal – the business and claims committee at the time?

A Yes. The council or –

Q Do you know whether or not Louie had any resolution from the tribe to represent the tribe there?

A I couldn't tell you at that time. I just took it – him being on the council and being there, I just took it that –

Q Did he tell you he was there representing the council – business and claims committee? Sorry.

A No, I don't believe he did, Jim. I can't remember, recall that.

* * *

Q Was the tribe a member of the association?

A When we started – could I explain a little bit on it?

[p. 658]

Q Please, yes.

A When we started, Ken Kredit brought it up that we – the city should pay five dollars per head.

Q Per person?

A Yes. To join the association.

Q Let me stop you there. Five dollars per person per population of the city?

A Yeah.

Q Okay. Go ahead.

A And they put their – cities put their money into it, and the tribe put in five dollars into our association. We –

Q Was that, Jack, a total of five dollars?

A At that time, yes.

Q That would have been Paula Butler's membership, right?

A No, the tribal membership because we made it clear that every entity had to put in five – money into this association.

Q When you say five dollars per person –

A Yes.

Q Now, how many members of the tribe were there at that time?

A How many members of the tribe that was on –

Q No. How many members or – were in the tribe at that time? What was the tribal membership, if you know?

A I couldn't tell you at that time.

Q Well, you have heard –

A Approximately around 22,000 – 2200, something like that.

[p. 659]

Q Darrell Drapeau says about 3,000. That would make it a membership of 15,000 for the tribe, is that right?

A Yes.

Q 15,000 dollars?

A Yes, if it's 3,000.

Q Did they give you 15,000 dollars?

A No, they didn't.

Q So the tribe was not then a member, was it?

A I felt they were.

Q Jack, if – sorry. You have more?

A I felt, Jim, that I was responsible for the people of Charles Mix County, and I wanted everyone to have a voice within this association. That was the way it was set up to be. And I wanted the tribe to join it and have a voice and a vote into this association.

Q Do you know anything about the governmental processes of the Yankton Sioux Tribe, Jack?

A Not that familiar with it, Jim, no.

Q Let me ask you specifically then, do you know who negotiates agreements with the tribe?

A Specifically who negotiates –

Q Yes.

A No.

Q Do you know who approves of agreements for the tribe?

A Okay. My understanding is the approval of it, the general

[p. 660, ll. 1-24]

council.

Q And do you know who the general council consists of?

A The people?

Q The adults in the tribe, right.

A Yes.

Q Do you know if there was a resolution from the general council approving membership in the Southern Missouri Waste Management Association?

A At that time I couldn't tell you.

Q You had never seen one?

A At that time I didn't know how their government worked. I thought that the council represented the people like commissioners. You represent people. That's how –

Q You know now it's different? You know now it's different?

A Yes.

Q But you never saw a resolution from the tribe of any sort, did you?

A No.

Q And yet – and they only paid 5 dollars instead of 15,000 dollars?

A Yes.

Q And yet you were assuming that they were members of the association?

A Yes.

* * *

[p. 682, ll. 1-22]

Q Mr. Soulek, is the town of Dante in southern Charles Mix County within the original 1858 boundaries of the Yankton Sioux Reservation?

A Yes.

Q And is the City of Wagner within the 1858 boundary lines of the original Yankton Sioux Reservation.

A Yes.

Q And is the township of Ravina within that same area?

A Yes.

Q And is the City of Lake Andes within that same area?

A Yes.

Q The City of Marty is within the same area?

A Yes.

Q The town of Marty. Okay. And how about the newest municipal in South Dakota, that being Pickstown?

A Yes.

Q And do all of those various towns and communities maintain their own city governments?

A Yes.

Q And do they maintain their own city infrastructure such as water and sewer and streets and all this and that?

A Yes.

* * *

[p. 692, ll. 3-20]

* * *

Q And you see new businesses springing up in Wagner?

A Yes.

Q For example, the Alco Discount Store?

A Yes.

Q Do you have any idea of any other businesses that are springing up in Wagner?

A I would – I won't say if there – I'm sure there is, Jim, because of the new motel. Like you said, Alco, gas station popped up there because of the five year tax exemption that we have in Charles Mix County.

Q Isn't there a new food shop and Amoco station in Pickstown?

A Yes, uh-huh.

Q And in your view, does that come from the presence of the casino as well?

A I'm sure it helps, yes, uh-huh.

Q So the tribe has been a good neighbor, haven't they?

A I can't – no, they have not been a bad neighbor, no. They are good neighbors.

* * *

David Raysor Trial Transcript

[p. 694, ll. 12-25]

* * *

Q Has the – has your division provided any grants or loans to entities within the former boundaries of the Yankton Sioux Reservation?

A Yes, we have.

Q And could you generally describe the projects and how much money was provided?

A In Lake Andes, we have provided Lake Andes with a 91,000 dollar EPA grant which we administered for the U.S. EPA, and a 30,000 dollar state grant for their waste water treatment facility. We have provided the City of Wagner 554,000 for their waste water treatment facility, again, a grant that we administered for the U.S. EPA. We have provided the City of Lake Andes 4,000 dollars to meet the requirements of the Resource Conservation Recovery Act, RCRA, for closure of their

[p. 695, ll. 1-12]

landfill.

We have provided the town of Ravina 30,000 dollars for their water system so they can meet the Safe Drinking Water Act. We have also provided money to Randall Rural Water System, 50,000 dollars for Randall for Safe Drinking Water Act, activities on their rural water system. And we have provided technical assistance grants to both the Charles Mix County Conservation District, I think we provided them two grants totally between 7 and 8 thousand dollars for non-point source activities related to activities in and around the Lake Andes watershed, and 22,000 dollars to the Randall RCWD for non-point source activities within that county.

* * *

Douglas Miller Trial Transcript

[p. 710, ll. 17-25]

* * *

Q Mr. Miller, are you familiar with the location of the former Yankton Sioux Reservation?

A Yes, I am.

Q And does the department regulate any storage tanks within that area?

A Yes, we do.

Q And by regulate, they are registered with you?

A Yes, they are.

Q And would you just generally describe how many tanks and

[p. 711, ll. 1-5]

what kind they are.

A There are roughly 70 registered underground storage tanks at I believe it's 28 facilities. And aboveground storage tanks, there is, if I recall correctly, ten facilities, with roughly 30 aboveground storage tanks.

* * *

[p. 712, ll. 16-23]

* * *

Q There is an error on that particular list, is there not, Mr. Miller?

A Yes, there is.

Q And would you describe that error, please.

A There is a spill report here for the community of Geddes, and Geddes is not within the area of question here.

Q So other than that error, are there any other errors?

A Not that I am aware of.

* * *

Brad Berven Trial Testimony

[p. 718, ll. 1-23]

Q Has the Department of Agriculture in these areas that you have discussed, pesticide, fertilizer, et cetera, have you regulated those type of activities within former boundaries of the Yankton Sioux Reservation?

A Yes.

Q And could you generally describe the type of regulation you are talking about, what you have done.

A Well, within the area in question, there's businesses that are involved in the types of activities that we regulate; grain elevators, feed manufacturing businesses, fertilizer distributorships, companies involved in the – in the application of pesticides, the distribution of pesticides. So those companies that are involved in those activities have been regulated by the programs that I administer.

Q You know that there are, for example, fertilizer licenses that you have issued in that area?

A Yes.

Q Has the department also been regulating pesticide use and handling in that area?

A Yes.

Q And have you take [sic] enforcement actions that you are aware of within the boundary of the former Yankton Sioux Reservation?

A Yes.

* * *

[p. 719, ll. 7-19]

* * *

Q Does the environmental – the federal Environmental Protection Agency have a companion set of statutes with regard to pesticides that the Department of Agriculture also has statutes concerning?

A Yes, they do.

Q And does the Department of Agriculture have enforcement authority from EPA over those areas?

A Yes. The Department of Agriculture has been granted primary enforcement responsibility for the federal requirements.

Q Did the Environmental Protection Agency exempt Indian country when it delegated you primary enforcement authority?

A No.

* * *

[p. 720]

Q Mr. Berven, you said the EPA did not exempt Indian country from when they granted you the right to regulate the matters that you regulate. Is that correct?

A Correct.

Q Then you can operate all through the Yankton Sioux Reservation without any problem, can't you?

A Correct. We have not distinguished the area from any other.

Q Do you know what the boundaries are of the Yankton Sioux Reservation?

A I am familiar with what is the – the disestablished – I don't know the proper terminology, but whatever the past boundary was.

Q Where are they located?

A Basic – in a real basic description, the southern portion of Charles Mix County.

Q Do you know where the northern boundary is?

A Not exactly, no.

Q Can you give me an idea within two miles of where it might be?

A No.

Q Five miles?

A No. The only thing that comes to mind would be the county line.

Q Well, there is no county line on the northern boundary, I

[p. 721, ll. 1-3]

might tell you. Is there a sign that tells you when you're within the boundaries of the Yankton Sioux Reservation?

A Not that I am aware of.

* * *

Ron Catlin Trial Testimony

[p. 723, ll. 19-22]

* * *

DIRECT EXAMINATION

BY MR. GUHIN:

Q Would you state your name, please.

A Ronald P. Catlin.

* * *

[p. 724, ll. 1-4]

Q And who is your present employer?

A South Dakota Department of Game, Fish and Parks.

Q How long have you worked for Game, Fish and Parks?

A Approximately 31 years.

* * *

[p. 727, ll. 16-25]

* * *

Q In your position, have you ever known the Yankton tribe to attempt to take jurisdiction over non-Indians on non-trust lands within the former boundaries with regard to game and fish matters?

A No.

Q In your position as the division staff specialist, have you every [sic] known the tribe to exercise jurisdiction over tribal members on non-trust land?

A Over tribal lands?

Q Tribal members on non-trust –

[p. 728]

A I don't have personal knowledge of that, no.

Q Does the State have any agreements with the Yankton Sioux Tribe regarding hunting and fishing?

A Yes, they do.

Q And what do they – what kinds of lands did the agreement – is there – how many agreements are there?

A It pertains to – the agreement pertains to trust lands of the Yankton Sioux Tribe.

Q Does it pertain to non-trust lands?

A No.

MR. GUHIN: I don't have any further questions.

THE COURT: Cross examine.

CROSS-EXAMINATION

BY MR. ABOUREZK:

Q Mr. Catlin, do you – are your responsibilities pretty much state-wide in South Dakota?

A Yes.

Q Do you – are you familiar with what your department does on the Pine Ridge Reservation?

A Yes.

Q Do you enforce your department's regulations on that reservation?

A On non-trust lands, yes.

Q And do you – I notice you said former Yankton Sioux Reservatior. boundaries. Do you use the same term with respect

[p. 729]

to Pine Ridge?

A No.

Q Why is that?

A Because we consider Pine Ridge an enclosed reservation.

Q But you still regulate your regulations – you regulate the area where it's non-precedent?

A That's right.

Q And the same is true with Yankton, isn't it?

A As far as the trust land itself, yes.

Q What been [sic] Cheyenne Eagle Butte?

A Yes, that is an enclosed reservation.

Q And you regulate on the non-trust land there?

A Yes.

Q And what about Crow Creek?

A Same situation.

Q Same thing. Fort Thompson? Same situation?

A Fort Thompson is Crow Creek.

Q Rosebud?

A Same situation.

Q Lower Brule?

A Lower Brule has a specific agreement that regulates that activity that is different than how we regulate the other enclosed reservations.

Q So really doesn't matter whether you think it's a former reservation or not, you still regulate on non-trust land on all

[p. 730, ll. 1, 6-25]

Indian reservations in South Dakota, am I correct?

* * *

Q You regulate – you regulate – your department's regulations, you enforce those on all Indian reservations on all non-trust land, is that right?

A We do. I'm not – that's kind of – if I can qualify that a little bit.

Q Please do.

A When you say we do it exactly the same, they are not exactly the same, but how we treat those, we treat – we do enforce the non-trust lands on all the areas for non-member activity.

Q Non-tribal member activity?

A Right.

Q Have you ever purchased a tribal hunting, fishing license from any reservation?

A Yes.

Q Which reservation?

A Lower Brule.

Q That means you respect their regulations up there, their own – their own regulations?

A We were going to be hunting on trust lands, and that's the

[p. 731, ll. 1, 17-21]

tribe, that happens to be under a special hunting agreement.

* * *

Q Now, turning your attention now to non-trust land within the former Yankton Reservation, does the State regulate tribal members on non-trust land within the former Yankton reservation?

A Yes, they do. We do.

[p. 733, ll. 11-25]

* * *

Q You – you do regulate tribal members on fee patent land in Yankton?

A Yes.

Q That's pursuant to the agreement you have?

A It's not directly, though. It's not addressed in that agreement.

Q It's not addressed at all?

A No, it wasn't addressed.

Q Has the Yankton Sioux Tribe objected to that particular jurisdiction?

A Not that I am aware of that I can recollect to.

Q Are you aware that there is a case in state court now where the state Game, Fish and Parks has arrested two tribal members for fishing – hunting, fishing violations?

A I'm aware that we have arrested tribal members. As far as

[p. 734, ll. 1-19]

what – where they were – and there have been some of those cases probably.

Q There is one currently now. Do you know about that case?

A I'm not sure which one that is, but I know there was – this was a fishing case?

Q Yes.

A I am aware that there – I don't know the names or the specifics of those particular cases.

Q And are you aware that the tribe is objecting to your jurisdiction in that respect?

A I wasn't aware of the status of those two cases right at the present time, no.

Q But do you know the nature of the case? Do you know the tribe is objecting to the jurisdiction?

A I do if you are telling me so. I haven't received that formal notice of the status of those cases.

Q I represent that to you.

A Okay.

Q You don't disagree with that?

* * *

[p. 735, ll. 4, 18-23]

* * *

BY THE COURT:

* * *

Q Are there any other reservations in the State of South Dakota where the Game, Fish and Parks is enforcing the South Dakota rules and regulations with regard to game and fish against tribal members on non-trust lands other than Yankton Reservation?

A Sisseton-Wahpeton would be a similar situation.

* * *

[p. 736, ll. 11-25]

* * *

Q Now, when you are talking about the Yankton Sioux Reservation in common parlance, you don't refer to it as the former Yankton Sioux Reservation; you just talk about the Yankton Reservation, don't you?

A No. I don't use the terminology Yankton Reservation.

Q What do you use?

A I use either the former reservation or I just talk about Charles Mix County, or occasionally the former.

Q How long has that been true?

A I really, Your Honor – I don't recall using maybe the Yankton Reservation, you know, for a lot of years. And I guess at some point formerly we may have been advised

by maybe a previous governor that in referring to this particular area, you know, it is the former –

Q Which governor was that?

[p. 737, ll. 1-19, 25]

A I believe it might have been Governor Janklow.

Q Last time he was governor, not this time?

A Last time. First time around.

THE COURT: My questions give rise to questions of anybody?

MR. ABOUREZK: Yes, Your Honor.

RECROSS EXAMINATION

BY MR. ABOUREZK:

Q Was there a directive issued by Governor Janklow with respect to using terminology on the Yankton Reservation?

A There may have been, as I recall, maybe a memo.

Q You have seen the memo?

A I did see the memo.

Q Do you recall the context of the memo or what it said?

A Not really. It was very brief. It just said in referring to this particular document, that it's the former.

Q He said you should use the terminology former Yankton Sioux Reservation?

A That's my recollection.

* * *

Q Mr. Catlin, are you aware that part of Gregory County is

[p. 738, ll. 1-17]

within a – used to be within a reservation?

A Yes.

Q And, for example, then do we treat the – used to be within the Rosebud Reservation, is that right?

A Yes.

Q And with regard to non-trust land within Gregory County, within the former boundaries of the Rosebud Reservation, does – is state law applied against tribal members?

A Yes. You are talking about – okay. Yes. Yes.

Q So you understand what I'm saying?

A Yes. On fee – on non-Indian land.

Q Yes. Former reservation boundaries on non-trust land, state game and fish law is applied against –

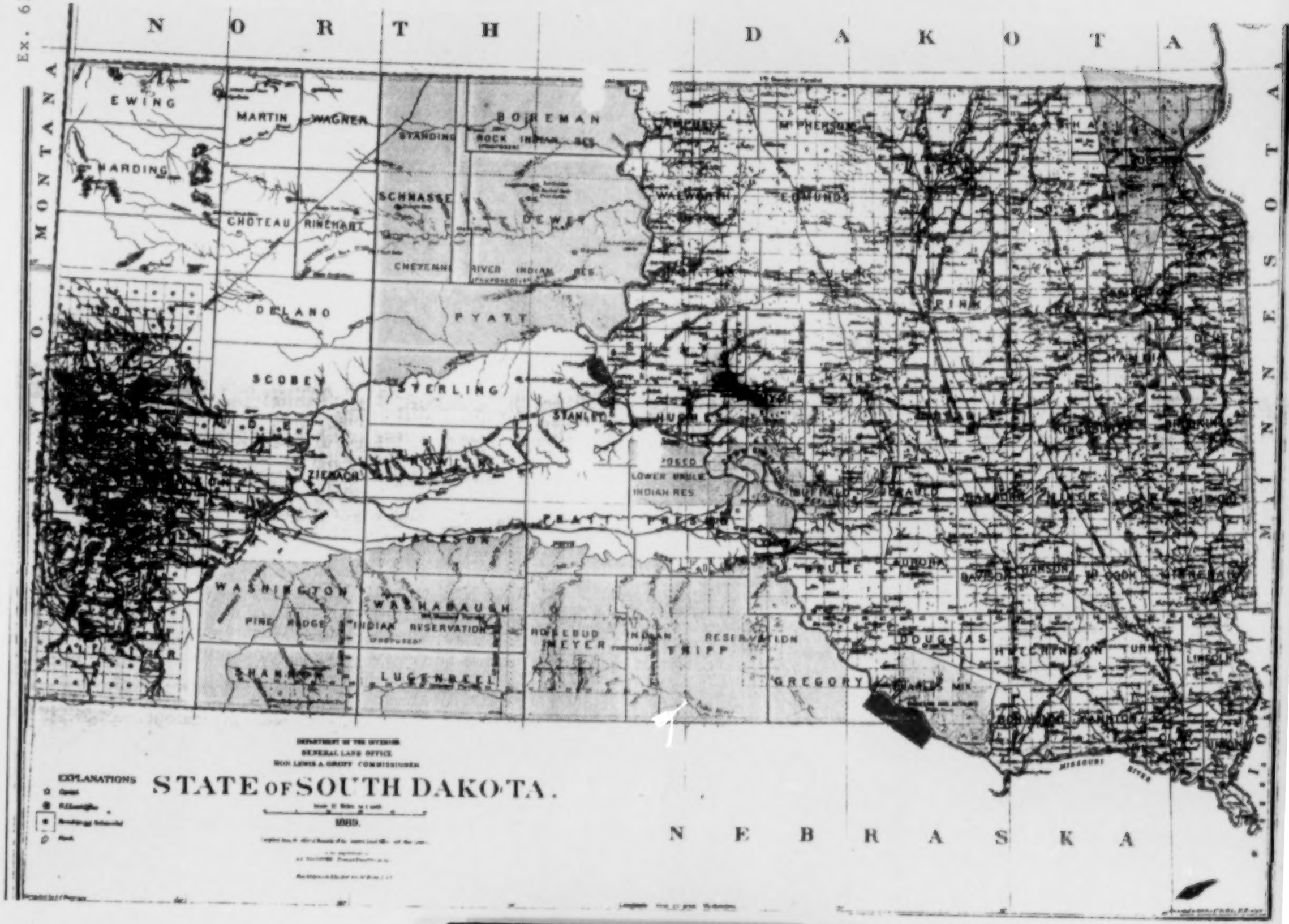
A Certainly.

Q – tribal members? And the same would be true with regard to Tripp County?

A Same is true there.

* * *

Ex. 615



BEST AVAILABLE COPY

Ex. 33



MAP

SHOWING

INDIAN RESERVATIONS

WITHIN THE LIMITS OF THE

UNITED STATES

COMPILED UNDER THE DIRECTION OF THE

Hon. T. J. MORGAN.

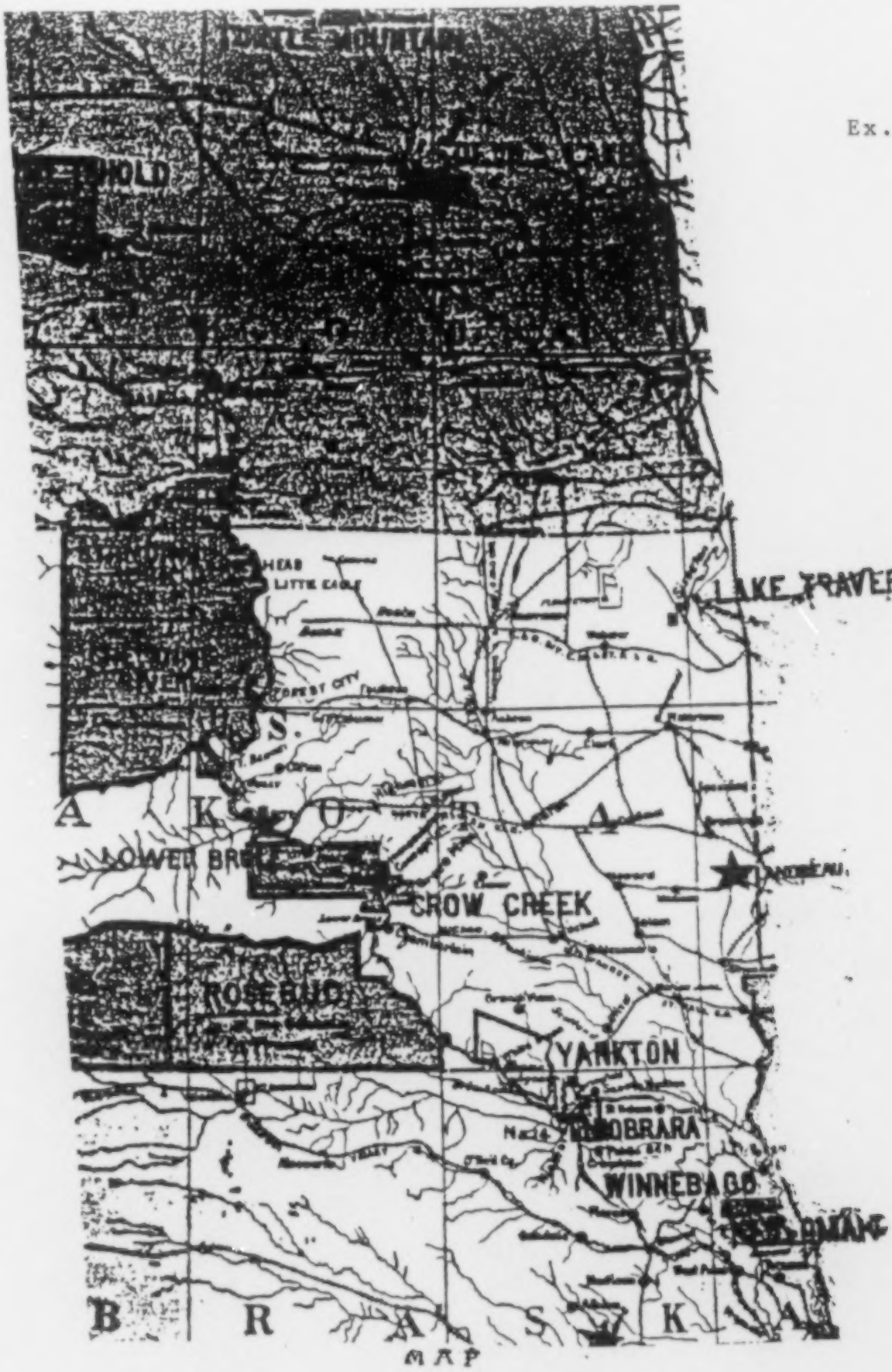
Commissioner of Indian Affairs

1889.

713

BEST AVAILABLE COPY

Ex. 35



MAP

SHOWING

INDIAN RESERVATIONS

WITHIN THE LIMITS OF THE

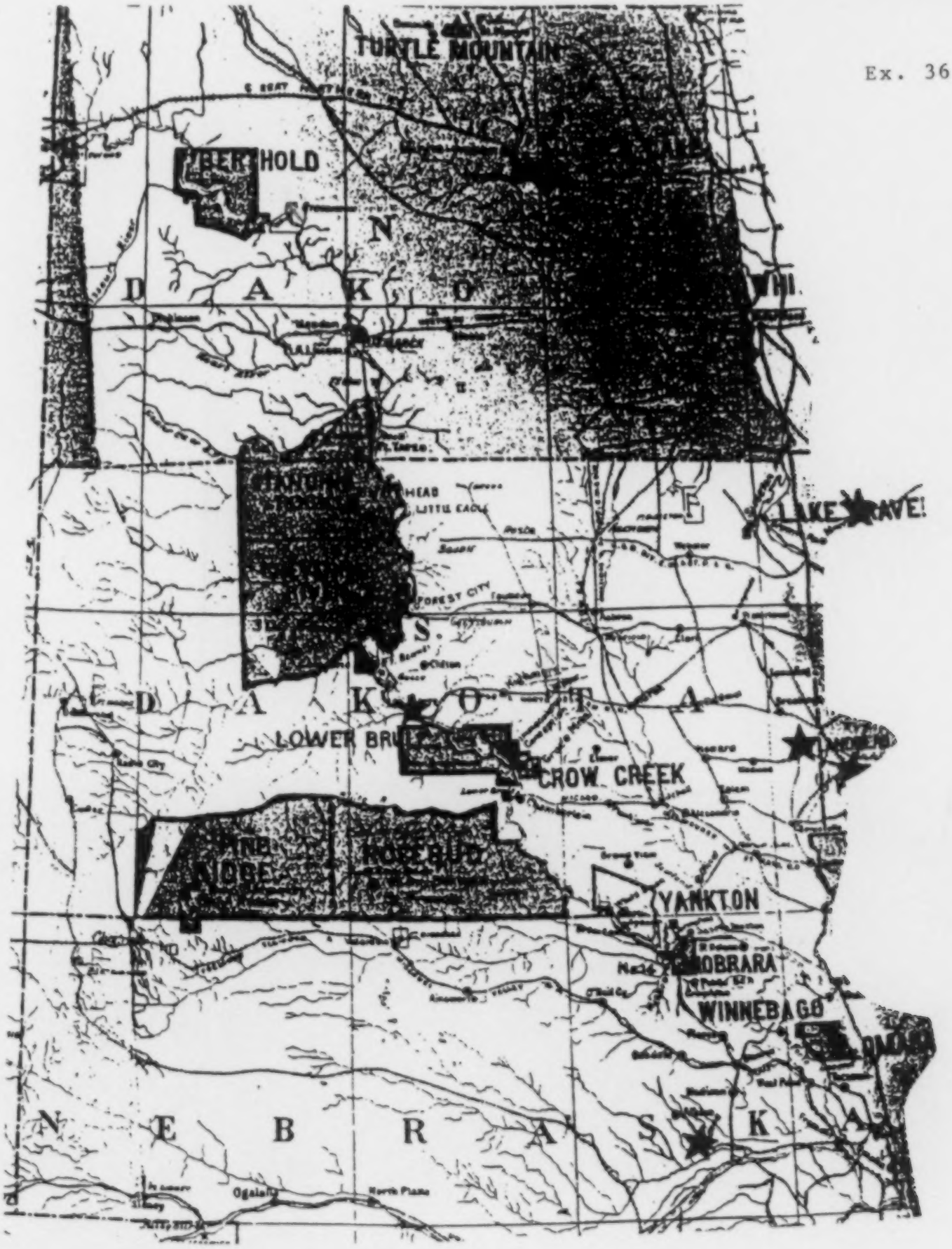
UNITED STATES

COMPILED UNDER THE DIRECTION OF THE

Hon. D. M. BROWNING.

Commissioner of Indian Affairs

1896



MAP

SHOWING

INDIAN RESERVATIONS

WITHIN THE LIMITS OF THE

UNITED STATES

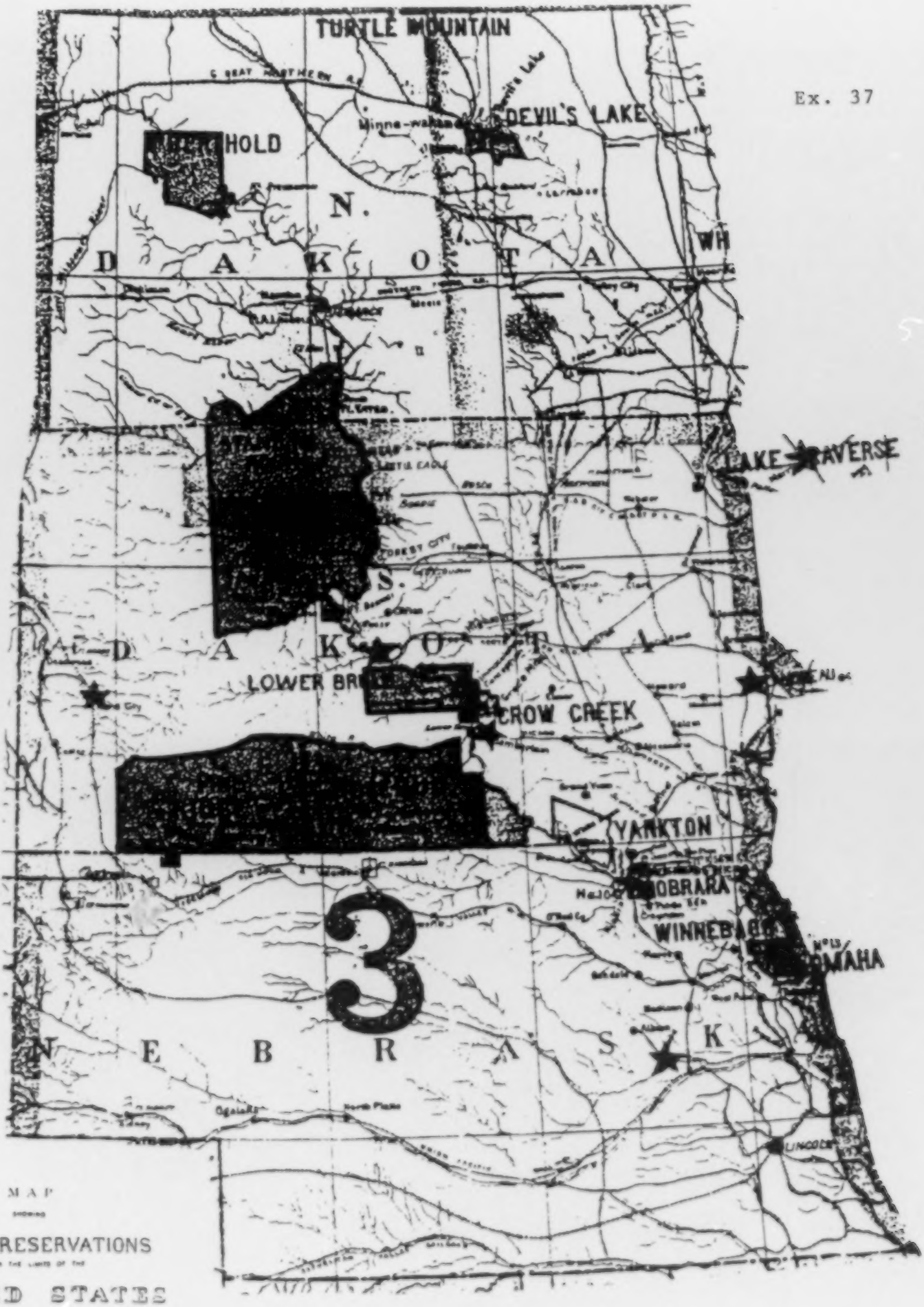
COMPILED UNDER THE DIRECTION OF THE

Hon. W. A. JONES

Commissioner of Indian Affairs

1897

Ex. 37



MAP

SHOWING

INDIAN RESERVATIONS

WITHIN THE LIMITS OF THE

UNITED STATES

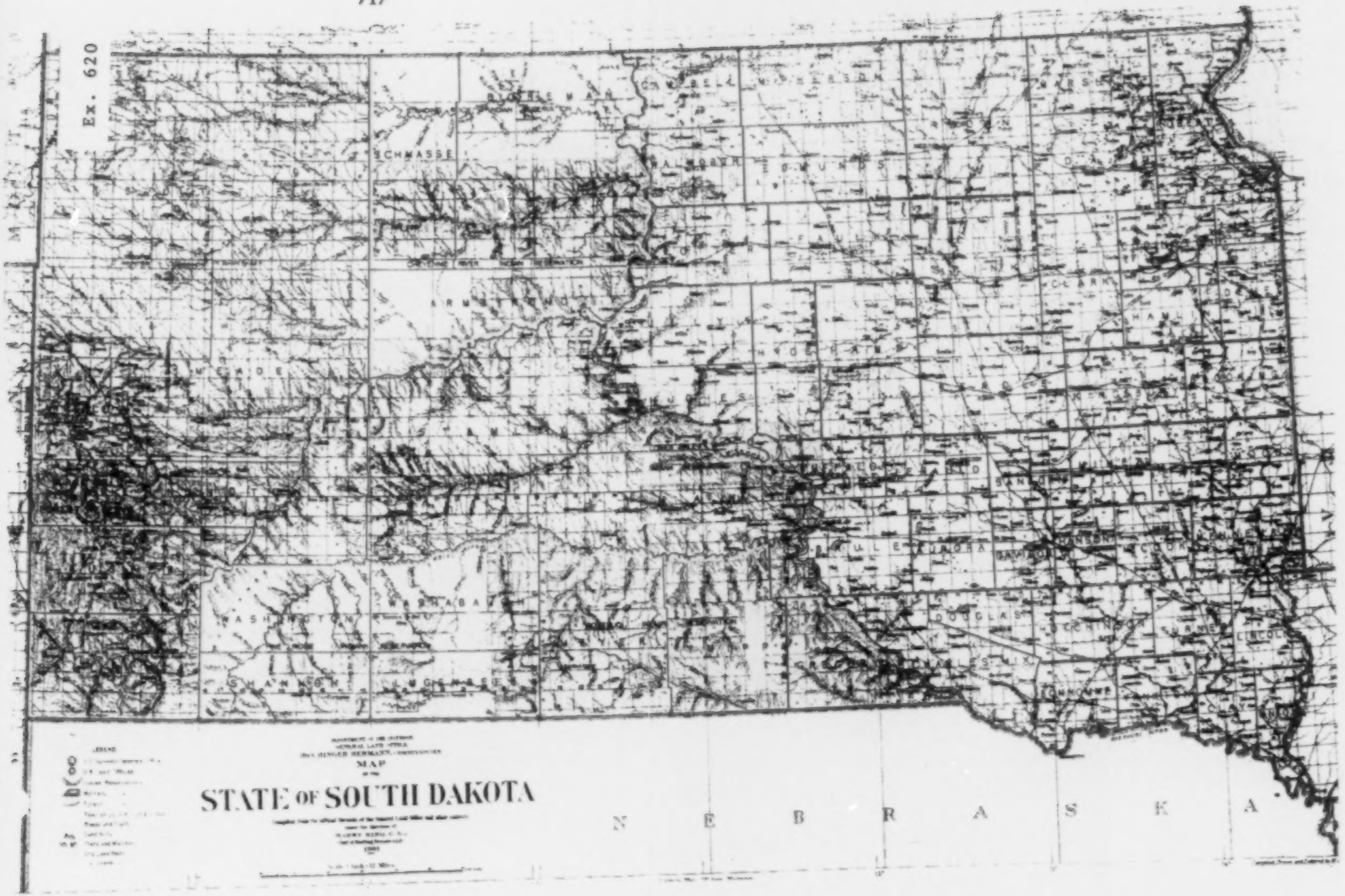
COMPILED UNDER THE DIRECTION OF THE

Hon. W.A.JONES

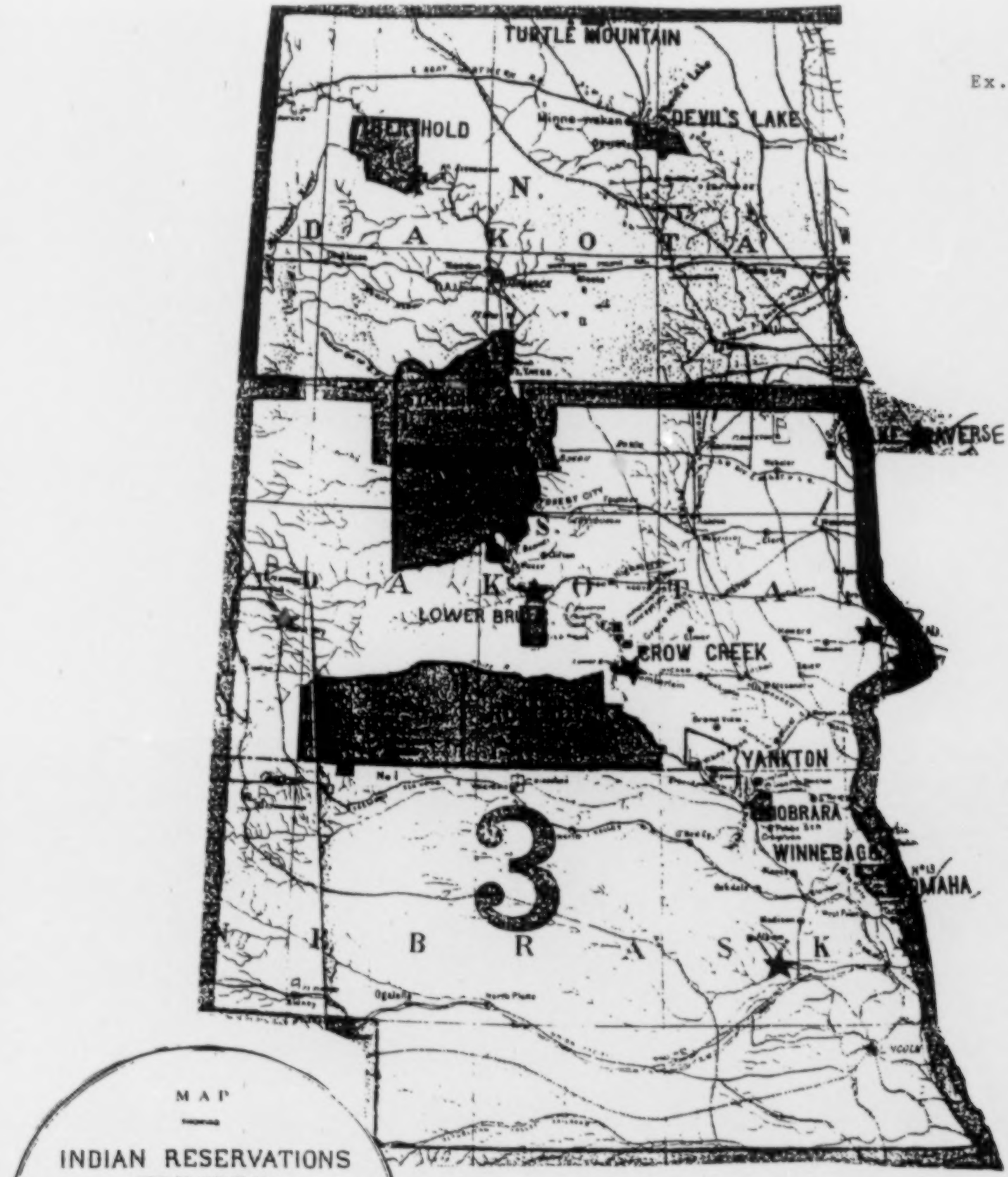
1898

716

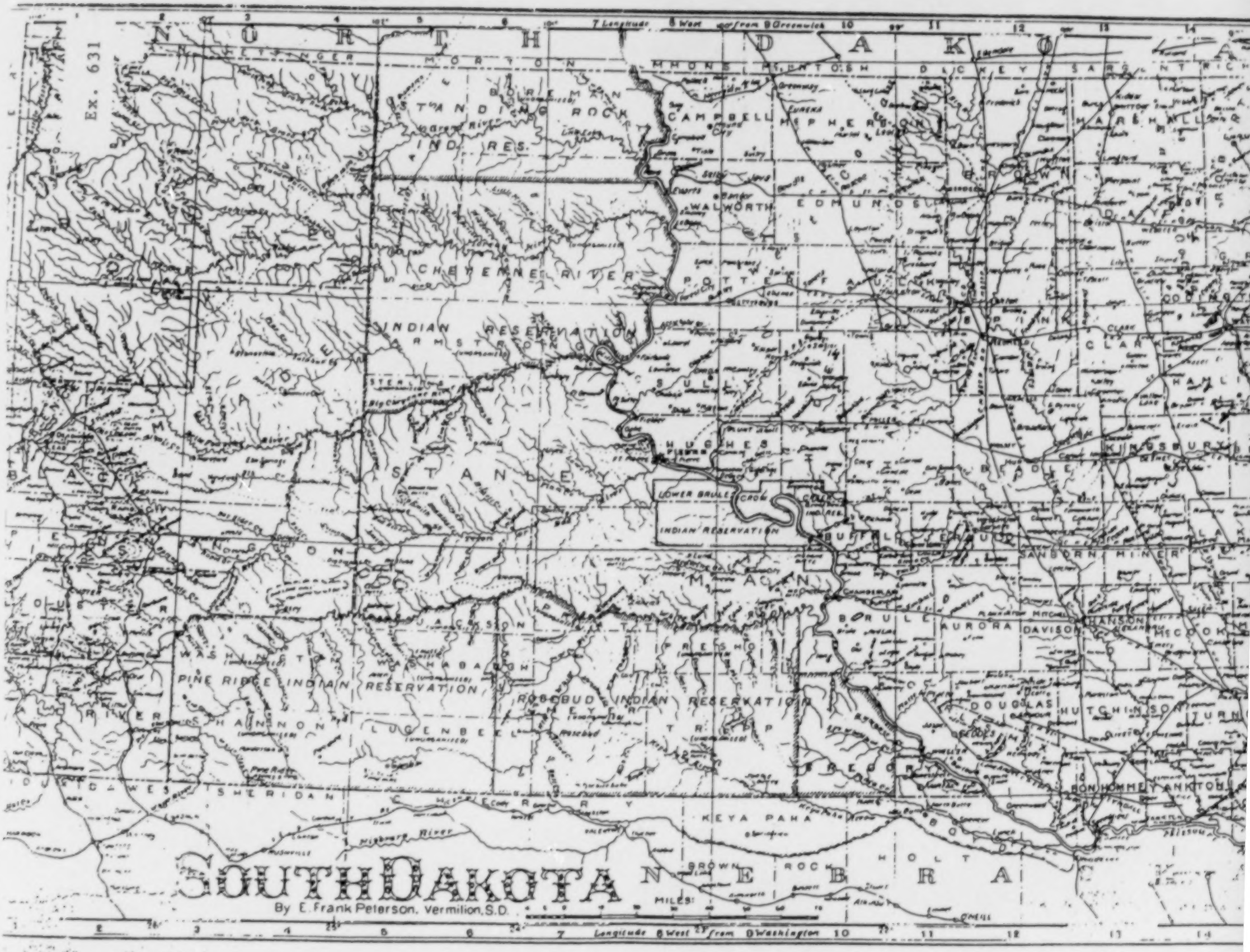
Ex. 620


SCHMASSE
CAMPBELL
WALWORTH
EDMUNDS
MARSHALL
ROBERTS
DEUEL
CLARK
HAMLIN
HYDE
HAND
SANBORN
COOK
BUFFALO
HUAKOTA
DOUGLAS
CHARLES MIX
GREGORY
TRIPP
LINCOLN
MELLETT
WASHINGTON
SHANNON
JACKSON
MAP
STATE OF SOUTH DAKOTA
N E B R A S K A

Ex. 39


TURTLE MOUNTAIN
DEVIL'S LAKE
HOLD
N.
D A K O T A
E
S.
D A K O T A
LOWER BRU
CROW CREEK
YANKTON
OBRARA
WINNEBAGO
MAHA
3
B R A S K
MAP
INDIAN RESERVATIONS
UNITED STATES
Hon. W. A. JONES.
1901.

718


NORTH DAKOTA
Ex. 631
STANDING ROCK IND. RES.
CHEYENNE RIVER INDIAN RESERVATION
LOWER BRULE INDIAN RESERVATION
PINE RIDGE INDIAN RESERVATION
ROSEBUD INDIAN RESERVATION
CAMPBELL
WALWORTH
EDMUNDS
POTTER
HUGHES
STANLEY
HYDE
HAND
JONES
LYMAN
TRIPP
GREGORY
TODD
MELLETTE
WASHABAUGH
SHANNON
BENNETT
MELLETTE
CHARLES MIX
BRULE
AURORA
DAVISON
HANSON
MCCOOK
DOUGLAS
HUTCHINSON
BON HOMME
YANKTON
CLAY
UNION
KINGSBURY
BROOKINGS
MARSHALL
DAY
CLARK
CODINGTON
HAMLIN
DEUEL
GRANT
ROBERTS
MARSHALL
SISSETON
WAHPETON
SOUTH DAKOTA
By E. Frank Peterson, Vermilion, S.D.
MILES
Longitude West from Washington

Ex. 631

SECTIONAL MAP OF

CHARLES MIX COUNTY

SOUTH DAKOTA

BY E. FRANK PETERSON,

LAKE ANDES, S.D.

1908

Copyright 1908 by E. Frank Peterson

Note - The 40 acre Lots in the eastern part of the County are numbered progressively from 1 to 160 inclusive, but are not governed by section, township and range, but these are usually added to the numbers of the lots in descriptions for greater facility in locating them.

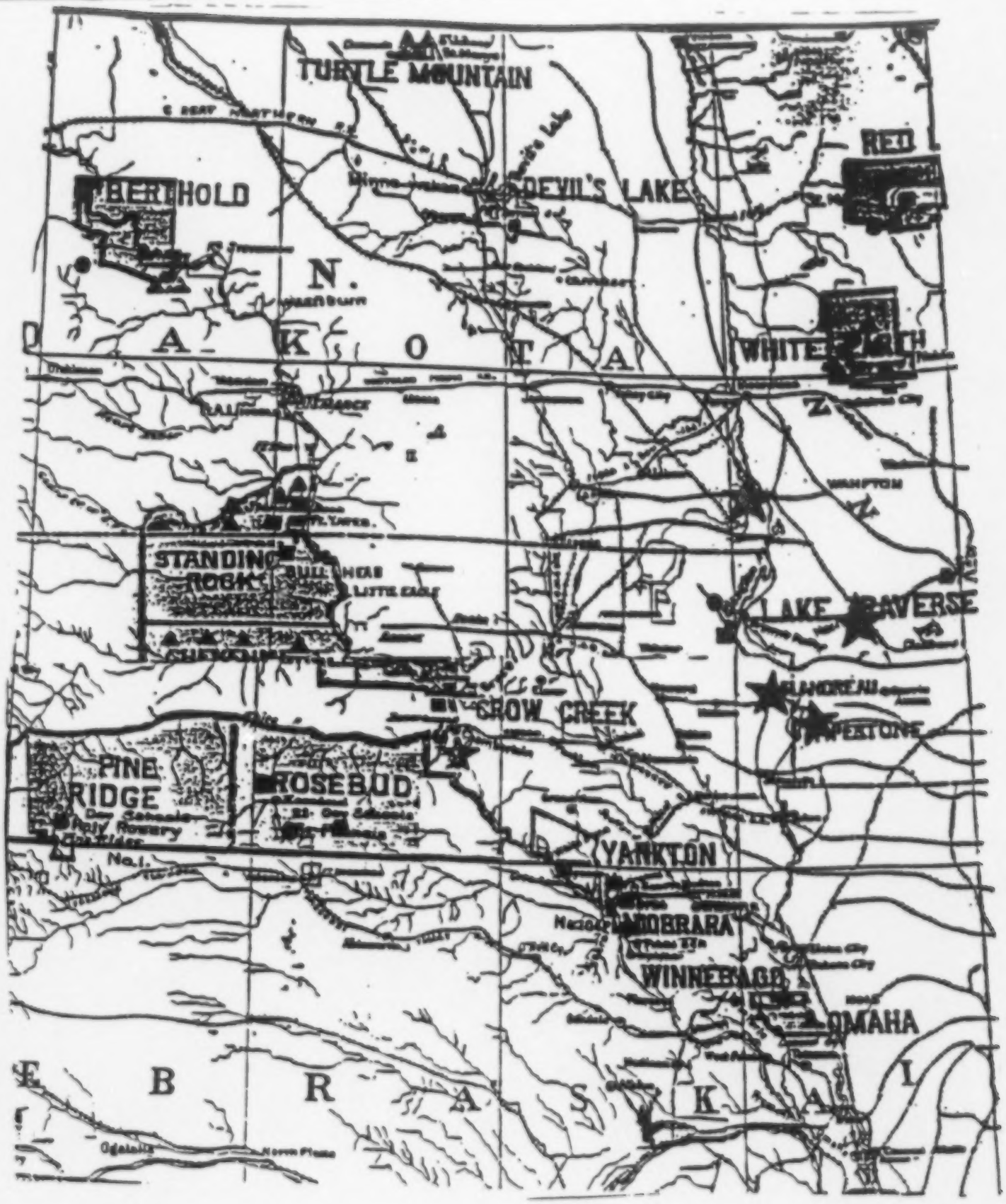
Charles Mix County includes Duran and Hot Springs Islands and the south part of Sections 19 and 20 in Township 99 Range 66.

For more detailed maps and Soil Reports apply at Office of County Auditor, Charles Mix County

POPULATION: STATE CENSUS OF 1905

Carroll Township	186	Moore Township	618
Carlisle "	264	Plum Center "	550
Fairbanks "	129	Platte "	734
Burlington "	175	Ree "	225
Forbes "	161	Rhoda "	491
Goose Lake "	624	Rouse "	456
Hamilton "	194	Signal "	423
Howard "	276	Wahoo "	482
Jackson "	157	White Swan "	518
Kennedy "	318	Geddes City	616
Lake Creek "	187	Lake Andes Village	491
La Roche "	451	Platte City	700
Lawrence "	272	Wagner Village	913
		Total	11,212

BEST AVAILABLE COPY



MAP

INDIAN RESERVATIONS

WITHIN THE LIMITS OF THE

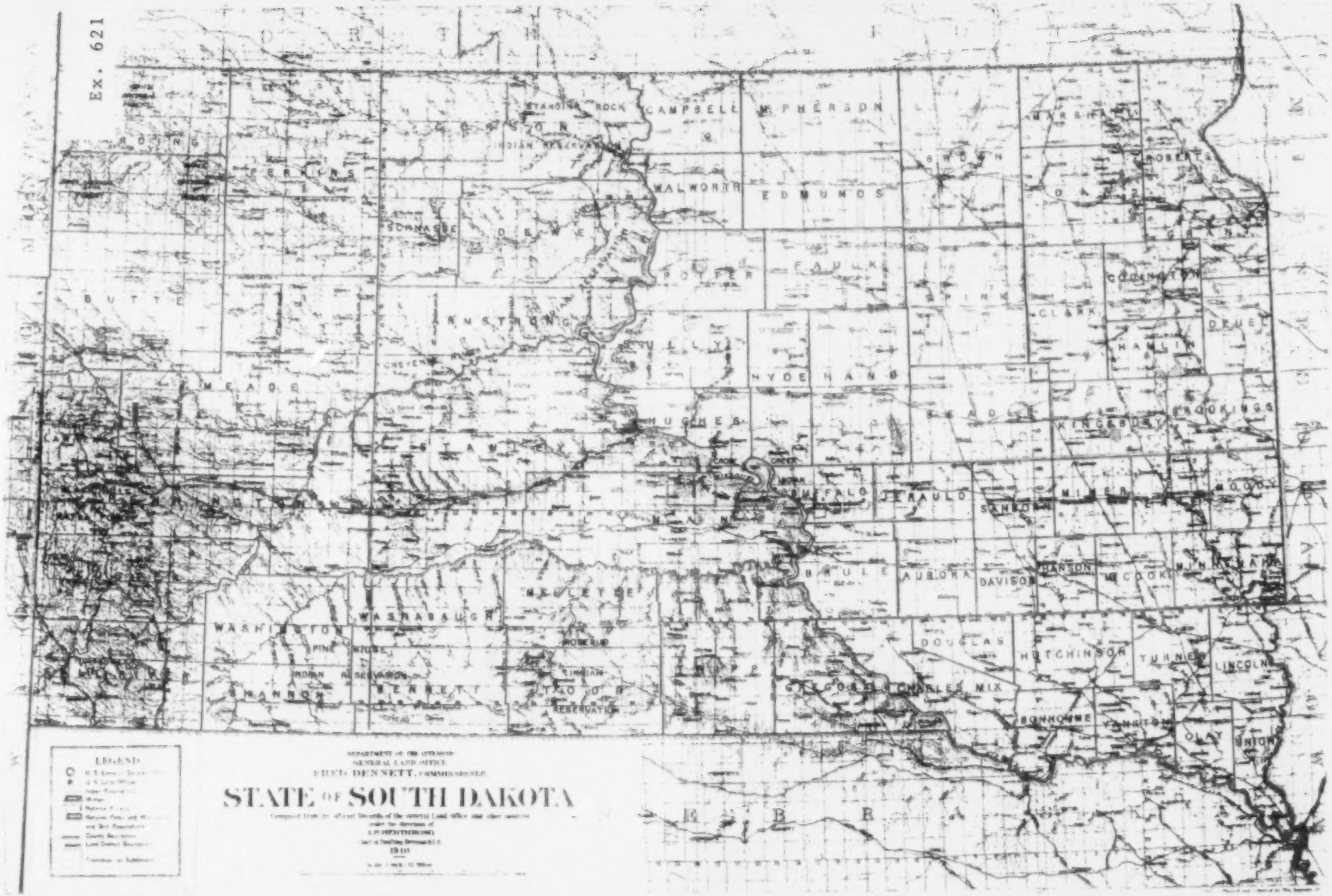
UNITED STATES

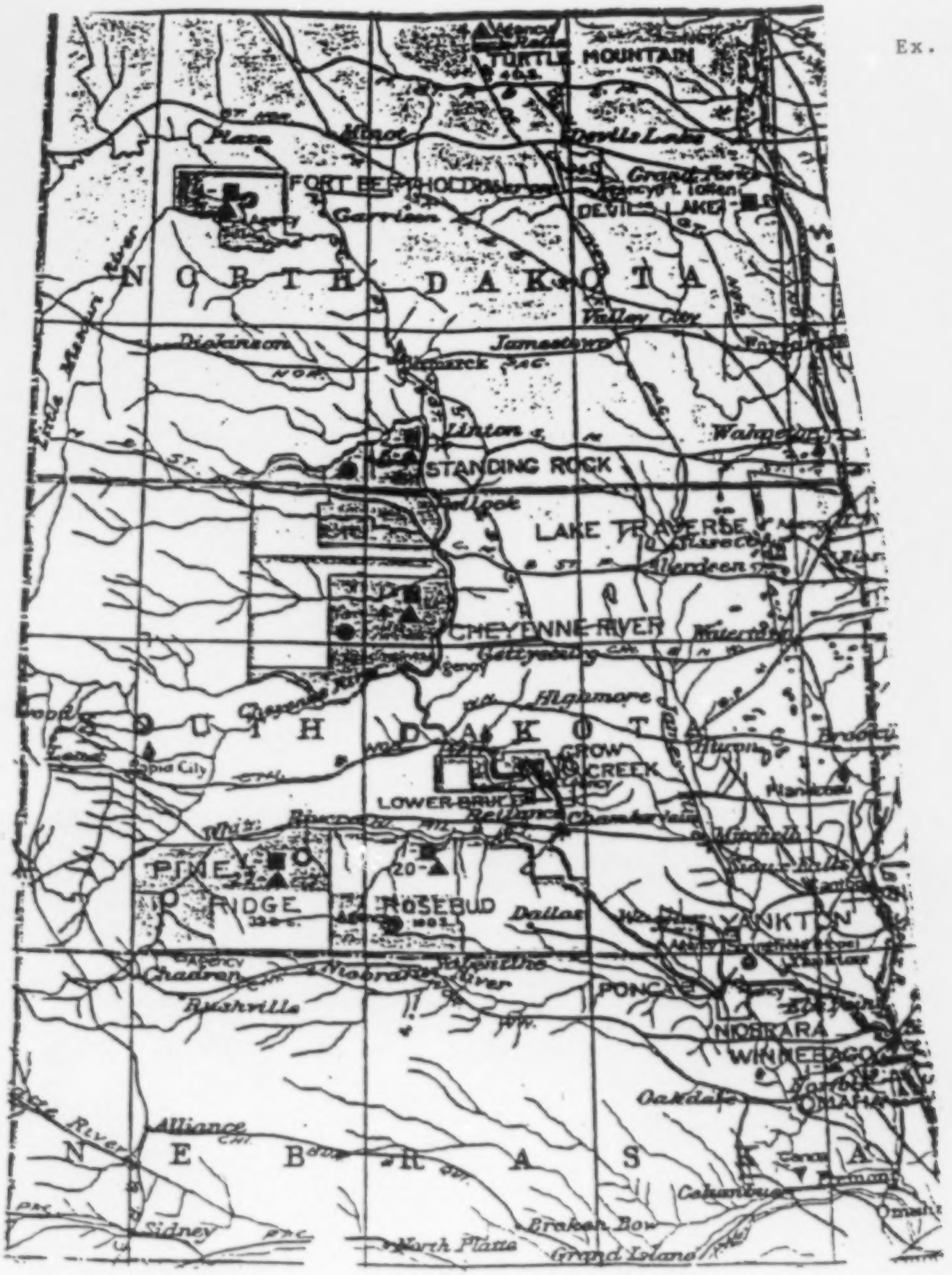
COMPILED UNDER THE DIRECTION OF THE

HON. F. E. LEUPP

1907

Ex. 621


CAMPBELL
MCPHERSON
MARSHALL
ROBERTS
WALWORTH
EDMUNDS
POTTER
FAULK
SPINK
CLARK
CODINGTON
HAMLIN
DEUEL
BUTTE
MEADE
HYDE
HAND
HUGHES
KINGSBURY
BROOKINGS
BUFFALO
JERAULD
MINER
MOODY
BRULE
AURORA
DAVISON
HANSON
MCCOOK
MINNEHAHA
WASHABAUGH
DOUGLAS
HUTCHINSON
TURNER
LINCOLN
CHARLES MIX
BONHOMME
YANKTON
CLAY
UNION
LEGEND
STATE OF SOUTH DAKOTA
1910



MAP

SHOWING

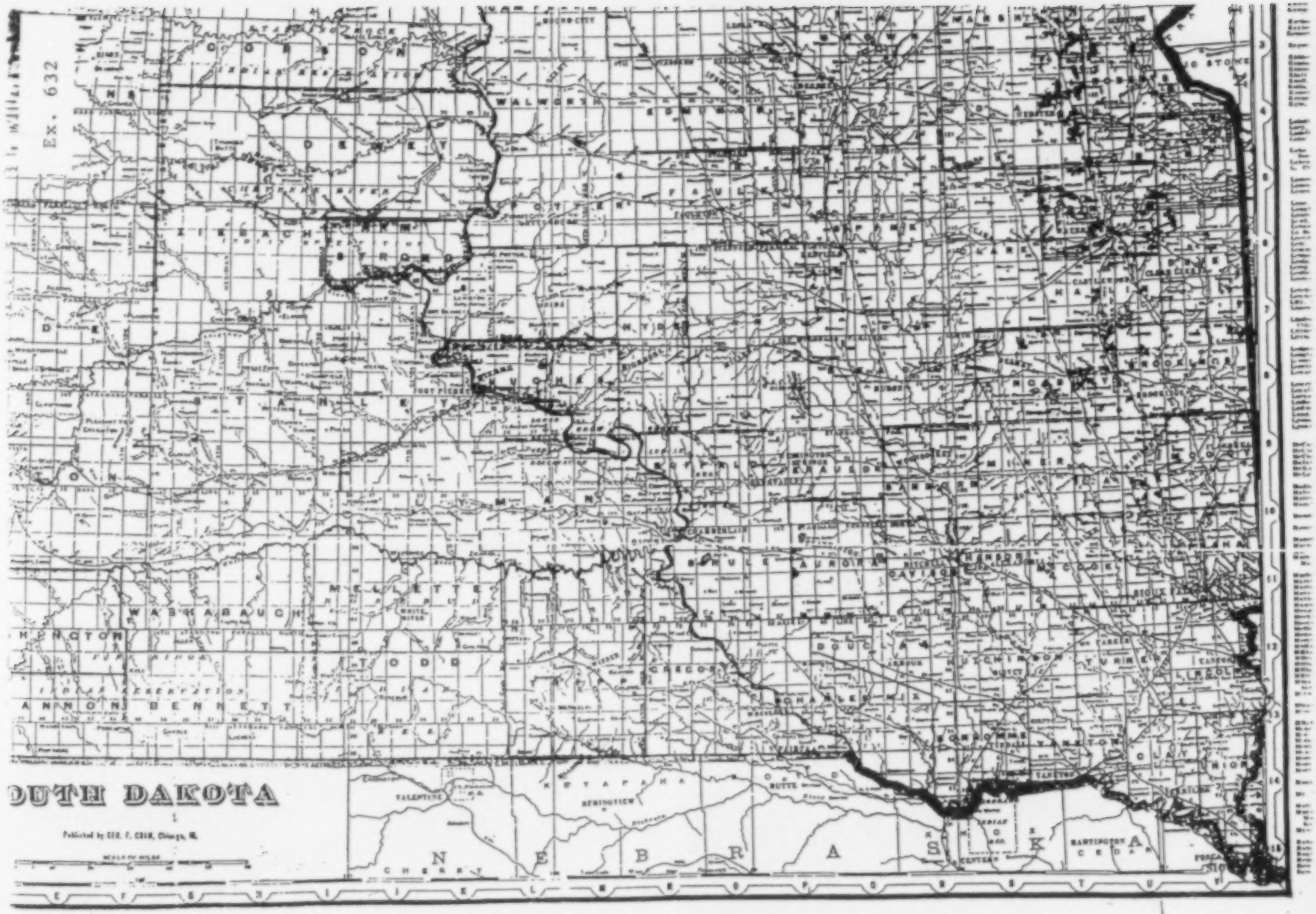
INDIAN RESERVATIONS

WITHIN THE LIMITS OF THE

UNITED STATES

1912

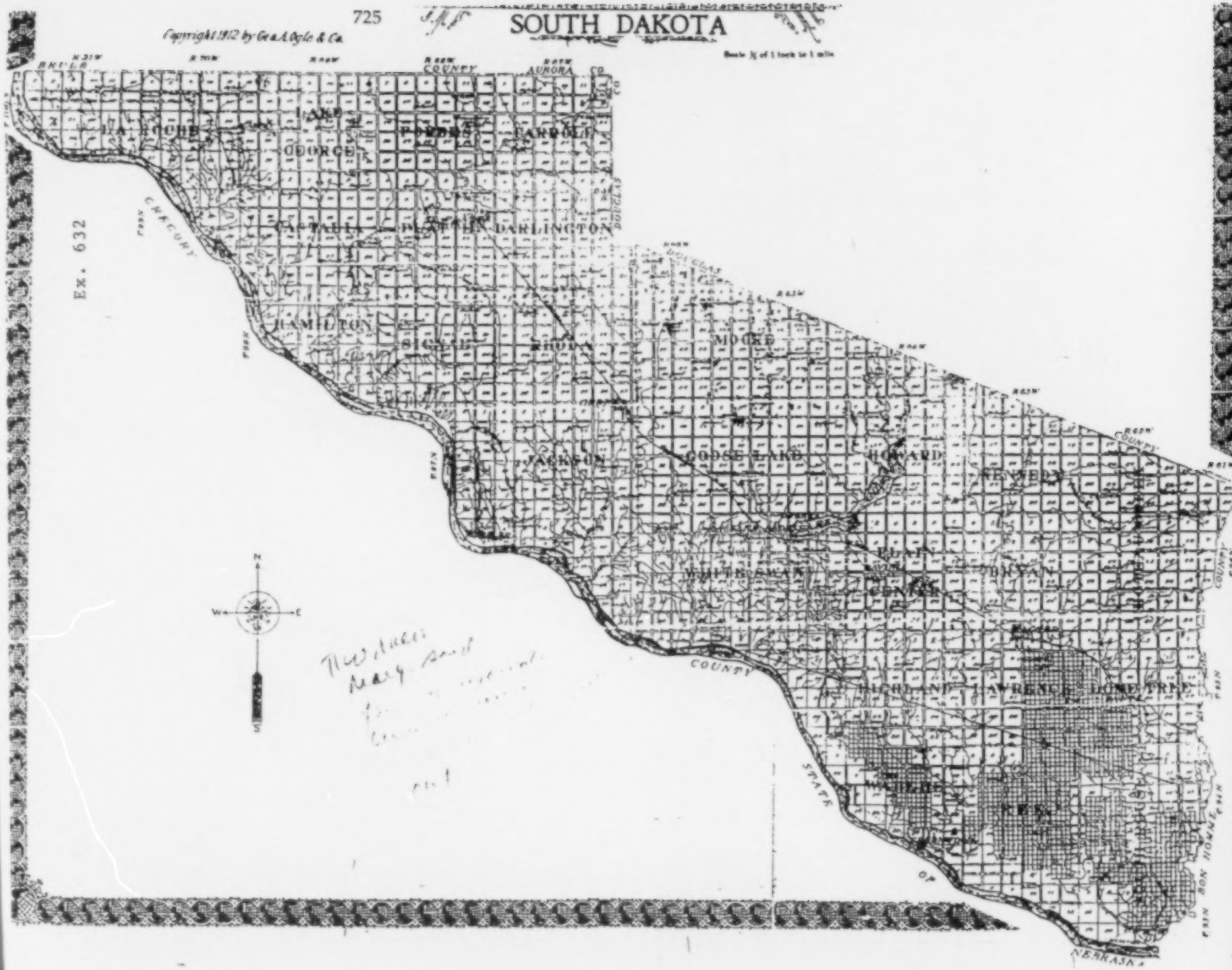
LEGEND
INDIAN RESERVATION
OPENED
Non-Reservation School
Boarding School
Day School / Sanitarium
Mission School / Contract
Insane Asylum
RAILROAD
Numbers indicate number of Schools


Ex. 632
DEWEY
ZIEBACH
STANLEY
JONES
MELLETTE
WASHABAUGH
TODD
JACKSON
BENNETT
MELLETTE
WALWORTH
CAMPBELL
MCPHERSON
EDMUNDS
FAULK
POTTER
HYDE
HUGHES
SULLY
HUGHES
STONE
HYDE
BUFFALO
HAND
HUGHES
SULLY
HYDE
BUFFALO
HAND
HUGHES
SULLY
HYDE
BUFFALO
HAND
HUGHES
SULLY

Copyright 1912 by Geo. A. Ogle & Co.

SOUTH DAKOTA

Ex. 632



(12)

No. 96-1581

Supreme Court, U.S.
FILED
AUG 7 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

STATE OF SOUTH DAKOTA,

Petitioner,

v.

YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,

Respondents,

and

SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR THE PETITIONER

MARK W. BARNETT
Attorney General
State of South Dakota
Counsel of Record

JOHN PATRICK GUHIN
Deputy Attorney General
500 East Capitol Avenue
Pierre, SD 57501-5070
Telephone: (605) 773-3215
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

58 pp

QUESTION PRESENTED

WHETHER THE YANKTON SIOUX RESERVATION HAS BEEN DISESTABLISHED OR DIMINISHED BY VIRTUE OF AN 1894 ACT ADOPTING A "CESSION AND SUM CERTAIN" AGREEMENT BETWEEN THE YANKTON SIOUX TRIBE AND THE UNITED STATES AND BY VIRTUE OF ITS CENTURY LONG TREATMENT AS DISESTABLISHED OR DIMINISHED?

LIST OF PARTIES

Parties to this case are: the State of South Dakota, Petitioner; Yankton Sioux Tribe, a federally recognized tribe of Indians, and its individual members, Respondents; Darrell E. Drapeau, individually, a member of the Yankton Sioux Tribe, Respondent; and Southern Missouri Waste Management District, a nonprofit corporation, Respondent. As was stated in the Brief of Respondent, Southern Missouri Waste Management District, on Petition for Writ of Certiorari at 1, n.1, the full and correct name of the District is Southern Missouri Recycling and Waste Management District. This entity was formed in August 1994, and had begun functioning as a political subdivision of the State of South Dakota under South Dakota Codified Laws 34A-16-1, et seq., at the time this litigation was instituted. Respondent Yankton Sioux Tribe presumably overlooked that fact when the complaint was filed against the initial nonprofit corporation. The full and correct name of that nonprofit corporation was Southern Missouri Waste Management Association, Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
DECISIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	12
ARGUMENT	14
I. THE CESSION AND SUM CERTAIN LANGUAGE OF THE YANKTON ACT CREATES AN "ALMOST INSURMOUNTABLE PRESUMPTION" OF DISESTABLISHMENT. THIS PRESUMPTION IS STRENGTHENED BY OTHER PROVISIONS OF THE ACT.	15
II. THE ARTICLE XVIII SAVINGS SECTION DOES NOT OVERCOME THE "ALMOST INSURMOUNTABLE PRESUMPTION" OF DISESTABLISHMENT.	20
III. THE EVENTS SURROUNDING PASSAGE OF THE ACT FURTHER SUPPORT THE PRESUMPTION OF DISESTABLISHMENT	28
IV. THIS CASE SHOULD BE CONTROLLED BY THE LEGAL PERSPECTIVE AND ANALYSIS SET FORTH IN *PERRIN*	33
V. SUBSEQUENT DEVELOPMENTS CONFIRM DISESTABLISHMENT	34
CONCLUSION	50

TABLE OF AUTHORITIES

Page

CASES CITED:

Arizonans for Official English v. Arizona, ___ U.S. ___, 117 S.Ct. 1055 (1997) 35

Bates v. Clark, 95 U.S. 204 (1877) 25

Bock v. Perkins, 139 U.S. 628 (1891) 27

Cihak v. United States, 232 F. 551 (8th Cir. 1916) 38

DeCoteau v. District County Court, 420 U.S. 425 (1975) ..... *passim*

DeMarris v. South Dakota, 319 F.2d 845 (8th Cir. 1963) 44

Dollar Savings Bank v. United States, 86 U.S. 227 (1873) 28

Forman v. United States, 256 F.2d 766 (8th Cir. 1958) 38

Hagen v. Utah, 510 U.S. 399 (1994) ..... *passim*

Johnson v. Gearlds, 234 U.S. 422 (1914) 34

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) 34

Montana v. United States, 450 U.S. 544 (1981) 26

Oregon Department of Fish and Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985) 16

Perrin v. United States, 232 U.S. 478 (1914) ..... *passim*

Perry v. Commerce Loan Co., 383 U.S. 392 (1966) 27

Primeaux v. Lee, 74 F.3d 1243 (8th Cir. 1996) 8, 38

Rice v. Rehner, 463 U.S. 713 (1983) 24

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) ..... *passim*

Solem v. Bartlett, 465 U.S. 463 (1984) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

State v. Greger, 559 N.W.2d 854 (S.D. 1997) ..... *passim*

State v. Thompson, 355 N.W.2d 349 (S.D. 1984) 36

State v. Williamson, 211 N.W.2d 182 (S.D. 1973) 35

State v. Winckler, 260 N.W.2d 356 (S.D. 1977) 36

United States v. 43 Gallons of Whiskey, 93 U.S. 188 (1876) 19, 33, 42

United States v. Granderson, 511 U.S. 39 (1994) 27

United States v. Mazurie, 419 U.S. 544 (1975) 34

United States v. Nice, 241 U.S. 591 (1916) 34

United States v. Oklahoma Gas and Electric Company, 318 U.S. 206 (1943) 44

Weddell v. Meierhenry, 636 F.2d 211 (8th Cir. 1980), *cert. denied*, 451 U.S. 941 (1981) 38

Wood v. Jameson, 130 N.W.2d 95 (S.D. 1964) 35

Yankton Sioux Tribe v. United States, 623 F.2d 159 (Ct.Cl. 1980) 38, 48

STATUTORY REFERENCES:

Agreement with the Yankton Sioux or Dakota Indians, in South Dakota, 1892, ratified, 28 Stat. 286, 314 (1894) ..... *passim*

Treaty with the Yankton Sioux, 1858, ratified, 11 Stat. 743 (1859) ..... *passim*

22 Stat. 42 (1882) 26

24 Stat. 388 (1887) 4

25 Stat. 676, § 10 (1889) 20

TABLE OF AUTHORITIES – Continued

Page

26 Stat. 594 (1891) 4
26 Stat. 989, § 31 (1891) 27
27 Stat. 120 (1892) 5
29 Stat. 865 (1895) 7
35 Stat. 460, § 9 (1908) 27
35 Stat. 808 (1909) 44
18 U.S.C. § 1151(a) 50
18 U.S.C. § 1151(b) 38, 50
18 U.S.C. § 1151(c) 50
28 U.S.C. § 1254(1) 1
28 U.S.C. § 1331 2

OTHER AUTHORITIES:

31 I. Dec. 250 (1902) 41
34 I. Dec. 415 (1906) 42
53 Cong. Rec. 6425 (1894) 7, 31
53 Cong. Rec. 6426 (1894) 7, 31
59 Fed. Reg. 16649 (April 7, 1994) 44
1990 Federal Census 9
Atlas of Charles Mix County, South Dakota (1906) 40
Cohen, *Handbook of Federal Indian Law* (1942) 43
H.R. Rep. No. 7613, 59th Cong., 2d Sess. 3-4 (1907) 20
Historical Atlas of South Dakota (1904) 40

TABLE OF AUTHORITIES – Continued

Page

Jennings, *The Acquisition of Territory in International Law* (1963) 34
S. Exec. Doc. No. 27, 53d Cong., 2d Sess. (1894) ("Negotiations") ..... *passim*
Standard Atlas of Charles Mix County, South Dakota (1912) 40
Strickland, *Felix S. Cohen's Handbook of Federal Indian Law* (1982 ed.) 17, 33

DECISIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 99 F.3d 1439 (8th Cir. 1996) and is reprinted in Petitioner's Appendix to the Petition for Writ of Certiorari. App. 1-65.[1]

The Memorandum Opinion and Order of the United States District Court for the District of South Dakota is reported at 890 F.Supp. 878 (D.S.D. 1995) and is reprinted in Petitioner's Appendix to the Petition for Writ of Certiorari. App. 66-97. The Judgment of the District Court is unreported and appears in the Joint Appendix at JA 95.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals for the Eighth Circuit was entered on October 24, 1996. The State's Petition for Rehearing and Suggestion for Rehearing En Banc were denied on January 6, 1997. App. 98. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Treaty with the Yankton Sioux, 1858, ratified, 11 Stat. 743 (1859). App. 99.

Agreement with the Yankton Sioux or Dakota Indians, in South Dakota, 1892, ratified, 28 Stat. 286, 314 (1894). App. 111.

STATEMENT OF THE CASE

The question presented is whether an 1894 Act, and subsequent historical developments, disestablish or

---

[1] As used herein, "App." refers to the Appendix to the Petition for Writ of Certiorari; "JA" refers to the Joint Appendix.

diminish the Yankton Reservation, eliminating the 1858 reservation boundaries.[2]

A. Procedural background.

Southern Missouri Waste Management District (District), which was formed to develop a regional landfill, selected a site on fee land owned by a non-Indian in Charles Mix County. A three-day administrative hearing was held on the District's solid waste permit application before the State Board of Environment and Natural Resources. The Yankton Sioux Tribe intervened and participated in that hearing, without raising any jurisdictional claims. *See* T 306, JA 646. At the close of the hearing, the Board issued the District a permit. The Tribe thereafter filed an action in federal court pursuant to 28 U.S.C. § 1331, inter alia, requesting injunctive relief halting construction of the District's landfill, and requesting declaratory relief that the Tribe, and not the State, had jurisdiction to regulate the facility because the landfill allegedly lay within the 1858 boundaries of the Yankton Sioux Reservation. The State, brought into this action by a third-party complaint filed by the District, asserted that the 1858 reservation had been disestablished or diminished. The district court denied the Tribe's injunctive relief, App. 90, but declared that the Yankton Sioux Reservation had not been disestablished or diminished. App. 89. The State appealed that portion of the district court's

---

[2] The State has used the term "disestablished" and "diminished" interchangeably to mean that the former reservation boundaries and status are "terminated" as in *DeCoteau v. District County Court*, 420 U.S. 425, 427-28 (1975), and that "Indian Country" status attaches only to remaining or nonextinguished "allotments," *id.* at 427 n.2, 446-447; 18 U.S.C. § 1151(c), and "dependent Indian communities." 18 U.S.C. § 1151(b). *See also Solem v. Bartlett*, 465 U.S. 463, 467 (1984); *United States v. Pelican*, 232 U.S. 442 (1914); *United States v. Stands*, 105 F.3d 1565, 1571-72 (8th Cir. 1997). *But see Ute Indian Tribe v. Utah*, No. 96-4073 (10th Cir. May 8, 1997).

decision finding that the reservation had not been diminished or disestablished.[3] The court of appeals affirmed in a two to one decision. Subsequently, the unanimous South Dakota Supreme Court determined that the reservation had been diminished notwithstanding the decisions of the lower federal courts. *State v. Greger*, 559 N.W.2d 854 (S.D. 1997) (reprinted in Petitioner's Appendix to Petition for Writ of Certiorari at App. 125-158).

The issue remaining before this Court is whether the Yankton Sioux Reservation has been disestablished.

B. 1858 Treaty.

In an 1858 treaty, the Yankton Sioux Tribe "cede[d] and relinquish[ed] to the United States all the lands now owned, possessed or claimed by them . . . ," App. 100, except 400,000 acres (later surveyed at 430,000 acres),[4] which were particularly described. *Id.* Approximately 11 million acres were ceded. App. 6. The United States, in return, agreed to pay "one million and six hundred thousand dollars in annuities in the period of fifty years" and to "protect the said Yanctons in the quiet and peaceable

---

[3] The Tribe did not appeal the injunctive relief it had been denied in district court. The Tribe had also asserted that the Environmental Protection Agency (EPA) had jurisdiction over the landfill based on 40 CFR Part 258. The district court noted, unremarkably, that EPA retained its federal powers until it delegated them to the State or the Tribe. DCO, App. 94. After entry of the district court's decision, the EPA denied the State's application for approval of its solid waste permit program which had been previously filed with regard to the area at issue here. 61 Fed. Reg. 48683-48686 (Sept. 16, 1996). The State has appealed this decision in a separate action in district court. (The Merits Brief of Southern Missouri at 1-7 sets out the procedural history in greater detail).

[4] After the 1858 Treaty was ratified, the United States performed a survey and determined that the area actually contained 430,495 acres. T 40-41, JA 575. The 1892 Negotiations proceeded on the basis of the latter figure.

possession of said tract of four hundred thousand acres of land. . . . " App. 102. The treaty provided that "[n]o white person, unless in the employment of the United States, or duly licensed to trade with the Yanctons, or members of the families of such persons, shall be permitted to reside or make any settlement upon any part of the tract herein reserved for said Indians. . . . " App. 108. The United States also agreed to build schools, assist instruction in agricultural and mechanical pursuits, to establish a mill suitable for grinding grain and sawing lumber, and to set up mechanic shops. App. 104-105. The Tribe acknowledges that this 1858 "cession" of land for $1.6 million diminished the area over which the Tribe could maintain jurisdiction or governmental authority.

C. Prelude to 1892 Agreement.

Following the 1858 Treaty, "the northern plains region experienced extreme weather cycles of prolonged drought and devastating flood, leaving the Yankton Sioux desperate for cash and direct assistance." App. 70. Further, there was growing pressure by "white farmers, businessmen and railroad men" to open the surplus lands of the Yankton Reservation. *Id.*

In 1887, Congress enacted the General Allotment Act or Dawes Act, 24 Stat. 388 (1887), which enabled the "President to allot portions of reservation land to tribal members and, with tribal consent, to sell the surplus lands to white settlers. . . . " *DeCoteau v. District County Court*, 420 U.S. 425, 432 (1975). The district court found that "[o]f the 430,495 acres of land comprising the 1858 Yankton Sioux Reservation, 167,325 acres were allotted and patented to Indians under the Dawes Act." DCO, App. 71. Further allotments amounting to approximately 95,000 acres were made pursuant to 26 Stat. 594 (1891). *Id.* Approximately 168,000 acres were unallotted, and therefore available for cession. *See id. See also* App. 9, n.9 (court of appeals implies that "approximately 200,000 unallotted acres" were available for cession).

In 1892, Congress enacted 27 Stat. 120, 137 (1892), which authorized funds "[t]o enable the Secretary of the Interior in his discretion to negotiate with any Indians for the *surrender* of portions of their respective reservations. . . . " (emphasis added). In the same year, the United States appointed the Yankton Indian Commission which negotiated for the *"cession"* of the surplus lands of the Yankton Indians. S. Exec. Doc. No. 27, 53d Cong., 2d Sess. (1894) (emphasis added) (hereinafter "Negotiations") 2; JA 109.

D. Negotiations.

Cession negotiations occurred in the latter part of 1892. *See id.* at 7, JA 122. The Tribe debated whether it should cede its lands at all, *see, e.g., id.* at 8-10, JA 125-129, and there was discussion as to whether the transaction should be an appraisal and sale of individual plots or a direct sale or cession to the government. *See, e.g., id.* at 75-78, JA 291-301. *See also id.* at 11-12, JA 133-136. Tribal and federal negotiators equated the contemplated transaction with the transaction by which the Tribe had ceded the 11 million acres of land to the United States through the 1858 agreement, *see id.* at 54, 56, 58, 59, 66, JA 225, 231, 236, 239, 262, and with the contemporaneous cession of the Lake Traverse Reservation which had effected disestablishment. *Id.* at 54, 68, 71, JA 226, 270, 279. *DeCoteau v. District County Court*, 420 U.S. 425 (1975).

During the negotiations, tribal members emphasized their belief that the government had not delivered on its former promises and threatened not to sign the new agreement for that reason. *See id.* at 55, 59, JA 226, 241. *See also id.* at 55-56, 65-66, 75, 80-81, JA 227-229, 259-263, 290-291, 306-308; App. 149. Further, Professor Hoover, the tribe's retained historian, testified that tribal members perceived a threat of the loss of annuities, T 53-55, JA 587-589, an extremely serious matter to the Tribe. (Annuities consisted of cash, guns, ammunition, food, clothing and other articles promised the tribe "primarily" under

the 1858 Treaty. *Id.*) Finally, statements were made which indicated that the transaction contemplated the end of reservation status. *See, e.g., id.* at 81, JA 309: "This reservation alone proclaims the old time and the old conditions. . . ."

E. Provisions of the 1892 agreement and proclamation opening the reservation.

An agreement was signed and dated December 31, 1892. App. 111-124. Article I contained clear language of *cession*:

> The Yankton tribe of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to United States all their claim, right, title and interest in and to all the unallotted lands within the limits of the reservation set apart to said Indians as aforesaid.

App. 112-113. Article II established that the cession was for a *sum certain*:

> In consideration for the lands ceded, sold, relinquished, and conveyed to the United States as aforesaid, the United States stipulates and agrees to pay to the said Yankton tribe of Sioux Indians the sum of six hundred thousand dollars ($600,000) as hereinbefore provided for.

App. 113. Article X specifically referred to the "ceded" lands. App. 117. Article XVII prohibited the sale or transfer of intoxicating liquors in the "ceded" area. App. 120. The Article XVIII savings clause, upon which the Tribe's case has rested, reads as follows:

> Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement, and its ratification by Congress, all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and

> the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858.

Id. Congress "accepted, ratified and confirmed" the agreement, App. 122, and provided that upon the Presidential Proclamation opening the area, the 16th and 36th sections in each congressional township were "reserved for common-school purposes and [ ] subject to the laws of the State of South Dakota." App. 123.

During debates on this and several other cession agreements, congressmen indicated that the lands in question here and in the other agreements would be returned to the "public domain." *See* 53 Cong. Rec. 6425 (1894), JA 380 (Rep. McRae); *id.* at 6426, JA 386 (Rep. Hermann).

In 1895, President Cleveland opened the reservation, stating that the Yankton Indians had "ceded, sold, relinquished, and conveyed to the United States, all their claim, right, title and interest in and to all the unallotted lands within the limits of the reservation" as set apart by the 1858 agreement. 29 Stat. 865 (1895), JA 453.

F. Subsequent historical developments.

1. Jurisdiction.

The State assumed virtually unquestioned exclusive jurisdiction over all persons in the area following the President's Proclamation opening the ceded lands. The divided panel noted the exercise of jurisdiction by the state of South Dakota in an "1895 criminal case, *State v. Andrew War*." App. 33. *See* Exh. 638, JA 458. The panel acknowledged that,

> state government has quite consistently exercised various forms of governmental authority over the opened lands on the Yankton reservation. State courts have exercised criminal jurisdiction over Indians on nontrust lands without objection from the tribe until recently.

App. 38. The panel also found the "tribe presented *no* evidence that it attempted until recently to exercise civil, regulatory or criminal jurisdiction over nontrust lands." (Emphasis added.) App. 39. *See also* T 316-319, 646-647, 727-728, JA 654-656, 686-688, 703; DCO, App. 88; *Greger*, App. 154-155. Similarly, the United States has *not* exercised criminal jurisdiction over any person within the nontrust areas of the 1858 reservation. *See* Testimony of Tribal Chairman Drapeau. T 318, 330-331, JA 655-656, 667-668; *Greger*, App. 154.

2. Precedent.

This Court in 1914, just twenty years after the adoption of the agreement, effectively found that the reservation had been disestablished by referring to the "ceded lands *formerly* included in the Yankton Sioux Indian Reservation," *Perrin v. United States*, 232 U.S. 478, 480 (1914) (emphasis added). *Perrin* referred to the "original reservation" as embracing 400,000 acres and contrasted the original "practically 25 miles square" reservation to the 1914 "small scattered" tracts of 100,000 acres. *Id.* at 486. The South Dakota Supreme Court has found disestablishment for the fifth time in a recent unanimous ruling. *See State v. Greger*, App. 125, 138. The lower federal courts have also consistently treated the area as disestablished. *See* Dissent, App. 63-64 (citing cases); *Greger*, App. 137-138 (citing cases). *See also* App. 25, n.18 (citing cases). Indeed, the same district court which decided the case now before this Court entered a decision in 1995 treating the Yankton reservation as disestablished and that decision was affirmed, per curiam, by the court of appeals. *Primeaux v. Lee*, Civ. 94-4022 (D.S.D. June 14, 1995), *aff'd*, No. 95-2943 (8th Cir. Jan. 3, 1996) (per curiam). (Unpublished opinions lodged with Clerk.) *See also Primeaux v. Lee*, 74 F.3d 1243 (8th Cir. 1996) (Table).

3. Demographics.

At present, approximately nine percent of the area within the 1858 boundaries is trust land, *see* App. 42, n.25; T 645, JA 685.[5] The 1990 Federal Census data indicate that non-Indians constitute over two-thirds or 68 percent of the population. Exh. 614, JA 529, *see also* App. 42.[6]

G. Decisions below.

The district court, relying almost entirely on Article XVIII, found that the 1858 Yankton Reservation had not been disestablished by the agreement of 1892. The district court found that Article XVIII, when read with the "clear cession and sale clauses of Articles I and II, creates an internal inconsistency in the 1892 Agreement." DCO, App. 81-82. The district court construed the "ambiguity in favor of the Tribe" and found that the effect of Article XVIII was to "incorporate by reference the exterior boundaries of the Yankton Sioux Reservation as set out in the 1858 treaty." *Id.* at 82.

A divided three-judge panel of the Court of Appeals for the Eighth Circuit affirmed. The panel quoted the "cession and sum certain" language of Articles I and II of the Yankton agreement. *See* App. 13 & n.11. This Court, in *Solem v. Bartlett*, 465 U.S. 463, 470-71 (1984) has found that such an arrangement creates an "almost insurmountable presumption" of diminishment or, according to *Hagen v.*

---

[5] The map at App. 159 is a recolored and reduced reproduction of a Bureau of Indian Affairs land status map generated after the district court's decision. (The phrase "Tribal fee to trust" area in the Legend, the purple lands, was apparently intended to denote lands held by the Tribe in fee for which trust application had been made.)

[6] The tribal chairman admitted that the tribal resident population statistics are not based on an actual count, but merely divide the total membership in half. T 313-315, JA 652-654.

Utah, 510 U.S. 399, 411 (1994), a "nearly conclusive presumption" of diminishment.

Yet, the divided panel "never acknowledges that the presumption of diminishment exists, nor does it hold that the presumption of diminishment has somehow been rebutted." Dissent, App. 47-48 (footnote omitted). Instead, the divided panel disregarded the presumption and treated it as a novel theory created by the State. *See* App. 14.

The divided panel instead relied upon prior circuit court opinion for the proposition that the Article I cession language, standing alone, did not evince a clear congressional intent to disestablish. App. 14. Nor did Article II support disestablishment, in light of its history. App. 15-16.

The divided panel determined that the Article XVIII savings section was "unusually expansive" and that, therefore, the other sections of the 1892 agreement "should be read narrowly to minimize any conflict with the 1858 treaty." App. 17. The panel rejected the State's argument that the specific provisions within Article XVIII for the continuation of "annuities under the said treaty of April 19, 1858" indicated that a narrower reading was to be given to the article. *See id.* at 17-18. The divided panel thus found that Article XVIII, when read in light of the canons of construction, required the determination that the reservation had not been disestablished. *See* App. 21.

Judge Magill dissented. Relying on *Solem v. Bartlett*, 465 U.S. at 470-71, Judge Magill found that the Yankton agreement "contained language of cession of land for a sum certain, which created 'an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished.' " Dissent, App. 44. He noted that the divided panel had failed to address "the presumption created by Articles I and II together" and instead inappropriately had considered "each Article separately." *Id.* at 48. Judge Magill indicated that the circuit precedent cited by the majority actually supported diminishment, *id.* at 48-49. He also criticized the majority's dependence

upon legislative history to overcome the "cession" and "sum certain" language used by Congress, citing the principle that "the language actually chosen by Congress is the best indication of its intent." App. 49. He concluded that, in any event, the majority "has pointed to nothing in the legislative history that betrays a contrary intent" to diminishment. *Id.*

Judge Magill rejected the majority's reliance upon the Article XVIII savings clause, finding that a literal interpretation of Article XVIII would nullify other provisions of the 1894 Act for it would not allow transfer of lands from the Yankton Indians to the United States, nor would it allow white settlers within the 1858 boundaries. *See* App. 51-53, & n.32. He found that Article XVIII extended only to annuities and so could not "rebut the powerful presumption that the Yankton Sioux Reservation was diminished." App. 56.

Judge Magill also relied on the liquor prohibition of Article XVIII, on the grant of Sections 16 and 36 of the congressional townships for common schools, *id.* at 56-58, and on "striking passages" in the legislative history which anticipated the "termination of tribal governance." *Id.* at 59.

Judge Magill further relied on the jurisdictional history, noting the area's treatment as nonreservation "for the past century" by the state courts, *id.* at 62; and noting the usual treatment by the federal courts of the area as diminished, beginning with this Court's decision in *Perrin*, *id.* at 63-64. The dissent also noted the failure of the Tribe to exercise jurisdiction beyond its trust lands. *Id.* at 62.

Following the decision of the divided panel and the denial of rehearing and rehearing en banc (three judges dissenting),[7] the South Dakota Supreme Court unanimously

---

[7] Judge Wollman recused himself from the original panel assigned to hear the case, and took no part in the rehearing

determined that the reservation *had* been diminished notwithstanding the very recent decisions of the lower federal courts in the case at bar. *State v. Greger*, App. 125-158.

SUMMARY OF ARGUMENT

1. This Court's disestablishment decisions determine that when Congress and a tribe employ "cession and sum certain" language in a surplus land agreement, an "almost insurmountable presumption" of disestablishment is created. The agreement with the Yankton Sioux Tribe used precisely such language; therefore, an "almost insurmountable presumption" of disestablishment arose. *Hagen v. Utah; Solem v. Bartlett; DeCoteau v. District County Court*.

2. Other provisions of the agreement as enacted enhance the presumption. For example, tribal members insisted that an anti-liquor provision regarding ceded lands be included in the agreement. Liquor was illegal on the reservation at the time of the agreement and therefore the tribal members would have had no reason to insist upon the provision unless they understood the reservation was being disestablished. The operation of the school lands provision also aids the presumption.

3. The savings section contained in Article XVIII does not overcome this "almost insurmountable presumption" of disestablishment. Article XVIII is internally ambiguous. It purports to protect *all* provisions of the 1858 treaty and also the *annuity* provisions of the 1858 treaty. Further, if the article actually were intended to protect all provisions of the 1858 Treaty, it would negate the 1892 agreement, for the 1858 Treaty guaranteed the

---

process, App. 98, presumably because he had three times, while a member of the South Dakota Supreme Court, found the Yankton Reservation diminished. *See State v. Williamson*, 211 N.W.2d 182, 184 (S.D. 1973) (Wollman, J. concurring specially); *see also State v. Thompson*, 355 N.W.2d 349 (S.D. 1984); *State v. Winckler*, 260 N.W.2d 356 (S.D. 1977).

tribe "quiet and peaceable possession" of 400,000 acres and also forbade any "white person" from settling on the reservation.

The canons of construction do not support the divided panel's analysis of Article XVIII. A canon of construction, as *DeCoteau* holds, is "not a license to disregard clear expressions of tribal and congressional intent." The ambiguous language of Article XVIII simply cannot overcome the uniquely clear expression of tribal and congressional intent created by Articles I and II of the agreement.

Nor is there a basis to argue that the Tribe somehow "understood" the agreement to allow the transfer and white settlement of the ceded land, but not to disestablish the boundaries of the reservation. As this Court has stated, the common "notion" at the turn of the century was that when Indian lands passed from tribal ownership, they ceased to be part of a reservation. There is nothing in the record which supports the argument that the tribal members and the United States somehow came to an agreement that Article XVIII would overturn this widespread understanding. Finally, this Court's own precedent indicates that even savings sections which are *not* ambiguous will not prevent diminution or disestablishment of a reservation.

4. The record of negotiations confirms disestablishment. For example, tribal members and the negotiators consistently equated the arrangement being debated with the 1858 Treaty by which the Yankton Indians had ceded 11 million acres and with the contemporaneous Sisseton agreement which disestablished the Lake Traverse Reservation. Furthermore, the tribal members were told that the agreement should be signed because "the reservation alone proclaims the old time and the old conditions." Despite the extensive history, there is no mention of the preservation of reservation boundaries or of maintaining tribal authority over the lands to be ceded.

5. Judicial precedent strongly supports disestablishment. This Court's decision in *Perrin v. United States*, 232

U.S. 478 (1914) found in effect that the reservation had been disestablished by referring to the reservation as reduced from 400,000 acres to 100,000 acres by 1914. Precedent of the lower federal courts and the South Dakota Supreme Court confirm disestablishment.

6. The events subsequent to the opening of the reservation likewise confirm disestablishment. Most critically, the State assumed virtually unchallenged exclusive jurisdiction over the area beginning in 1895 and continuing until this litigation. The land area of the purported reservation is now 91 percent nontrust land and 68 percent of the residents are non-Indian. The century-long "reasonable expectations" of all persons in the area, Indian and non-Indians, are seriously upset by the decisions below.

ARGUMENT

In *Hagen v. Utah*, 510 U.S. 399, 411 (1994), this Court summarized the " 'fairly clean analytical structure' " it employs in diminishment cases:

> The most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands. . . . We have also considered the historical context surrounding the passage of the surplus land Acts, although we have been careful to distinguish between evidence of the contemporaneous understanding of the particular Act and matters occurring subsequent to the Act's passage. . . . Finally, "[o]n a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land Act diminished a reservation." . . . Throughout the inquiry, we resolve any ambiguities in favor of the Indians, and we will not lightly find diminishment.

Application of this structure – which focuses on statutory language, historical context and subsequent events – compels a finding of disestablishment.

I. THE CESSION AND SUM CERTAIN LANGUAGE OF THE YANKTON ACT CREATES AN "ALMOST INSURMOUNTABLE PRESUMPTION" OF DISESTABLISHMENT. THIS PRESUMPTION IS STRENGTHENED BY OTHER PROVISIONS OF THE ACT.

A. Articles I and II of the Yankton Act contain language of "cession" for a "sum certain" and therefore an "almost insurmountable presumption" of disestablishment is created.

Articles I and II of the Yankton Surplus Land Act, App. 112-113, constitute a "cession" for a "sum certain":

> ARTICLE I
>
> The Yankton tribe of Dakota or Sioux Indians hereby **cede, sell, relinquish, and convey** to the United States **all their claim, right, title, and interest** in and to all the unallotted lands within the limits of the reservation set apart to said Indians as aforesaid.
>
> ARTICLE II
>
> **In consideration for the lands ceded, sold, relinquished, and conveyed** to the United States as aforesaid, the United States stipulates and agrees to pay to the said Yankton tribe of Sioux Indians **the sum of six hundred thousand dollars ($600,000)**, as hereinbefore provided for.

That this language creates a "cession and sum certain" arrangement is not disputed. *See DeCoteau*, 420 U.S. at 445-446. This Court has definitively established that the use of this language creates an "almost insurmountable presumption of diminishment":

> Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress

> meant to divest from the reservation all unallotted opened lands. (Citations omitted.) *When such language of cession is buttressed by an unconditional commitment from Congress to compensate the Indian tribe for its opened land, there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished.*

Solem, 465 U.S. at 470-71 (emphasis added). This Court recently reiterated that rule of law in *Hagen*, 510 U.S. at 411, finding that cession and sum certain language creates a *"nearly conclusive presumption"* of diminishment. Indeed, "cession and sum certain" language is "[a]t one extreme" of that which indicates diminishment, *Solem*, 465 U.S. at 469, n.10, and is also "precisely suited" to termination of reservation status. *DeCoteau*, 420 U.S. at 445. That the "almost insurmountable presumption" of disestablishment was created is beyond question.[8] *See also Oregon Department of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 760 (1985); *Id.* at 768.

Moreover, even absent the presumption recognized in *Solem* and *Hagen*, use of "cession and sum certain"

---

[8] The presumption, and the great weight assigned to it, apparently flow from the universal turn of the century understanding that when land ceased to be held by Indians, it ceased to be Indian country or to be part of a reservation. *See Solem*, 465 U.S. at 468; *Bates v. Clark*, 95 U.S. 204, 208 (1877). This understanding was combined with a perception that the use of the term "cession" in the international context connotes the "transfer of territorial sovereignty by one State to another State." Jennings, *The Acquisition of Territory in International Law* (1963) at 16. *See also In Re Cooper*, 143 U.S. 472, 496 (1892); *Goetz v. United States*, 103 F. 72, 77 (S.D.N.Y. 1900); Treaty with Russia, 15 Stat. 539 (1867), Art. I, IV. The conveyance of "all" rights in the property, see, *Klamath*, 473 U.S. at 768, by way of a "cession" gained even greater weight when the tribe was guaranteed a "sum certain" which consummated the transaction, and which did not benefit the tribe "only indirectly, by establishing a fund dependent on uncertain future sales of its lands to settlers." *DeCoteau*, 420 U.S. at 448.

language would, *in this case*, independently carry "almost insurmountable presumption" of disestablishment. The 1858 agreement signed by the Yankton Tribe provided in Article 1, App. 100, that the tribe "cede[d] and relinquish[ed]" certain territory to the United States and in Article 4 provided for specific payments, or a "sum certain" to the tribe amounting to "one million and six hundred thousand dollars in annuities" as well as other payments. App. 102. The Tribe should be presumed to have the same understanding of both "cession and sum certain" agreements, i.e., that each conveyed all claim to and jurisdiction over the subject territory.

B. Other Articles of the agreement and congressional act aid the presumption of disestablishment.

1. The adoption of the anti-liquor provision at the demand of tribal members supports the presumption of disestablishment.

> Article XVII, an anti-liquor provision, provides: No intoxicating liquors nor other intoxicants shall ever be sold or given away upon any of the lands by this agreement ceded and sold to the United States, nor upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the treaty between the said Indians and the United States, dated April 19th, 1858. . . .

App. 120. The article thus makes federal liquor law applicable to the lands ceded by the Agreement. The provision would be surplusage if the reservation were not disestablished by the Act of 1894, as intoxicants were already forbidden in "Indian country" by federal law effective at least since 1877. *See* Strickland, *Felix S. Cohen's Handbook of Federal Indian Law (1982 ed.)*, p. 305, n.189.[9] *See also* T 73, JA 606 (liquor illegal since 1832).

---

[9] The majority incorrectly understood the Act of July 23, 1892, 27 Stat. 260, to be the initial act forbidding intoxicants in

This Court found, in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 613 (1977), that a similar provision in a 1910 act raised an inference that that reservation was diminished:

> [t]he most reasonable inference from the inclusion of this provision is that Congress was aware that the opened, unallotted areas would henceforth not be "Indian country," because not in the Reservation.

(Footnote omitted.) The provision here can be given even *greater* weight than the anti-liquor provision in *Rosebud* (or a similar anti-liquor provision in *Solem*, 465 U.S. at 475, n.18), in that the Yankton anti-liquor provision was indisputably the product of negotiations between the tribe and the United States. Thus, the anti-liquor provision was included in the Yankton Agreement itself, rather than only in post-agreement legislation as in *Rosebud* and *Solem*, and was, moreover, inserted at the urging of the Indians themselves. According to the negotiators, "it was made an imperative condition of the sale, *by the Indians*, that whiskey should be excluded." Negotiations at 21, JA 154 (emphasis added). As Chief Jandran stated:

> I sign the treaty because it contains the article about the Pipestone Reservation, the whisky clause, and the clause for the care of the poor, for schools, etc.

Id. at 25, JA 162-163. The tribal members, of course, knew that liquor was already prohibited on the reservation and their demand that the liquor provision be adopted in the agreement speaks strongly to their perception that the agreement surrendered reservation status and that special protection was needed as a result.

Indian country. *See* App. 23. Regardless of the date used, however, liquor was illegal in Indian country by the time the proposed agreement was drawn and certainly by the time the agreement was signed on the last day of December, 1892.

Third, the 1893 Commissioner of Indian Affairs Report to Congress, which accompanied the proposed Yankton agreement, stated:

> Article XVII, prohibiting the sale or disposition of intoxicants upon any of the lands *now* within the Yankton Reservation, seems to be a desirable provision, and from the decision of the Supreme Court in *United States v. Forty-three Gallons of Whisky* (93 U.S. 188), the stipulation would appear to be valid if ratified by the United States.

Id. at 6-7, JA 121 (emphasis added). In *United States v. 43 Gallons of Whiskey*, 93 U.S. 188, 195 (1876), this Court determined that the United States could prohibit the introduction of liquor *outside* of a reservation:

> If liquor is injurious to [the Indians] inside of a reservation, is it equally so outside of it; and why cannot Congress forbid its introduction into a place near by, which they would be likely to frequent?

The citation by the Commissioner of *43 Gallons of Whiskey* as the legal basis for the liquor provision strongly indicates his perception to be the same as that of the Indians signatory to the 1892 agreement: That the reservation would be disestablished by the agreement.[10] The anti-liquor provision thus strengthens the already weighty presumption of disestablishment.

2. The provision of the Yankton act relating to school lands strengthens the presumption of disestablishment.

The 1894 Act adopting the agreement with the Yankton Sioux Tribe provides specifically for the reservation of

---

[10] The Commissioner's reference to the lands "*now* within the Yankton reservation," Negotiations at 7, JA 121, likewise strongly implies that the lands soon would *not* be on a reservation.

Sections 16 and 36 of each congressional township "for common-school purposes . . . subject to the laws of the State of South Dakota. . . . " App. 123. South Dakota's Enabling Act provides, however, that Sections 16 and 36 in each congressional township may *not* be granted to the state for common school purposes within Indian "reservations" until the reservations have been "extinguished" and such lands have "become a part of [ ] the public domain." 25 Stat. 676, § 10 (1889). As in *Rosebud*, 430 U.S. at 600-602, the language of the Yankton Act adopting the agreement indicates that the Enabling Act conditions had been fulfilled, and that the Yankton reservation had been "*extinguished* and such lands . . . restored to . . . the *public domain*." (Emphasis added.) H.R. Rep. No. 7613, 59th Cong., 2d Sess. 3-4 (1907) later pointed out that four "precedents" justified the grant of such lands to South Dakota "based upon" its Enabling Act: The acts "opening" the Great Sioux Reservation and the Sisseton Reservation, an act providing for the sale of the Rosebud reservation, *and the act "opening the Yankton Reservation."* (Emphasis added.) Three of these reservations have been held to be disestablished or diminished; logic and history now support a finding of disestablishment with regard to Yankton, the fourth "precedent."[11]

II. THE ARTICLE XVIII SAVINGS SECTION DOES NOT OVERCOME THE "ALMOST INSURMOUNTABLE PRESUMPTION" OF DISESTABLISHMENT.

The Tribe relies almost entirely upon Article XVIII:

> Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement, and its ratification by Congress, all

[11] The fact that the Tribe did not retain any lands for itself also indicates disestablishment.

> provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858.

App. 120. Article XVIII does not overcome the "almost insurmountable presumption" of disestablishment.[12]

A. The savings clause was included to preserve the annuities due the Tribe under the Treaty of 1858.

The historical record demonstrates that the primary purpose for adoption of Article XVIII was the preservation of annuities guaranteed under the Treaty of 1858. First, the text of Article XVIII specifically mentions only the annuities guaranteed by the 1858 treaty, *id.*, and the "annuities" guaranteed in 1858 are the only rights specifically identified to be preserved by Article XVIII in the Commissioner's report to Congress. *See* Negotiations at 4, JA 115. Second, the testimony of the historian retained by the Tribe strongly indicates that the section was included to preserve the 1858 annuities – i.e., the cash, guns,

[12] The quantum of evidence necessary to overcome the presumption has not been definitively articulated. An "almost insurmountable presumption" is not the same as an "insurmountable presumption." An "insurmountable presumption" is probably not a "presumption" at all, but rather is a "rule of law." *See generally* Strong, *2 McCormick on Evidence* (4th ed.) at 451. Ordinary presumptions have more or less effect, according to their terms. *See generally, id.*, §§ 342-344. The use of the term "*almost* insurmountable presumption," in the words of Judge Magill, "suggests that it is at least theoretically possible, although difficult, to rebut this presumption" and one "challenging" the presumption "should have the burden of presenting evidence, which, at a minimum, clearly and convincingly demonstrates that Congress intended to maintain tribal governance over ceded lands. . . . " App. 47, n.29.

ammunition, food, clothing and so on, critical to their existence. *See* T 53-54, JA 587-588. Thus, Professor Hoover testified:

> [T]here was a belief in the tribe that it's plausible that the government might shut these [annuities] down if we resist, because the resistance had led to the loss of annuities in the past. . . . [T]hat would have been disastrous.

T 54-55, JA 588-589; *see also Greger*, App. 147-148. Tribal members were not only uneasy about annuities, but were also concerned about similar monetary benefits they perceived were due them under prior agreements. As the government negotiators reported to Congress, "The Indians . . . presented to us a long list of claims and grievances. They claim that they had not received their dues under the treaty of 1858. . . . " Negotiations at 21, JA 155. The practical difficulty before the negotiators was that if the tribal members were not given adequate assurance as to these old claims, the tribal members might well have refused to sign the agreement. For example, tribal member Henry Selwyn stated: "In two previous treaties the entire payment has not been made, and that is the way this would probably be. Until all things are carried out and straightened up this land should not be sold." *Id.* at 55, JA 226. Tribal member Jumping Thunder stated, "Among these propositions are many claims. When these claims are settled, then it will be time to consider the sale of the lands." *Id.* 59, JA 241. *See also id.* at 58, JA 237 (Chief Jandran).

Article XVIII protected the tribal members against a "disastrous" loss of annuities due them for 50 years under the treaty of 1858 and, by answering the claims of the tribal members about other monetary claims, persuaded them to sign the 1892 Agreement. The state supreme court, in rejecting an over-broad construction of Article XVIII, stated that,

> the record of negotiations is replete with Yankton concerns for obtaining unsatisfied monetary entitlements before selling their unallotted reservation land. Nevertheless . . . *no mention is found respecting the preservation of reservation boundaries*, keeping a tribal presence on ceded lands, or extending Indian dominion over white settlements, except with respect to the prohibition on the sale of liquor as discussed in *Perrin*.

Greger, App. 149, (emphasis added).[13]

B. Because the text of Article XVIII is internally ambiguous, it cannot overcome the "almost insurmountable presumption" of disestablishment.

Article XVIII is internally ambiguous and, for that reason alone, cannot overcome the "almost insurmountable presumption" of disestablishment. Article XVIII states that nothing in the agreement "shall be construed to abrogate the treaty of April 19th, 1858," and *also* that the "annuities under the said treaty of April 19th, 1858" shall remain in effect. App. 120. The section is inconsistent as to what is preserved; i.e., if the language were actually intended to protect *all* provisions of the Treaty of 1858 from abrogation, certainly the 1858 annuities would be protected.

Additional ambiguity arises if a literalistic interpretation of the first portion of the savings section is adopted, for such an interpretation would effectively negate the 1892 agreement. Article 4 of the 1858 treaty guaranteed the Tribe "quiet and peaceable possession" of 400,000 acres "for their future home." App. 102. Article 10 of the 1858 agreement excluded settlement by any "white person" on the reservation, except certain narrow categories. *Id.* at 108. Under a literalistic interpretation of the first portion of the 1894 savings clause, the entirety of the 1858

---

[13] We also note that the validity of Article XVI of the 1894 Act, App. 119-120, relating to Pipestone was litigated in this Court in *Yankton Sioux Tribe v. United States*, 272 U.S. 351 (1926).

Treaty remains in effect, the cession of land provided for by Articles I and II of the 1894 Act would be negated and no settlers would be able to reside in the 1858 boundaries. As the Dissent found:

> No one, including the district court, any party or amici, or the majority, suggest that we interpret Article XVIII literally, because to do so would eviscerate the 1894 Act, nullifying its chief provisions and contradicting its entire purpose.

App. 51 (footnote omitted).

The Tribe, to solve this difficulty, seeks refuge in a canon of construction favoring Indian tribes. The canon relied on, however, does not allow an ambiguous Article XVIII to overcome the clear provisions of Articles I and II. In *DeCoteau v. District County Court*, 420 U.S. at 447, this Court stated:

> A canon of construction is not a license to disregard clear expressions of tribal and congressional intent.

This Court has definitively established that "cession and sum certain" language identical to that used in the 1894 Yankton agreement constitutes a clear and unequivocal expression of intent to disestablish. *See, e.g., Solem*, 465 U.S. at 470-71; *DeCoteau*, 420 U.S. at 445-47. The attempt to use the ambiguous language of Article XVIII to overcome the "clear expression of tribal and congressional intent" created by the "cession and sum certain" language is contrary to *Solem* and *DeCoteau*. *See also Rice v. Rehner*, 463 U.S. 713, 732 (1983) (canon should not be employed to accomplish "formalistic disregard of congressional intent").[14]

---

[14] To the extent, however, that the canon *does* apply, it appears certain that the 1894 Congress would have perceived that disestablishment would be a "benefit" to the Indians; therefore the canon operates in favor of disestablishment.

C. There is no basis for an argument that tribal members somehow "understood" that Article XVIII would narrow the ordinary meaning of cession and sum certain language so as to preserve the boundaries of their reservation.

The United States argued below that Article XVIII should be interpreted to narrow the construction of Articles I and II to allow the transfer of land to the United States for a sum certain but not to disestablish the boundaries of a reservation. This interpretation is offered, according to the United States, to protect the "tribe's understanding" of Article XVIII. *See* Brief of the United States as Amicus Curiae in Support of Plaintiffs-Appellees, p. 9. No evidence has been cited, however, to support this rendition of the "tribe's understanding" of Article XVIII.

Furthermore, reading Article XVIII to allow the cession of lands for a sum certain without altering reservation status would be *precisely contrary* to the common understanding of the day. In *Solem*, 465 U.S. at 468, this Court stated:

> The notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century.

The common understanding and practice, in fact, were to the contrary: When Indian lands passed from tribal ownership, they ceased to be part of a reservation. *See, e.g., id.; Bates v. Clark*, 95 U.S. 204, 208 (1877). To sustain the remarkable argument that the tribal members and the

---

Negonsott v. Samuels, 507 U.S. 99, 110 (1993). *See generally*, Cohen, *Handbook of Federal Indian Law* 78 (1942): ("The process of allotment and civilization was deemed as important for Indian welfare as for the welfare of non-Indians"); Prucha, II The Great Father 631 (1984): ("[I]n the end the reservations became an abomination" to reformers and their friends in government).

United States somehow came to an agreement, sub silentio, that Article XVIII would upset the common understanding that reservation status of Indian lands was coextensive with tribal ownership would obviously require extensive evidence; none has been offered and the argument should be rejected.[15]

D. This Court's treatment of savings clauses indicates that even if the Article XVIII savings clause is found not to be ambiguous, it should not be given overreaching effect.

This Court has manifested its intent that savings clauses be given only limited effect in cases which acknowledge diminishment, albeit without citing the savings clause language. The Dissent thus noted that this Court has "found diminishment despite similarly 'strong' – if less verbose – savings clauses in two other allotment-era statutes." Dissent, App. 50, n.31. An Agreement with the Crow Tribe states: "all the existing provisions of May seventh, eighteen hundred and sixty-eight, shall continue in force." 22 Stat. 42 (1882). This language is *stronger* than that of the Yankton agreement for it contains no internal ambiguity. Nonetheless, this Court, in *Montana v. United States*, 450 U.S. 544, 548 (1981), referred to the Act as one of four which "reduced the reservation to slightly fewer than 2.3 million acres." Likewise, at *id.*, and *DeCoteau*, 420 U.S. at 439, n.22, this Court noted diminishment with

---

[15] We do not argue that this common understanding dictates disestablishment in every case in which there was a transfer of tribal lands. In *Solem* itself disestablishment was not found. *Solem* is easily distinguishable from this case in that there was no "cession and sum certain language" creating the "almost insurmountable presumption" nor was there an unequivocal assumption of jurisdiction on the part of the State following the opening act. Nonetheless, the identification of the understanding creates a factor which presumably must be weighed in the balance in each case. See also, Brief of Amici States of California, et al., in Support of Petitioner.

regard to another Crow Agreement found at 26 Stat. 989, 1039, 1042, § 31, Act of March 3, 1891, which stated:

> That all existing provisions of the treaty of May seventh, Anno Domini eighteen hundred and sixty-eight, and the agreement approved by act of Congress dated April eleventh, eighteen hundred and eighty-two, shall continue in force.

This language is again *stronger* than that included in the ambiguous Article XVIII. This Court nonetheless acknowledged that the agreement diminished the Crow Reservation. While neither *Montana* nor *DeCoteau* directly set forth the savings language of the two agreements, this Court's opinions indicate their minimal importance.

Furthermore, we note that this Court has never failed to find diminishment because of a savings clause; indeed, when savings clauses *are* present, and diminishment *is not* found, the savings clause has not been held by this Court to have made any difference. *See, e.g., Solem, supra*; 35 Stat. 460 (1908) § 9.

Ordinary principles of statutory construction also direct that Article XVIII be given limited effect. All admit that a literalistic meaning may not be assigned to Article XVIII; therefore a court must look " 'beyond the words to the purpose of the act.' " *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966). Similarly, the courts must seek a " 'sensible construction' that avoids attributing to the legislature either 'an unjust or an absurd conclusion.' " *United States v. Granderson*, 511 U.S. 39, 56 (1994). Here the "purpose" of the act and the "sensible" construction are evident: Congress meant its "cession and sum certain" language to mean what it had always meant – nothing in the history indicates a different result; the savings clause is sensibly interpreted to protect annuities. *See also*, Dissent, App. 53-54.

This interpretation also gives credit to the precept that "a specific provision [in a contract] controls over a general one," *Greger*, App. 150, *citing Bock v. Perkins*, 139 U.S. 628, 634 (1891) and the similar rule that a "broad construction" of a "proviso" in an act of the legislature

will not be allowed when it is "plainly repugnant to the body of the Act." *Dollar Savings Bank v. United States*, 86 U.S. 227, 236 (1873).

The South Dakota Supreme Court resolved the statutory interpretation problem consistent with the foregoing when it found that because a definitive intent is expressed by the "cession and sum certain" language and because Article XVIII "only generally asserts the preeminence of the 1858 Treaty and in no way disavows the purpose of divestiture in Articles I and II," Articles I and II must prevail. *State v. Greger*, App. 150.

III. THE EVENTS SURROUNDING PASSAGE OF THE ACT FURTHER SUPPORT THE PRESUMPTION OF DISESTABLISHMENT.

This Court has indicated that disestablishment may be found even when the actual language used by Congress does not itself effect disestablishment. In *Solem*, 465 U.S. at 471, this Court stated:

> [E]xplicit language of cession and unconditional compensation are not prerequisites for a finding of diminishment. When events surrounding the passage of a surplus land Act – particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress – unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation, we have been willing to infer that Congress shared the understanding that its action would diminish the reservation. . . .

The issue *here*, of course, is not whether it should be concluded from contemporaneous evidence *alone* that disestablishment has occurred; rather, it is whether this history overcomes the "almost insurmountable presumption of disestablishment" created by "cession and sum certain

language." It does not. The history strongly supports disestablishment.

A. The on-the-record exchanges between tribal members and the government negotiators support disestablishment.

Commentary by the negotiators strongly indicate disestablishment. For example, Commissioner Cole told the tribal members during the negotiations:

> *The reservation alone proclaims the old time and the old conditions.* But even here the means of your former mode of life have vanquished [sic]. The tide of civilization is as resistless as the tide of the ocean, and you have no choice but to accept it and live according to its methods or be destroyed by it. *To accept it requires the sale of these surplus lands and the opening of this reservation to white settlement.*

Negotiations at 81, JA 309. Similarly, Dr. Brown said: "The time is past when you could stay in your present condition. I think I shall live to see many Indian men occupy prominent places, not only in the State, but in the nation." *Id.* at 68, JA 267. Other commentary also pointed to the end of tribal governance:

> It might be, after you sold your land, you could have this reservation organized as a separate county. If this could be done – I do not say it can – you could govern your own people in your own way, so long as you obeyed the laws of the State.

Id. at 48, JA 206. *See also id.* at 49, 50, JA 208-209, 211 (Commissioner Cole); *id.* at 67, JA 266 (Commissioner Brown).

A similar recognition that the agreement intended the disestablishment of the reservation is found in the equation of the pending agreement with the 1858 Treaty by which the Tribe ceded all authority over 11 million acres of land. For example, tribal member William Bean,

Further, a 1969 Solicitor's opinion, relying in part on *DeMarrias v. South Dakota*, 319 F.2d 845 (8th Cir. 1963), which had found that the Sisseton Reservation disestablished, stated that the 1894 Act "diminish[ed] the area over which the [Yankton] tribe might exercise its authority." Exh. 628, JA 525. No reference was made to the 1941 Cohen letter.

In 1985, as set forth above, the Department of Justice admitted that the reservation had been "diminished" in a brief filed with the Eighth Circuit Court of Appeals. In 1994, the BIA (again) and the EPA both virtually admitted disestablishment of the reservation. In that year, the EPA, in issuing its "Notice of Tentative Determination" stated:

> On review of the arguments and consultation with the Department of the Interior, EPA believes that the State of South Dakota has sufficiently demonstrated that the Yankton Sioux Reservation was disestablished by the Act of 1894. *See Weddell v. Meierhenry*, 636 F.2d 211 (8th Cir. 1980).

59 Fed. Reg. 16649 (April 7, 1994), JA 532-533. (The EPA reversed itself only *after* the decision below.)

3. Treatment in federal legislation.

Language used in legislation was admittedly not consistent. For example, 35 Stat. 808, March 3, 1909, referred to an allotment of 80 acres of land "on the *former* Yankton reservation in South Dakota." (Emphasis added.) Other legislation occasionally referred to a "reservation" but apparently as a convenient geographical description and not as a political description, as one speaks of the "Northwest Territory." *Cf. United States v. Oklahoma Gas and Electric Company*, 318 U.S. 206, 216 (1943). *See*, App. 35.[24] In any event, as this Court has

---

[24] The divided panel apparently perceived that the most relevant legislation was found at 29 Stat. 16 (1896). *See* App. 32. The panel thought it important that Section 1 of that Act referred to the "Yankton Reservation" and Section 3 referred to "any former Indian reservation" in the state. The panel's opinion that the distinction between the two sections is meaningful is based on an incomplete analysis. First, the panel failed to recognize that Section 3 constituted a Senate amendment to the original bill. 28 Cong. Rec. 1630 (Feb. 13, 1896). Rep. Lacey stated that the amendments "include some additional reservations in the State of South Dakota, where the situation is *substantially the same* as the one covered by the House bill." 28 Cong. Rec. 1750 (Feb. 15, 1896). The only "reservations" the remark could have referred to were the Lake Traverse Reservation and the Great Sioux Reservation, *each of which had been earlier diminished. See DeCoteau, supra; Rosebud*, 430 U.S. at 589. Yankton, as the Representative perceived, was in *"substantially the same"* situation as the two diminished or disestablished reservations. *See also* 28 Cong. Rec. 1087 (Sen. Pettigrew refers to Yankton lands as "public lands of South Dakota"). Finally, the divided panel slighted the significance of the report of S.W. Lamoreaux, the Commissioner of Public Lands, which was included in H.R. Rep. 100, 54th Cong., 1st Sess. 2, Exh. 611, JA 462, stating that the "lands in the *former* Yankton Indian Reservation were opened to settlement and entry on May 21, 1895. . . . " (emphasis added).

found in other disestablishment cases, the " 'views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' " *Hagen*, 510 U.S. at 420.

4. Neither of the tribal constitutions claims reservation status.

The tribal constitution adopted in 1932 does not assert jurisdiction over any land base, Exh. 651, JA 483-488, and members of the tribal council could be from any part of Charles Mix County, *id.*, JA 484, although the 1858 reservation includes only *one-half* of the county.

Likewise, the 1962 tribal constitution, adopted after studies of other tribal constitutions, T 205-207, JA 637-638, failed to claim jurisdiction over all lands within a defined reservation boundary. Instead, Article V, Section 1 of the 1962 constitution states:

> The territory under which this Constitution shall exist shall extend to *all original Tribal lands now owned by the Tribe* under the Treaty of 1858.

Exh. 652, JA 499 (emphasis added). Thus the Tribe in the constitution by which it is governed today has carefully limited its jurisdiction to "original tribal lands now owned by the Tribe" only, and *does not claim jurisdiction over any other lands whatsoever or over the 1858 reservation boundaries.*[25]

As a result, this Court is now asked to declare the existence of a reservation status which the Tribe has not claimed even in its own constitution.

5. No tribal government of general jurisdiction.

The Tribe's recognition of its lack of reservation status is also reflected in its historic lack of a government of general jurisdiction.

In 1892 federal authorities caused a speaking council to be developed whose actions had to be approved by the Commissioner of Indian Affairs and the Yankton agent. *See* T 124-126, JA 626-627. No evidence was offered of any action ever taken by it, however, or by any other committee which

---

[25] The Yankton constitution stands in stark contrast to those of other South Dakota tribes which have opposed disestablishment. In *DeCoteau*, 420 U.S. at 443, the Sisseton Tribe relied upon a tribal constitution adopted in 1966 which claimed jurisdiction over lands "lying in the territory within the original confines of the Lake Traverse Reservation as described in Article III of the Treaty of February 19, 1867." *See also Rosebud*, 430 U.S. at 616, n.1 (Marshall, J. dissenting). The Court ultimately rejected claims that the Sisseton and Rosebud reservations still existed in the disputed areas, despite the language of these constitutional provisions. *See also*, examples of claims of other South Dakota tribes to reservation boundaries, in Fay, *Charter, Constitutions and By-Laws of the Indian Tribes of North America, Part I: The Sioux Tribes of South Dakota*, Colorado State College, Museum of Anthropology (1967): (Lower Brule, p. 39; Oglala Sioux, p. 48; Standing Rock, p. 94).

it might in turn have formed. *Id.* Further, there was apparently no operating tribal business committee, the central governmental unit of the Tribe, between 1903 and 1934. T 127-131, JA 627-630.

Accordingly, in 1932, approximately 280 tribal members signed a letter to a congressional investigating committee which stated:

> Our allotment rolls were closed in 1894. Therefore all Indians 38 years old or less got no allotments and never will get any as no land is available. Our Boarding school was closed about 20 years ago. Our children attend public school. We have no hospital, never did. We have no tribal funds. Our rolls were closed in 1920. . . . We had no Tribal Council in the 75 years of our establishment and today, when our reservation is reduced to A MILE SQUARE, we do not need a Tribal Council.

Exh. 23, JA 489-490 (emphasis in original). *See also* identifying the reservation as a mile square, Exh. 623, JA 478. Nonetheless, the tribal constitution of 1932 did permit the selection of a business committee, but, as the district court found,

> the Business and Claims Committee was suspended from 1936 through 1965 and did not operate during that time, although two or three other limited purpose committees were developed by tribal members.

DCO, App. 87. The Tribe actually took few actions even on trust land after 1965 and did not attempt to exercise jurisdiction over nontrust lands. The court of appeals found at App. 39 that:

> The tribe presented no evidence that it has attempted until recently to exercise civil, regulatory or criminal jurisdiction over nontrust lands.

6. The tribal chairman recently acknowledged disestablishment.

The tribal chairman acknowledged disestablishment when, at the administrative hearing on the landfill which gave rise to this controversy he testified:

> Q. (By Mr. Abourezk): Are you familiar with the *former boundaries* before that area was opened up of the Yankton Sioux Reservation?
> A. (By Mr. Drapeau): Yes.
> Q. Was that land within the *former boundaries* of the Yankton Sioux Reservation?
> A. Yes.

Exh. 675, p 556 (emphasis added). Chairman Drapeau's subsequent trial explanation of his answers to these questions was muddled indeed. *See* T 306-313, JA 646-652. In any event, the testimony demonstrates that the tribal chairman and the Tribe's lawyer were freely using the term "former boundaries" as late as 1993, consistent with an acceptance of disestablishment. This admission is further supported by the testimony of the tribal chairman that the Tribe had posted *no* signs on highways to tell a visitor where the purported boundary to the reservation existed. *See* T 339, JA 674. (The Tribe did, however, have signs telling people how to get to its casino. *Id.*)

C. The demographics of the area confirm disestablishment.

The key post-act demographic indicators – land ownership and population – each confirm disestablishment. *See Hagen*, 510 U.S. at 421-422. The court of claims found in *Yankton Sioux Tribe*, 623 F.2d at 171 that:

> Settlement [of the ceded lands] proceeded at a rapid pace. In the 75½ [sic] months remaining of the year 1895, over 56,000 acres were taken up by settlors [sic]. In 1896, over 13,000 additional acres were taken up, and in 1897, over 35,000 acres were taken up. Thus, over 100,000 acres were taken up in the first 3 years.

Furthermore, although the Indians had initially retained allotments of over 200,000 acres, that number also declined precipitously. As Albert Kneale reported in 1913,

> [T]hese Indians were originally allotted over 200,000 acres of land and that to-day they possess less than one-third of their original holdings . . . 1800 of them to-day hold about 70,000 acres of land. . . .

Exh. 22, JA 475-476. By 1930, tribal members owned only 43,358 acres. *Greger*, App. 156. As of the time of trial, approximately 91 percent of the land was privately owned: Only about 40,000 acres of the original 430,000 acres, or about nine percent, is now trust land. *See* T 645, JA 685; App. 42, n.25. *See also* BIA map at App. 159. Furthermore, there are now six state-chartered municipalities within the area claimed to be a reservation: Wagner, Lake Andes, Pickstown, Dante, Marty, and Ravinia. T 682, JA 695-696. *See* Merits Brief of Cities of Dante, et al.

Tribal population also greatly declined in proportion to non-Indians. The district court found at DCO 86,

> White settlers rapidly entered and settled the opened areas of the reservation. Census data show that the population of Charles Mix County increased by 103.4 percent between 1890 and 1900, and of the 8,498 persons residing in Charles Mix County in 1900, only 1,483 were Indian.

As of the 1990 census, approximately 68 percent of those residing in the area of the former reservation were non-Indian. Exh. 614, JA 527. *See* n.6, infra. Thus, both the land ownership and population of the newly disputed area are clearly non-Indian.

D. The justifiable expectations of the residents of the area would be honored by a finding of disestablishment.

The century long jurisdictional history described above, together with the land ownership and population patterns, support a finding of disestablishment because "the contrary

conclusion would seriously disrupt the justifiable expectations of people living in the area." *Hagen*, 510 U.S. at 421; *Rosebud*, 430 U.S. at 603-605.

CONCLUSION

The decision below should be reversed and this Court should find that the area has lost "reservation" status pursuant to 18 U.S.C. § 1151(a), and that the only "Indian country" remaining in the area is found in the unextinguished allotments, 18 U.S.C. § 1151(c), and "dependent Indian communities." 18 U.S.C. § 1151(b).

Respectfully submitted,

MARK BARNETT
Attorney General
Counsel of Record

JOHN PATRICK GUHIN
Deputy Attorney General
500 East Capitol Avenue
Pierre, SD 57501-5070
(605) 773-3215

RESPONDENT'S

BRIEF



TABLE OF CONTENTS—Continued

Page

Excerpt (p. 385) U.S. Department of Interior, Federal Indian Law (1958 ed.) 4a

Excerpt (p. 307) F. Cohen, Handbook of Federal Indian Law (1982 ed.) 5a

Excerpt, Transcript of Oral Argument, *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 99 F.3d 1439 (8th Cir. 1996) 6a

Excerpt, Brief of the United States, *U.S. ex rel. Erickson v. Feather decided with DeCoteau*, 420 U.S. 425 (1975) (No. 73-1500) 7a

Instructions to Register and Receiver from Department of the Interior in relation to the Yankton Indian Lands opened to Settlement, 20 Interior Dec. 435 (1895) 8a

Excerpt, Brief for Petitioner, *DeCoteau v. District County Court*, 420 U.S. 425 (1975) (No. 73-1148) 13a

Excerpt, *DeCoteau v. District County Court*, 420 U.S. 425, 463-464 (1975) 14a

Excerpt, Transcript at 12, *Erickson v. Feather decided with DeCoteau*, 420 U.S. 425 (1975) (No. 73-1500) 15a

TABLE OF AUTHORITIES

CASES: Page

Backcountry Against Dumps v. E.P.A., 100 F.3d 147 (D.C. Cir. 1996) 6
DeCoteau v. District County Court, 420 U.S. 425 (1975) ..... *passim*
DeMarrias v. South Dakota, 319 F.2d 845 (8th Cir. 1963) 49
Dick v. United States, 208 U.S. 340 (1908) 34, 44
Hagen v. Utah, 510 U.S. 399 (1994) ..... *passim*
Matter of Heff, 197 U.S. 488 (1905) 38
Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) 50
Montana v. United States, 450 U.S. 455 (1981) 5
Perrin v. United States, 232 U.S. 478 (1914) 44
Pittsburgh & Midway Coal Min. Co. v. Yazzie, 909 F.2d 1387 (10th Cir. 1990) 31, 34
Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) ..... *passim*
Solem v. Bartlett, 465 U.S. 463 (1984) 11
State v. Greger, 559 N.W.2d 854 (S.D. 1997) 9, 49
United States v. Forty-three Gallons of Whiskey, 108 U.S. 491 (1883) 44
United States v. Nice, 241 U.S. 591 (1916) 38
United States ex rel. Cook v. Parkinson, 525 F.2d 120 (8th Cir. 1974), *cert. denied*, 430 U.S. 982 (1977) 48
United States v. Pelican, 232 U.S. 442 (1914) 46
Ute Indian Tribe v. Utah, 114 F.3d 1513 (10th Cir. 1997) 35
Yankton Sioux Tribe v. Southern Missouri Waste Management Dist., 890 F.Supp. 878 (D.S.D. 1995) ..... *passim*
Yankton Sioux Tribe v. Southern Missouri Waste Management Dist., 99 F.3d 1439 (8th Cir. 1996) ..... *passim*
Yankton Sioux Tribe v. United States, 623 F.2d 159 (8th Cir. 1980) 41

STATUTES:

Act of April 19, 1858, 11 Stat. 743 ..... 11, 15, 20, 22
Act of February 8, 1887, 24 Stat. 388 ..... 12, 14

TABLE OF AUTHORITIES—Continued

	Page
Act of July 13, 1892, 27 Stat. 120	14
Act of August 15, 1894, 28 Stat. 286	9, 12, 38
Yankton Proclamation of May 16, 1895, 29 Stat. 865	40
Act of April 29, 1920, 41 Stat. 1468	49
Act of June 11, 1932, 47 Stat. 300	49
Act of June 27, 1934, 48 Stat. 1245	45
CONGRESSIONAL MATERIALS:	
South Dakota H.R.J. Res. 183, Special Sess. (1889)	13
21 Cong. Rec. 1753 (1890)	13
Report of the Yankton Indian Commission dated March 31, 1893, S. Ex. Doc. No. 27, 53d Cong., 2d Sess. (1894)	*passim*
26 Cong. Rec., 53d Cong., 2d Sess. (1894)	*passim*
H.R. Rep. No. 802, 53d Cong., 2d Sess., pt. 5 (1894)	31
S. Rep. No. 510, 53d Cong., 2d Sess. (1894)	34
S. Misc. Doc. No. 134, 53d Cong., 2d Sess. (1894)	30
H.R. Rep. No. 599, 72d Cong., 1st Sess. (1932)	49
H.R. Rep. No. 1681, 73d Cong., 2d Sess. (1934)	48
S. Rep. No. 1423, 73d Cong., 2d Sess. (1934)	48
OTHER AUTHORITIES:	
Sup. Ct. R. 24.2	1
Letter from Commissioner, J. T. Morgan, Department of the Interior, to Commissioners (July 27, 1892)	14
Yankton Press and Dakotan, (1894)	29
Supplemental Memorandum for the Petitioner, *Squire v. Capoeman*, 351 U.S. 1 (1956) (No. 134)	50
Brief for Respondent and Appendix II for Respondent, *DeCoteau v. District County Court*, 420 U.S. 425 (1975) (No. 73-1148)	9
Brief of the United States, *DeCoteau v. District County Court*, 420 U.S. 425 (1975) (No. 73-1148)	39, 46

TABLE OF AUTHORITIES—Continued

	Page
Brief for Petitioner, *DeCoteau v. District County Court*, 420 U.S. 425 (1975) (No. 73-1148)	46
Transcript of Oral Argument, *Erickson v. Feather*, (decided with *DeCoteau v. District County Court*, 420 U.S. 425 (1975)) (No. 73-1500)	46
Memorandum of the United States, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562)	47
Brief of the United States, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562)	47, 48
Brief for Vine DeLoria, Jr., et al. as *Amici Curiae* in Support of Appellee, *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 99 F.3d 1439 (8th Cir. 1996) (No. 96-1581)	44
Brief for Petitioner, State of South Dakota, *South Dakota v. Yankton Sioux Tribe*, No. 96-1581 (August 7, 1997)	29, 43, 47
40 C.F.R. pt. 258	1, 3, 6
58 F.Reg. 52488 (Oct. 8, 1993)	3
59 F.Reg. 16649 (April 7, 1994)	4
61 F.Reg. 48684-48685 (Sept. 16, 1996)	4, 6
42 U.S.C. 6972	7
Ex. 675, Administrative Record before the South Dakota Board of Minerals and Environment, Drapeau Testimony	3
Report of the Commissioner of Indian Affairs, 8 (1891)	10
Yankton Act, Annual Report, Commissioner of Indian Affairs (1894)	9
Yankton Act, Annual Report, Secretary of the Interior (1894-1895)	9
United States Patent, March 1, 1904	41
Letter of August 7, 1941, Opinions of the Solicitor, Department of the Interior (1979)	43, 45, 48
54 Interior Decision 559 (1934)	47
F. Cohen, Handbook of Federal Indian Law (1942 ed.)	44
U.S. Dep't of Interior, Federal Indian Law (1858 ed.)	44
F. Cohen, Handbook of Federal Indian Law (1982 ed.)	44

BRIEF OF RESPONDENT, SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, IN SUPPORT OF PETITIONER, STATE OF SOUTH DAKOTA

Respondent, Southern Missouri Waste Management District (District) in support of Petitioner, State of South Dakota (State), adopts the "Question Presented," "Decisions Below," "Statement of Jurisdiction," and "Constitution and Statutory Provisions Involved," set forth in the Brief for Petitioner. Sup. Ct. R. 24.2.

STATEMENT OF THE CASE

The District concurs in the "Statement of the Case" submitted by the State, but adds the following to illustrate the dramatic change in the status quo effected by the decisions below which hold that the Yankton Sioux Reservation has not been disestablished.

In late 1991 and early 1992, representatives of Charles Mix and Douglas counties, the Yankton Sioux Tribe (Tribe) and various municipalities began to meet in order to discuss significant new state and new federal regulatory criteria for solid waste landfills. Tr. at 573, *Yankton Sioux v. Southern Missouri*, 890 F.Supp. 878 (D.S.D. 1995). The federal requirements, developed by the Environmental Protection Agency (EPA) pursuant to the Resource Conservation and Recovery Act (RCRA), amended existing rules to include new criteria for siting, designing and operating solid waste facilities. 40 CFR pt. 258.

In February, 1992, a non-profit entity entitled Southern Missouri Waste Management Association, Inc. was incorporated to deal with the challenge of the new requirements. District Court Opinion (DCO), Pet. App. at 90. According to the district court, "tribal members regularly attended Southern Missouri's meetings" although the Tribe "did not sign the joint powers agreement or become an official member of the organization." *Id.* Nonetheless, the testimony indicated that a tribal representative was a voting member of the District Board, Tr. at 581-582, 640-641, JA at 682 and that a tribal councilman occasionally at-

tended. *Id.* at 640-641. A former chairman of the District perceived at the time that the Tribe was, in fact, a member. *Id.* at 640, 660. *See also id.* at 581.

The District aggressively sought out various sites for the landfill and, indeed, advertised in an effort to seek sellers of property. Tr. at 637-638. After conferences with its engineers, as well as the South Dakota Department of Environment and Natural Resources (DENR), the District selected as a site non-Indian fee land approximately one and one-half miles west of Lake Andes, South Dakota. The testimony at trial indicated that the tribal member present at the Southern Missouri meeting voted in favor of the proposed site, or at least did not oppose the site. Tr. at 581-582, 589-590, JA at 683. The site selection was reviewed with the tribal chairman, who stated that he did not want the site on nearby trust land but made no objection to the site actually selected on the grounds that it was within a "reservation." Tr. at 636-637. The site was within the 1858 boundaries of the Yankton Sioux Reservation, a factor not deemed important or material at the time.

After a site characterization study was completed, the site was found to be environmentally suitable and the District submitted a formal request to DENR for a solid waste permit in order to construct and operate the landfill. DCO, Pet. App. at 91. Further, at about the same time as the study was completed, the District approved membership in the District of two additional neighboring counties —Gregory County, South Dakota and Bon Homme County, South Dakota. Tr. at 579-580. The greater size of the District promised to make the facility more affordable to the rural population it was meant to serve.

In the latter part of 1993, after a general tribal election and a change in the tribal administration, the attitude of the new leadership of the Tribe toward the merits of the landfill changed radically.[1] In early October, 1993,

[1] Throughout the 1980's and the 1990's, voter participation in tribal elections fluctuated substantially. Sometimes fewer than 600 people participated in the tribal process. More recently, voter turnout has leveled out at around 1,000 (tribal voters need not reside in the area). In general, approximately 90% of the area within the 1858 boundaries is non-Indian owned and over two-thirds of the population is non-Indian.

the Tribe petitioned to intervene in the contested case hearing procedure with regard to the landfill permit. The Tribe's Petition was granted, and the Tribe was allowed "party status" in the hearing. Tr. at 91.[2]

A four-day contested case hearing was held before the South Dakota Department of Minerals and Environment on December 8-10 and 20, 1993. DCO, Pet. App. at 91. It is critical to note that at this time the Tribe opposed the landfill on environmental grounds but did *not* oppose it on jurisdictional grounds *nor* on the grounds that it was planned within a reservation. The colloquy between tribal chairman and the tribal attorney, in December of 1993, in fact, referred to "*former* boundaries" of the reservation. According to the testimony:

> Q: (By Mr. Abourezk, the Tribe's Attorney): Are you familiar with the *former boundaries* before that area was opened up, of the Yankton Sioux Reservation?
>
> A: (By Tribal Chairman Drapeau): Yes.
>
> Q: Was that land within the *former boundaries* of the Yankton Sioux Reservation?
>
> A: Yes.

Ex. 675, Administrative Record before the South Dakota Board of Minerals and Environment, Drapeau Testimony at 556 (emphasis added).[3]

[2] Consistent with RCRA's authority to delegate environmental programs to states (Subtitle D of RCRA) the State sought to implement the new requirements and therefore revised statutes and rules to do so. EPA generally approved the State's program on October 8, 1993, thereby authorizing the State to implement and enforce the requirements of 40 CFR pt. 258. Plaintiff's Exhibit 3. *See* generally Tr. at 573. In the same notice, EPA reserved the delegation question on "'existing or former' Indian reservations." 58 Fed. Reg. 52488 (Oct. 3, 1993), JA at 530.

[3] The tribal chairman's subsequent effort to explain this testimony was unconvincing. Tr. at 306-313, JA at 645-652.

The Board granted the permit in December, 1993. Following the Board's decision, a second group represented by Mr. Abourezk (the Tribe's attorney) filed an appeal to state circuit court alleging an abuse of discretion on the part of the Board in granting the permit. *See* Pet. App. at 93. No jurisdictional issue was raised. The Sixth Judicial Circuit Court for the State of South Dakota ultimately affirmed the Board decision, and no appeal was taken to the South Dakota Supreme Court. *Id.* The Tribe did not participate in the circuit court appeal.

Federal regulators continued to recognize that the original reservation had been disestablished well into 1994. Thus, on April 7, 1994, EPA issued its Tentative Determination, based on consultation with the Department of the Interior, on whether the State would be granted RCRA authority with regard to the former Yankton Reservation. According to EPA:

> On review of the arguments presented and following consultation with the Department of the Interior, EPA believes that the State of South Dakota has sufficiently demonstrated that the Yankton Sioux Reservation was *disestablished* by the Act of 1894.

59 Fed. Reg. 16649 (April 7, 1994), JA at 532 (emphasis added).[4] The Tribe's arguments with regard to reservation status had thus been raised for the first time in the process before EPA.

Having failed to convince EPA and, apparently, the Department of the Interior, of the existence of the reservation, the Tribe, in September, 1994, filed a complaint in federal district court. In the complaint, the Tribe alleged that the Yankton Sioux Reservation remained intact and had not been disestablished by the 1894 Act, *contrary* to nearly a century of state and federal precedent.

In essence, the Tribe contended that, based on the status of the area as a "reservation," the State did not

[4] EPA reversed its position with regard to reservation status only after the district court's decision. *See* 61 Fed. Reg. 48684-48685 (Sept. 16, 1996).

have authority to issue the District a "Subtitle D" landfill permit and that the Tribe had jurisdiction over the site. At this point, the District sued the States, on a third party complaint, requiring it to defend its jurisdiction as to the solid waste permit that the District had obtained from the State. The State waived its Eleventh Amendment privilege and participated fully in all the proceedings at bar.

The district court, after trial, found that Congress had not disestablished or diminished the boundaries of the Yankton Reservation. Pet. App. at 96. The district court additionally found that, in this instance, the Tribe had failed to demonstrate the existence of either of the Montana exceptions, *Montana v. United States*, 450 U.S. 544, 565-566 (1981), and so could not regulate the landfill itself.

The district court also found that, because EPA had not delegated federal authority to the State with regard to "Indian country" and because the proposed landfill was now newly defined as within "Indian country," EPA regulations applied. The district court found further that the federal regulations required the installation of a very expensive (1.75 million dollars) "composite liner." *See* DCO Pet. App. at 96.[5]

The State appealed the disestablishment/diminishment issue to the Eighth Circuit Court of Appeals. A divided panel affirmed the district court on this issue. *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 99 F.3d 1439 (8th Cir. 1996). Pet. App. at 1. (The District did not appeal because the district court allowed

[5] The District later petitioned EPA to waive the liner requirement. On June 6, 1996, EPA granted the District's petition. The District thereafter sought and obtained relief from the federal court order with regard to the liner based upon EPA's determination. This relief was granted on December 11, 1996. The Tribe has separately sued EPA arguing that it lacked legal authority to grant the waiver; the district court ruled in favor of EPA on December 11, 1996, on that issue. The Tribe has appealed both of these decisions to the Court of Appeals for the Eighth Circuit.

it to go forward with the construction of the proposed landfill facility.)[6]

Further, the decisions of the federal courts present a very difficult situation for the District. Both the State and the Tribe have applied for delegation of federal RCRA authority with regard to the area within the 1858 boundaries of the Yankton reservation. EPA denied RCRA authority delegation to the State after, and based upon, the district court decision. *See* 61 Fed. Reg. 48684-48685 (Sept. 16, 1996). Even though the Tribe has been found by the federal district court to *lack* the authority under *Montana* to regulate the facility as a matter of tribal law, it is by no means certain that the federal government will not delegate *federal* authority to the Tribe, resulting in even further litigation.[7] *But see, Backcountry Against Dumps v. E.P.A.*, 100 F.3d 147 (D.C. Cir. 1996).

Thus, in the place of a well-defined system in which the State was able to grant all of the necessary permits, and would certainly have been delegated federal authority with regard to this area and this landfill, a confused and difficult situation has resulted for the District.

Lastly, the panel majority decision would adversely impact environmental protection in the area generally. EPA has no regulatory machinery in existence with which to grant permits to operate a Subtitle D landfill. Although the landfill would be required to comply with EPA criteria set forth in 40 CFR 258, the *only* entity with jurisdiction

[6] The District expected that the district court would be reversed on the disestablishment issue in light of the strength of the precedent from this Court, the Eighth Circuit Court of Appeals, and the South Dakota Supreme Court. *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 603-604 (1977), "the single most salient fact is the unquestioned actual assumption of state jurisdiction." The District files this brief in support of the State because the district court was affirmed on the disestablishment issue and because of the likelihood that the assertion of tribal jurisdiction will continue to affect the District in this or similar contexts.

[7] The State continues to assert its inherent jurisdiction over the District; to what degree that authority will be challenged in the future is unknown.

to enforce those provisions would be a federal court through a citizen lawsuit filed against the District pursuant to RCRA. 42 U.S.C. § 6972. Similarly, it is the District's understanding that EPA does not approve site characterization studies or sites for landfills, nor does it approve preliminary or final design plans for landfills or monitor the construction of landfills. The District also understands that EPA does not have the manpower to adequately inspect landfills. The Tribe had virtually no environmental program at the time of trial, *see* Tr. at 315-316, JA at 652-654, and had not even made an estimate of the cost of a comprehensive program. Tr. at 335, JA at 671-672. To the extent that the Tribe intends to and does successfully insert itself into the regulation of non-Indian lands, which constitute more than 90% of the area in question, the State's authority would no doubt be further clouded.[8]

SUMMARY OF ARGUMENT

The District fully supports the arguments set forth in the Brief of Petitioner, State of South Dakota. In addition, however, the District would specifically direct the attention of the Court to the legislative history of the 1894 Act, which is excerpted and summarized *infra*, at 12. A brief review of this documentation reiterates two fundamental points in further support of the Petition:

1. The decision of the court of appeals conflicts in principle with relevant decisions of this Court.

2. This case presents a question of federal law that is important and national in scope.

First, in *every* significant respect, the Yankton documentation squarely tracks the Sisseton-Wahpeton (Lake Traverse) documentation detailed at length in *DeCoteau v. District County Court*, 420 U.S. 425 (1975). Although three short years and one session of Congress separates the passage of the Sisseton-Wahpeton and the Yankton Acts, parts of the Yankton process were actually under

[8] The Tribe's intent in this regard is unknown. *See* Tr. at 320-329, JA at 656-666.

consideration in both sessions. Moreover, many of the key congressional participants in the process continued to hold office through the passage of the Yankton Act (e.g., Congressman John A. Pickler of South Dakota "same kind of a treaty we have always made," *infra* at 36-37, and Chairman of the Committee on Indian Affairs, William S. Holman). In fact, approximately *one-third* of the members in the House of Representatives and *two-thirds* of the members in the entire Senate for the 51st Congress (Sisseton-Wahpeton) were still there in the 53rd Congress when the Yankton Act was finally considered, debated and passed.

In this light, uncontested statements in the debates and reports that *specifically* reference the Sisseton-Wahpeton (Lake Traverse) documentation as *precedent* for consideration in the Yankton process assume a degree of significance that the Tribe cannot avoid. When one also considers that there is not a single reference (or even a suggestion) in the same documentation that Congress considered, much less intended, the enactment of the *radical* departure the Tribe asserts, the extent to which the decision of the court of appeals conflicts with the relevant decisions of this Court is readily apparent.

A single point serves to highlight the extent of this conflict. This is only the *second* time that any federal court of appeals has ever held that a congressional act of this nature did not disestablish the reservation area affected; the *first and only* other case with a similiar holding (when controlling law was less clear), was promptly reversed in *DeCoteau*. Since then, *DeCoteau* has been cited and relied on in all circuits as controlling precedent by every other court *except* the district court and the majority of the panel in this case. Nothing in the record in this case fairly supports a departure from this universal view, as the Dissent forcefully and succinctly attests. *See* Pet. at 9-11, 16-19, 21-22, and 24. *See also* Pet. App. at 44-64.

Secondly, the same documentation also confirms the importance of the question of federal law presented. Here,

as in the Sisseton-Wahpeton debates, Congress addressed the national scope of this and related cession legislation and its place in forming the crux of federal Indian policy in that period (1887-1900). In this instance, as in *DeCoteau*, the annual Indian department appropriation act ratified *several* other cession agreements in addition to the Yankton agreement, which further demonstrates the scope of the legislation and its relationship with similar cessions considered in *DeCoteau* (together affecting tens of millions of acres of land across the United States). *See DeCoteau*, 420 U.S. at 439, and the Act of August 15, 1894, 28 Stat. 286.[9]

To complete the perspective, at the petition stage the District has appended excerpts of the Annual Reports of the Commissioner of Indian Affairs and the Secretary of Interior for the same period. Br. of Resp. in Support Pet. App. at 1a-46a.[10] These reports unequivocally confirm that the Commissioner of Indian Affairs and the Secretary of Interior considered both the Yankton and Sisseton reservations "restored to the public domain" by the legislation in question ("*land will be restored to the public domain,*" Yankton Act, Annual Report, Commissioner of Indian Affairs (1894), JA at 450; "*restoring to the public domain,*" Yankton Act, Annual Report, Secretary of the Interior (1894-1895)). Br. of Resp. in Support Pet. App. at 23a, 43a, 44a (emphasis added). They also demonstrate the general thrust of federal Indian law policy and legislation for that period, and unmistakenly support that the conclusions this Court set forth in *DeCoteau* are applicable

---

[9] This legislative history was first submitted to the Supreme Court of the State of South Dakota by Charles Mix County, South Dakota, as *Amicus Curiae* in *State v. Greger*, 559 N.W.2d 854 (S.D. 1997). In *Greger*, the South Dakota Supreme Court reaffirmed its view that the 1894 Act disestabilshed the Yankton Sioux Reservation. *Greger* is discussed in the Petition at 12-14 and appended in the Petition Appendix at 125-158.

[10] These excerpts were first presented to this Court in the text of the Brief for Respondent (pages 72-113) and in Appendix II of Respondent in *DeCoteau*. Brief for Respondent and Appendix II for Respondent, *DeCoteau* (No. 73-1148).

to the present case. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) and *Hagen v. Utah*, 510 U.S. 399 (1994).

Subsequent jurisdictional history, which is essentially undisputed here, unequivocally confirms that Congress intended this cession to disestablish the 1858 Yankton reservation. The opinion in the district court and the majority and the dissenting opinions in the court of appeals are in substantial agreement on this point.

Over the years, the views of the Department of the Interior have also reflected this analysis, notwithstanding the one 1941 letter to the contrary. And even that letter was subsequently disregarded in the relevant sections of the 1942 edition of Felix Cohen's Federal Indian Law. Those sections clearly confirm that the Article XVII liquor prohibition generally supports disestablishment analysis, as this Court noted in *Rosebud*, 430 U.S. at 613-615 n.47.

ARGUMENT

> If the policy of allotting lands is conceded to be wise, then it should be applied at an early date to all alike wherever the circumstances will warrant. If we have settled upon the breaking up of the tribal relations, the extinguishment of the Indian titles to surplus lands, and the restoration of the unneeded surplus to the public domain, let it be done thoroughly. If reservations have proven to be inadequate for the purposes for which they were designed, have shown themselves a hindrance to the progress of the Indians as well as an obstruction in the pathway of civilization, let the reservations, as speedily as wisdom dictates, be utterly destroyed and entirely swept away.

Report of the Commissioner of Indian Affairs, 8 (1891), Br. of Resp. in Support Pet. App. at 27a-28a.

I. THE LEGISLATIVE HISTORY OF THE YANKTON ACT ESTABLISHES THAT THE DIVIDED PANEL UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE RELEVANT DECISIONS OF THIS COURT; THE EXTENT OF THE CONFLICT IS NOT LIMITED TO SOUTH DAKOTA OR TO THE EIGHTH CIRCUIT, IT IS NATIONAL IN SCOPE AND IT IS IMPORTANT.

A. Congress and the Yankton Sioux Tribe Did Not Intend That the Original Boundaries of the Yankton Reservation Would Remain Intact.

1. Introduction. During the "latter half of the 19th century, large sections of the Western States and Territories were set aside for Indian reservations." *Solem v. Bartlett*, 465 U.S. 463, 466 (1984). In particular, the original Yankton Sioux reservation was created in 1858 when Congress ratified a cession agreement with the Tribe, ceding other lands. Act of April 19, 1858, 11 Stat. 743. Pursuant to this cession agreement, some 430,495 acres were set aside for the exclusive use of the Yankton Sioux. *Id.* This is the 1858 Yankton reservation.

Near the end of the century, however, federal Indian policy changed. *Hagen v. Utah*, 510 U.S. at 402. Congress began to take the view that "Indian tribes should abandon their nomadic lives on the communal reservations and settle into an agrarian economy on privately owned parcels of land." *Solem*, 465 U.S. at 466. *See also DeCoteau*, 420 U.S. at 431; *Hagen*, 510 U.S. at 402. It was felt that "individualized farming would speed the Indians' assimilation" into the American way of life. *Solem*, 465 U.S. at 466.

During this same period, many reservations were subject to certain "familiar forces" encouraging their opening. These "familiar forces" consisted predominantly of two factors. First, "[a] nearby and growing population of white farmers, merchants, and railroad men began urging authorities in Washington to open [reservations] to

general settlement." *DeCoteau*, 420 U.S. at 431. Second, many Indians on the reservations "suffering from disease and bad harvests, developed an increasing need for cash and direct assistance." *Id.*

Ultimately, the combination of Congress' new position that Indians should settle on privately owned parcels of land and the ever-present "familiar forces" resulted in the General Allotment ("Dawes") Act of 1887. Act of Feb. 8, 1887, 24 Stat. 388. This Act was "enacted in an attempt to reconcile the Government's responsibility for the Indians' welfare with the desire of non-Indians to settle upon reservation lands." *DeCoteau*, 420 U.S. at 432 (citing Act of February 8, 1887, c.119, 24 Stat. 388). Pursuant to this Act, the President of the United States was granted the authority "to allot portions of reservation land to tribal members and, with tribal consent, to sell the surplus lands to . . . [non-Indian] settlers, with the proceeds of these sales being dedicated to the Indians' benefit." *Id.* (citation omitted).

As a result of the General Allotment Act and the Amendatory Act of February 28, 1891, parcels of land within the Yankton Sioux reservation were allotted to individual Yankton Sioux Indians. Subsequent to the allotment, approximately 168,000 acres of "surplus" land remained unallotted.

2. Legislative History. A brief review of the legislative history of the Act of August 15, 1894, 28 Stat. 286, puts this disestablishment issue in the proper historical perspective. Such a perspective establishes beyond question that the construction of this Act by the federal courts is untenable and clearly erroneous. As the Yankton documentation attests, neither Congress nor the Tribe intended that the original boundaries would remain intact.

The significant aspects of this legislative history are set forth in various disestablishment arguments submitted in the Brief of the State. However, the following chronological overview is intended to supplement those arguments by making clear that nothing in the entire history of this process supports any other conclusion. To the

contrary, viewed in perspective, every source confirms that the intent of Congress and the Tribe, in all significant respects, tracks the views set forth by this Court in *DeCoteau*. In *DeCoteau*, this Court was presented with a contemporaneous and nearly identical 1891 Sisseton-Wahpeton (Lake Traverse) Act and held that it had disestablished that reservation. *DeCoteau* is controlling here. *See also Rosebud*, 430 U.S. 584.

(a) The Negotiations. The history of the negotiations for the cession of the surplus lands of the Yankton Sioux reservation follows the same general pattern found throughout the west in the latter part of the Nineteenth Century. Established as a result of an extensive 1858 cession, the Yankton reservation itself was soon subject to the familiar forces noted in *DeCoteau*. In the early 1880's, this process was initially set in motion by the United States. In 1884, the first Commission was sent to the Yankton reservation to negotiate for a cession. Report of the Yankton Indian Commission dated March 31, 1893, S. Ex. Doc. No. 27, 53d Cong., 2d Sess. at 12-13 (1894), JA at 134-138. These 1884 negotiations were unsuccessful. *Id.* After the passage of the General Allotment Act, applicable throughout the United States, efforts for negotiations were renewed. *DeCoteau*, 420 U.S. at 434 (discussing Section 5 of the General Allotment Act).

In 1889, the South Dakota legislature passed a Memorial to Congress in support of "the opening to settlement under the 'Homestead law' of the Yankton reservation." South Dakota H.R.J. Res. 183, Special Sess. (1889).[11] This Memorial was presented in Congress and referred to the respective committees on Indian affairs. 21 Cong. Rec. 1753, 51st Cong., 1st Sess. (1890). Significantly, similar actions predated the passage of the *DeCoteau* legislation. *DeCoteau*, 420 U.S. at 431-432 n.8.

According to the Commissioners finally appointed to conduct the negotiations, the Yankton Sioux tribe itself

---

[11] The complete text of the South Dakota Memorial is reproduced in Br. of Resp. in Support Pet. App. at 47a-48a.

initiated the process through communications with the Secretary of the Interior. S. Ex. Doc. No. 27 at 50, 74, JA at 286, 289. In 1892, an appropriation for expenses for this purpose was approved: "to enable the Secretary of the Interior in his discretion to negotiate with any Indians for the surrender of portions of their respective reservations. . . ." Act of July 13, 1892, 27 Stat. 120, 137. In July, 1892, Commissioner of Indian Affairs J.T. Morgan issued letters of instruction to three Commissioners: Colonel J. C. Adams, Dr. W. L. Brown, and John J. Cole. Letter from Commissioner, J. T. Morgan, Department of the Interior, to Commissioners (July 27, 1892), Br. of Resp. in Support Pet. App. at 49a-51a.

In this instance, as in *DeCoteau*, the instructions are detailed and referenced throughout the Yankton documents. Commissioner Morgan put the issue squarely in the cession format:

> [T]o negotiate with the Yankton Sioux Indians for the *cession* of their surplus lands. . . .

Br. of Resp. in Supp. of Pet. App. at 49a (emphasis added).

Importantly, the Commissioner also specifically referenced allotments pursuant to the "Act of February 8, 1887" (General Allotment or "Dawes" Act) and acts amendatory thereto, "averaging over 150 acres for each member of the tribe." *Id.* at 50a. As a result of these allotments, the Commissioner noted that there should be "a surplus of some 168,000 acres." *Id.* at 49a. *See also*, Pet. App. at 9 n.9 (stating "some 200,000 acres were sold in 1894"). Further, the Commissioner instructed that:

> If they are unwilling to cede all the surplus land you will endeavor to obtain the relinquishment of such part thereof as they may be willing to part with.

Id. at 50a.

In addition, the text of the instructions clearly anticipated that the status of the reservation would be altered by the cession agreement:

> The surplus lands in their *present state of reservation* cannot be made to yield any considerable income, while the money which will be paid for their *relinquishment* . . . will give them an income. . . .

Br. of Resp. in Supp. of Pet. App. at 50a (emphasis added).

Also enclosed with the instructions was a "form of agreement" transmitted for "guidance," but the Commissioner specifically noted that "you are not required to adhere to the same absolutely." *Id.* at 51a. Here, as in *DeCoteau*, the instructions were general in nature. Moreover, Congress was aware of this fact. The exact point was subsequently addressed in the ratification debate on the floor of the House of Representatives in the remarks of South Dakota Representative Pickler:

> [T]he provision in this bill in relation to the treaty for the Yankton Sioux Reservation; and *what can be said of that treaty can, in general terms, be said of the others.* The proposition that is before the House to-day is very simple. We are needing more lands for settlement. By an act of Congress we provided for sending out a commission to treat with the Yankton Sioux Indians for their reservation. That commission was organized by the Secretary of the Interior and was sent out with *general instructions.*

26 Cong. Rec. 8267 (1894), JA at 419 (emphasis added).

One other aspect of the instructions is worthy of special notation. In setting forth the history of the reservation and the status of the area at that time, Commissioner of Indian Affairs, Morgan cited the Treaty of April 19, 1858, 11 Stat. 743, and noted that "the treaty makes no provision regarding the cession or relinquishment of the reservation or any portion thereof." Br. of Resp. in Support Pet. App. at 50a. In other words, unlike some Sioux and other treaties, which required three-fourths approval, the 1858 Treaty had no such special limitation. As a result, the provisions set forth in the General Allotment Act would control the Yankton negotiations. In this respect, a simple majority would suffice. As the Commissioner noted:

> The terms and conditions agreed upon in council should be reduced to writing and incorporated in the

> accompanying form of agreement which should be signed by at least a *majority* of the male adults of the members of the tribe.

Id. at 50a (emphasis added).

The federal district court, in an attempt to support the result reached in its memorandum opinion, *sua sponte* quoted similar language ("most importantly") (" '[t]he treaty makes no provision regarding the cession or relinquishment of the reservation or any portion thereof' ") in support of the *inexplicable* proposition that the subsequent Yankton agreement of 1892 was *not* a cession. *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 890 F.Supp. 878, 885-886 (D.S.D. 1995), Pet. App. at 82. In context, the Senate Document does not support the conclusion of the district court and the instructions make clear that the reference there, as in the instructions, was to the 1858 Treaty and the percentage of members' consent required for ratification. Presumably, the Tribe recognized this fact and did not advance or support this strained argument on appeal. The panel majority ignored this error of the district court but the dissent did not. Pet. App. at 59-60. Importantly, even in this instance, the *DeCoteau* documents track the Yankton instructions. See the word for word, identical language in the *DeCoteau* instructions ("The treaty makes no provision regarding the cession or relinquishment of the reservation or any portion thereof."). Cities App. at 29.

The Commission arrived at the Yankton agency in Greenwood, South Dakota on October 1, 1892. S. Ex. Doc. No. 27 at 7, JA at 122. Almost immediately, the work of the Commission was interrupted by personal problems. During the first week, Commissioner Brown was "called away, and was absent about six days," covering the period of the first council. *Id.* at 8, JA at 124. On October 10, Commissioner Cole received a telegram informing him of a fatal accident involving his oldest son, which, together with the serious illness of his wife, kept him away from the reservation until November 26, 1892. *Id.* In addition,

on October 25, Commissioner Adams returned home and was absent until November 10, 1892. *Id.*

Moreover, because of a rivalry among tribal factions, the Commissioners met with some support but more opposition. *Id.* at 8-10, JA at 112-120. As a result, the discussions continued for several months. *Id.* In the process, several councils were convened and the issue was thoroughly discussed. *Id.* The proceedings of the councils were "kept as fully and as accurately as possible." *Id.* at 8, JA at 123. At the conclusion of the council proceedings, the Commissioners attested that the written records were:

> [C]orrect in all substantial particulars and are as nearly verbatim as possible under the circumstances, and they correctly represent the council proceedings between the commissioners and the Yankton Indians. *Id.* at 97, JA at 358.

Throughout the councils, the price per acre was the dominant theme in the discussions.

> Peter St. Pierre: This is our land the price is entirely too small. . . . Tom No. 1: The people desire a high price for this land. Whatever we have we want a good price for it, no matter how small. You know that this is a very small tract of land. *Id.* at 74, JA at 287.
>
> Peter St. Pierre: I am against the sale. My friends, this land belongs to us. If the price was higher I might be willing to consider it. *Id.* at 78, JA at 299.

A summary of the council of February 18, 1893, reflected this same sentiment. *Id.* at 91, JA at 339-340.

The Commissioners were convinced that others, with "vested interest" motives, fueled the opposition. This group, according to the Commissioners, was not concerned with the price per acre:

> Commissioner Cole said: [T]hat we can not get these employe[e]s to sign the agreement? Of all the Indians employed at this agency but two have signed. Louis Claymore and one other mechanic signed,

> and all the balance are against us, the office is against us, the police office is against us, the shops are against us, the whole agency is against us and is a hotbed of opposition, so that men who come here to sign are sent away without doing so. . . . [L]ittle progress had been made in taking signatures, as the opposition, under the lead of some of the white employe[e]s of the Government, were straining every nerve to prevent the signing of the agreement. Id. at 86, 89, JA at 325, 333.

In the end, an agreement was reached with more than a majority of the adult male members of the Tribe (two hundred fifty-five (255) out of a total four hundred fifty-eight (458)). *Id.* at 94, JA at 347-348.[12] Significantly, in the process, the discussion establishes several points that are important in the resolution of the question presented here.

(1) References to Sisseton-Wahpeton (Lake Traverse) Cession. In general, this record constitutes an important source which confirms that, without exception, the substance of the process and the intended result corresponds with the *DeCoteau* process in every respect. In fact, in several instances the Commissioners and others specifically made reference to the Sisseton-Wahpeton (Lake Traverse) cession presented in *DeCoteau*:

> Henry Selwyn: If the *Sissetons* and Titowan had sold their land at the same price at which we sold ours in 1858 per acre they would have given the Government their lands for nothing. *Id.* at 54, JA at 226 (emphasis added).
>
> John Cole: They have reported that four bands of Pawnee Indians will sell their land for $1.25 per acre. *The Sisseton Reservation was purchased by the Government at $2.50 per acre.* This is the highest price which has ever been given. So you see your ideas of price are away up. *Id.* at 68, JA at 270 (emphasis added).

[12] The agreement was "translated into the Dakota language for the use and consideration of the tribe's committee. . . ." S. Ex. Doc. No. 27 at 51, JA at 213.

> John Cole: The commissioners are now ready to make you an offer for your surplus lands. The Government will pay you $600,000 for your surplus lands, amounting to about 168,000 acres; payments to be made on the terms of our instructions from the Department of the Interior. This is nearly $3.60 per acre and is more than double what the Cherokees have agreed to sell for. *It is more than the Government paid for the Sisseton Reservation* and is the highest price we have ever known the Government to offer. *Id.* at 71, JA at 278-279 (emphasis added).

(2) Cession and Related References. The manner in which all parties referred to the process in general "cession," "sale," and "treaty" terms also confirms the general understanding and further demonstrates the similarities and the purposes of the negotiations. As in *DeCoteau*, the process was not atypical. *DeCoteau*, 420 U.S. at 439 nn.21, 22. From the very beginning, the Agent, Col. Foster, the commissioners and others clearly stated:

> Col. Foster: The Government has sent a commission to you to negotiate with you for your surplus lands . . . You do not have to sell your surplus lands if you do not want to. . . . Col. Adams: [W]e also understand that you own, outside of your allotments, a large quantity of land in common. It is this land that you own in common that we were appointed by the Great Father to talk to you about. . . . [A] treaty with you for your lands. . . . John J. Cole: [W]e must make this treaty . . . to sell your surplus lands . . . to sell your surplus lands . . . [T]he Government would buy your surplus lands if you want to sell them. . . . John J. Cole: [Y]ou have sent word to Secretary Noble that you desire to sell your surplus lands. . . . Henry Selwyn: This is the second time we sold land to the Government. . . . William T. Selwyn: treat for the sale of the surplus land. . . . William Bean, Sr.: Struck by the Rees has sold a great portion of our reservation . . . Jandran: selling our lands. . . . White Swan: Negotiate for the sale of these surplus lands. . . . Dr. Brown: I believe if you make this

treaty. . . . Dr. Brown: [D]ecide whether you want to sell or not . . . . John J. Cole: [T]o make this treaty between you and the Government. . . . [A] direct out-and-out sale of the whole of your surplus lands. . . . [T]o cede these surplus lands to the Government. . . . We propose to buy all these lands, good, bad and indifferent. . . . Felix Brunot: [W]hether we will sell our lands or not. . . . Eugene Brunot: [S]ell their land. . . . John Omaha: It was decided by the committee that they would sell the land. . . . John Grayface: We do not object to the provisions of the treaty, but we do not want to make a treaty at this time. S. Ex. Doc. No. 27 at 48-50, 54, 56, 58, 67, 68, 73, 91; JA at 204-205, 207, 208, 210, 211, 225, 232, 236, 237, 238, 267, 268, 269, 284, 285, 340. *See also* S. Ex. Doc. No. 27 at 50, 52, 57, 59-64, 66, 67, 69-72, 74, 75, 77-79, 83, 86-88, 93, 94.

(3) Treaty of 1858, 11 Stat. 743. All parties also made specific reference in these negotiations to the earlier 1858 Yankton cession. Of course, no one has ever questioned the effect of the 1858 cession (or any similar cession) on the reservation boundaries. A distinction between the 1858 cession and the 1892 cession in this respect cannot be documented in the transcripts of these negotiations:

Henry Selwyn: I will now refer to the treaty of 1858. This is the second time we sold land to the Government. I think they should be very grateful to us for selling our land. We do not know how many acres we sold at that time, but we know it was many thousands of acres. I have traveled over it and know that it takes a man six days to go to the eastern line and six days to go to the western boundary. . . . [W]e have given them the best land, especially that along the James River. In two previous treaties entire payment has not been made, and that is the way this would probably be. Exh. 605 at 54, 55, JA at 225.

Peter St. Pierre: We have already sold a large tract of land and received a very small amount for it. For the sale of this small tract, we will not get enough to make us rich. *Id.* at 56, JA at 231.

William T. Selwyn: It was stated well this morning that we gained nothing by the treaty of 1858. The reason of this is because there were not enough young men educated at that time to prevent it. I think we should not in any way charge the violation of that treaty to these commissioners. I think that treaty has no connection whatever with this matter. Some will probably remember the words of this treaty. There are three of you here who were present at the council. We have Mr. Charles Picotte here who was chairman of the committee who signed the treaty. When the chiefs and chairman went on to Washington to sign the treaty, they put in these words . . . *Id.* at 57, JA at 232.

William Bean, Sr.: I am going to refer to a certain thing. Struck by the Rees has sold a great portion of our reservation. *Id.* at 58, JA at 236.

Robert Clarkson: I said at that time when they made the old treaty, they did not consider the matter, and did not know what they were doing at that time. *Id.* at 61, JA at 246.

Dr. Brown: I want to speak to you of the treaty of 1858. Now, I will give you the language of that treaty as it is given in this book, and have it interpreted: 'That the Yankton Indians by that treaty relinquish to the United States all the lands owned or claimed by them, except this reservation, which is described there as consisting of 400,000 acres . . . There were about 12,000,000 acres. This land was ceded by that treaty. . . . That treaty set aside for your people a reservation with certain boundaries which it was supposed to contain 400,000 acres. When they came to survey it, they found it had 430,405 acres in it. *Id.* at 65, 66, JA at 259.

John J. Cole: Now, exactly the reverse of this is true. The Government has not only carried out that treaty faithfully, but it has also given to you as a free gift as much as was due you under the treaty. *Id.* at 80, JA at 307.

Col. Foster: Under the treaty of 1858 you sold a vast tract of land for but little more than you

> will get under this treaty for the small amount of surplus land which you have left. *Id.* at 83, JA at 315.[13]

(4) Familiar Forces and The General Allotment Act. The familiar forces noted in *DeCoteau* are also reflected in the Yankton councils:

> John J. Cole: The Great White Father . . . wants you to sell your surplus lands for which you have no use. If you want to sell these surplus lands we will buy them and pay you all they are worth, and the Government will sell them to men who will make homes on them and will build good houses and make good farms, and this will make your other lands—your homes—more valuable, so that the lands you have left will be worth more than all your lands are now worth, and what you get from the Government for the surplus lands will be a clear gain to you.
>
> The buffalo is gone, the antelope is gone, you can no longer live by hunting. You must plow like the white man; you must raise cattle to take the place of the buffalo; you must raise sheep to take the place of the antelope. You must raise wheat and corn and oats to make bread and to feed your stock. You must raise everything which the white man

[13] In one other instance specific reference was made to the Treaty of 1858. During the council of Saturday, January 21, 1893, Commissioner Cole, in noting that Secretary of the Interior Noble had "fully approved the agreement with suggested changes," Commissioner Cole also referred to having submitted the agreement to the Yankton missionaries for their comments. In that connection, he caused a letter to be read into the record from missionary John P. Williamson. Mr. Williamson, after noting that he believed the "terms of this agreement are the most liberal that could be granted," and that he had "no doubt that the stipulations would all be faithfully carried out," concluded:

> And further, there is no cause for apprehension that this agreement will, in any way, interfere with the treaty of 1858. Exh. 605 at 84, JA at 318.

In context, this language referencing, in a general way the Treaty of 1858, does not support the continued existence of original reservation boundaries.

> raises, and have plenty to eat and plenty to sell. Then you can build good houses where you can keep warm and dry, and be comfortable. You can wear good warm clothes and have many comforts that will make you happy. (How!)
>
> In the old times. . . . Now you can live in peace with your women and children and have plenty. *Id.* at 49, JA at 209.
>
> John J. Cole: Now that you have your homes and that your allotted lands are more than you can make use of, you have sent word to Secretary Noble that you desire to sell your surplus lands and get money to help you to improve your farms and build good houses and buy stock. . . . They have sent us here to buy these surplus lands for homes for white men who will settle among you; who will live peaceably and neighborly with you; who will cultivate these surplus lands and make your allotted lands much more valuable. *Id.* at 50, JA at 211.
>
> Dr. Brown: I believe if you make this treaty you will be able to build better houses, you can have better clothes and better horses, and be in every way better off. The time is past when you could stay in your present condition. *Id.* at 67-68, JA at 267.
>
> Col. Adams: He was placed on a reservation that he might learn what a home was. After a while the Government allotted him land on which to build him a home, to raise crops, that he might learn how much better it is to have one and provide for the long, cold winters. When the Government found how well the Indian liked to have a place called home she sent men like the members of this commission to buy the land the Indians did not want, that the white man might come in and settle near them so the Indian might see how they did and learn all about how to make a home and become like white men, who work to get money to make themselves and families better, to make them wise, to give them more knowledge, to keep disease from their bodies, and how to take care of their bodies. *Id.* at 71-72, JA at 279-280.

John J. Cole: Forty years ago this plain was covered with buffalo; there were deer and antelope and other wild game. Now I want you to show me where there is a buffalo. You might, perhaps, show me one single deer, but not game enough to live upon. You can not live forty years ago. There are some here who were living then, but they can not live over that time, and the conditions now are totally different from what they were then. *Id.* at 74, JA at 288.

John J. Cole: You people signified to the Great Father that you wanted to sell your land. He did not send this commission to treat for the sale of your land until he understood that you wanted to sell. He did not send this commission until every one of you had a farm allotted, every man, woman, and child. So that every one of you, down to the smallest baby, has a home of their own on this reservation. *Id.* at 74-75, JA at 289.

John J. Cole: You have been a great people; you have been a powerful people. You have felt your superiority and have held yourselves above other people around you. As huntsmen you were fleet of foot and sure of aim. As warriors you were brave and feared no enemy. To be a Sioux was an honor, and you were proud of your name and your fame. Thus was it with your fathers.

But conditions have changed, the country has changed from what it was when your fathers lived here. Then the forest and plains were wild and unbroken, and buffalo, elk, deer, antelope, and other game abounded, and the chase was the only means of securing a living, and self-protection was the only means of safety. But how different are the conditions at the present time. The white man has come, civilization has come, the wilderness has been reclaimed and you are now surrounded on all sides by farms and fields. Horses, cattle, sheep, hogs, and other domestic animals have taken the place of wild animals. Law and order reign and you live in the midst of peace, security, and plenty. This reservation alone proclaims the old time and the old conditions. But even here the means of your former mode of life have vanquished. The tide of civilization is as resistless as the tide of the ocean, and you have no choice but to accept it and live according to its methods or be destroyed by it. To accept it requires the sale of these surplus lands and the opening of this reservation to white settlement. *Id.* at 81, JA at 308-309.[14]

(5) Important Omissions Regarding Reservation Statute and Article XVIII. The transcripts also document the fact that Article XVIII did not play a significant role with reference to 1858 reservation status at any time or at any place in the negotiation process. The district court confirmed this important omission:

> The transcribed minutes . . . . *do not divulge any discussion* that might have taken place as to the meaning the parties to the Agreement gave to Article XVIII, and there is *no discussion* as to whether the Yankton Sioux or the negotiators believed the 1858 boundaries of the reservation would change.

Yankton Sioux Tribe, 890 F.Supp. at 886 (emphasis added).

(b) Commissioners Report. On March 31, 1893, the Commission submitted their report to the Secretary of the Interior. S. Ex. Doc. No. 27 at 7, JA at 121-123. In approximately 18 pages, this report summarizes all significant aspects of the Yankton negotiations. In every respect it confirms the substance of points noted above. The transaction was aptly described by the Commissioners as a "cession of their surplus lands," or "purchase of the surplus lands" or "sale of their surplus lands," excerpts of the negotiations were restated in detail. *Id.* at 7, 17, JA at 107, 135, 146.

---

[14] In more specific terms, the General Allotment Act (Section 5), formed the backdrop for this process as it did in the Lake Traverse negotiations discussed in *DeCoteau*. *DeCoteau*, 420 U.S. 425. It is also mentioned several times in the negotiations. Exh. 605 at 51, 52, 57, JA at 213-219, 232-235.

One paragraph in particular summarizes the entire process:

> First, That the Indians were *not selling their whole reservation, but less than two-fifths of it*, and that more than three-fifths of it would remain in their possession for such cultivation and improvement as Indians will give to it, and free from taxation for twenty-five years, second, that the surplus lands are not in one body, but scattered over the reservation and mixed up with the allotted lands of the Indians. We think the value of these surplus lands per acre would be doubled if the whole reservation were being disposed of by the Indians, to be equally improved by white people and uniformly taxed.

S. Ex. Doc. No. 27 at 13, JA at 136, 137 (emphasis added).

The Commissioners concluded that the "purchase covers all the unallotted lands at a liberal price." *Id.* at 20, JA at 152. At the same time the Commissioners noted:

> Advancing civilization and the improvement of the surrounding country have immensely increased the market value of the land in this reservation, but aside from this increased valuation from external causes the reservation is worth much less to day than it was when they made the treaty with the United States 35 years ago. While the farm improvements on the reservation are very meager, large bodies of timber have been almost wholly destroyed, leaving the reservation nearly denuded of tree life without any compensating improvement . . . . At present these Indians are receiving no benefit worthy of mention from any of their lands. Not only are their surplus lands lying waste and useless, but the same is true of their allotted lands, as but an exceedingly small portion of these lands is under cultivation. *Id.* at 15, 19, JA at 142-143.

The report concluded:

> But for the opposition of these white employ[e]es we think that after we had drawn an agreeemnt in every way so favorable to the Indians we could more easily have overcome the objection on account of price,

> and that no other form of opposition would have been interposed, and that we could have secured the assent of nearly all the tribe to the sale. Few, if any, of the Indians were opposed to the sale of the surplus lands. *Id.* at 23, JA at 159.

(c) Congressional Ratification. When the report reached Washington, D.C., a bill to ratify the agreement was introduced in the Senate (S.442) but was delayed due to allegations involving the negotiations. *Id.* at 7, JA at 121-123. In September, 1893, the Commissioner of Indian Affairs detailed a special United States Indian Inspector to the reservation who, after an investigation, concluded "no undue pressure was used or improper methods resorted to by the commissioners or any other persons last winter to secure signers." *Id.* at 38, JA at 110.

Less than a month after the investigative report dated November 13, 1893, was received by the Commissioner of Indian Affairs, he formally submitted a favorable report on the entire agreement to the Secretary of the Interior. *Id.* at 1, JA at 108-109. This report again confirms the substance of all points noted above. In addition, it reviews the agreement *article by article*. Not a word in the entire six-page report supports the Tribe's contentions. Nor is there any doubt that the Yankton agreement was viewed as anything other than a normal cession. The Commissioner of Indian Affairs concluded his report in precisely this fashion:

> I have accordingly prepared the draft of a bill for that purpose, in the *usual* form and herewith transmit the same in duplicate. . . . Although it is probably not the duty of this office to draft a provision for the opening of the lands for settlement, I have for convenience incorporated a section for that purpose, in line with *similar* acts. *Id.* at 7, JA at 121-122 (emphasis added).

By letter of January 16, 1894, the Secretary of the Interior submitted the Commissioner of Indian Affairs report and enclosed a draft to the President of the United States Senate. *Id.* at 1, JA at 108-109. In this correspond-

ence, the Secretary specially noted that the correspondence contained "a full statement of the facts in relation to said agreement." *Id.*

Two days later, the entire package was referred to the Senate Committee on Indian Affairs in order to be printed as Sen. Exec. Doc. No. 27. JA at 108. This 101-page document contains the entire council proceedings with the Yankton Indians (47-101), the Articles of Agreement between the United States and the Yankton Sioux tribe (38-47), the investigative report (35-38), the Commissioner of Indian Affairs' draft of the bill to ratify and confirm the agreement and the Commissioner of the General Land Office correspondence relating to same (25-35), the report of the Yankton Indian Commission (7-25), the Commissioner of Indian Affairs report (1-7), and the Secretary of the Interior's submitted correspondence (1).

The Acting Commissioner of Indian Affairs noted the Yankton transmittal was somewhat special in one respect. For convenience, his office drafted and incorporated the "provision for the opening." S. Ex. Doc. No. 27 at 7, JA at 122. Normally, this was not, as the Commissioner pointed out, the "duty" of his office. *Id.* Because this provision contains the section sixteen (16) and thirty-six (36) "school lands grant," the source of this section is particularly significant. Moreover, the Acting Commissioner specifically stated that the provision was "in line with *similar* acts." *Id.* (emphasis added). The Acting Commissioner also suggested that the Commissioner of the General Land Office be requested to submit his views on this section. As a result, the Acting Commissioner of Indian Affairs, the Commissioner of the General Land Office, and the Secretary of the Interior, all had reason to focus on this significant "school lands grant" provision. *Id.*

The text of the "school lands grant" provision was reproduced twice in S. Ex. Doc. No. 27. S. Ex. Doc. No. 27 at 25, 35, JA at 162-165, 178-181. And although it was not singled out for special discussion, it did appear

throughout the congressional debates. 26 Cong. Rec. 6373, 6425, 7628. With the Great Sioux Act of 1889 and the Sisseton-Wahpeton (Lake Traverse) Act of 1891 as recent precedent (as the State has pointed out), the limited congressional discussion of this "public domain" related provision in the debate is understandable. State's Br. at 19-20. *See also Rosebud*, 430 U.S. at 599-601.

In the interim, as in *DeCoteau*, newspapers reported that many settlers anxiously awaited the opening of the reservation:

> The prospect for the early opening of the Yankton reservation is causing quite a stir at Armour. Inquiries are pouring in from all directions, and the minute the bill passes congress there will be a rush to be on the ground.

Yankton Press and Dakotan, Feb. 15, 1894.

> It is expected that when the president declares the reserve open there will be a great rush for land.

Yankton Press and Dakotan, Feb. 17, 1894.

Similarities to the opening of the Sisseton-Wahpeton (Lake Traverse) reservation do not end here. As noted *supra* at p.10, in Congress, the Yankton agreement was eventually presented for ratification as part of the annual Indian department appropriation bill, the same process utilized for ratification in *DeCoteau*. *DeCoteau*, 420 U.S. 425, 440. Moreover, here, as in *DeCoteau*, other agreements were also a part of this package. *Id.* at 439 nn.21, 22. If Congress did not intend this cession agreement for a sum certain to disestablish the Yankton reservation, there is certainly no evidence of such intent in any of the documentation.

On March 2, 1894, a significant number of "chiefs, headmen and members of the Yankton tribe of Sioux Indians" met at the Yankton Agency, Greenwood, South Dakota, and prepared a petition to the Chairman to the Senate Committee on Indian Affairs. The purpose of the petition was to request the Senator to use his "influence in the passage of the bill effecting our treaty with the

U.S. Government for the relinquishment of our surplus land." Sen. Misc. Doc. 134 at 2, 53d Cong., 2d Sess. (1894).

In support of their position, the petitioners stated:

> When we signed the treaty we knew what we were doing for ourselves and for the Yankton tribe in general. We did sign it because we love and respect our families, for whom we expect a support could be made out of the sale of our surplus lands. . . . We think it is a good treaty. We have had a good understanding of its provisions and the compensation. . . . We want the nation to take on new life by becoming good farmers and mechanics and professional men, and that they should all be good citizens of the United States. We do not want to become loafers and beggars like the majority of the opposition. We want the laws of the United States and the State that we live in to be recognized and observed. We do not think it is a proper thing to keep up the tribal relation—like the tribal relation and its existence now on this reservation—as the tribal relation on this reservation is an obstacle and hindrance to the advancement of civilization. For instance, the matter of the tribal relation is a bondage to a tribe of Indians where the tyrannical chiefs are principally looked upon for advice, but of course there are some exceptions. . . . We are therefore anxious that this treaty should go through at once, so as to enable us to receive a sufficient sum of money as cash payment to improve us mentally and physically. Without this treaty we have no hope of prosperity, and no desire for civilization. We think it will benefit our children by associating them with white people, especially in the schools and in farming.

Sen. Misc. Doc. No. 134 at 1, 2.

On April 3, 1894, South Dakota Senator Pettigrew ordered the petition to be printed and presented to the Senate in its entirety. Sen. Misc. Doc. No. 134 at 1.

The bill, H.R. 6913, was introduced and reported to the Committee of the Whole House by the House Committee on Indian Affairs on April 30, 1894. 26 Cong. Rec. 4275, 53d Cong., 2d Sess. (1894); H.R. Rep. No. 802, 53d Cong., 2d Sess., pt. 5 (1894). The appropriation report especially noted:

> There are a few legislative provisions in the bill, most of which have been recommended by the Commissioner of Indian Affairs, although in some instances modified by the committee. *The most important* of these legislative provisions are the ratification of *agreements* made with the Yankton Sioux . . . for the *cession* of land. . . .

H.R. Rep. No. 802 at 2, 53d Cong., 2d Sess. (1894) (emphasis added).

In the many pages of general congressional debate that follow, nothing of substance can be cited to support the argument that Congress intended to leave the original boundaries of the reservation intact. In fact, every exchange points to the opposite conclusion.[15]

For example, by June, 1893, the House started to focus on reservation policy generally:

> Mr. WILSON of Washington. I will ask the gentleman whether he does not think a start should be made by diminishing the reservations. There are now about 120,000 reservation Indians, and they occupy about 5,000,000 acres of land. 26 Cong. Rec. 6235 (1894) (Exh. 669).
>
> Mr. SMITH of Arizona. Yes, they hold five times as much land as they ought to occupy. They are roaming over great areas of land now, and that tends to keep them in a wild state, because it keeps

[15] Of course, this is not to say that the record does not also contain an occasional reference to "in" or "on" the reservation. But as the Tenth Circuit Court of Appeals aptly pointed out in *Pittsburg & Midway Coal Min. Co. v. Yazzie*, 909 F.2d 1387, 1416 (10th Cir. 1990), such references are of little probative value. Similar references also appear throughout the documentation in *DeCoteau* and *Rosebud*. See also the reference in *Hagen* to a similar "longstanding observation" regarding the views of a subsequent Congress. *Hagen*, 510 U.S. at 420.

them removed from all sorts of civilizing and educating influences. As long as the Indian is allowed to occupy reservations, some of which are as large as an Eastern State. . . . 26 Cong. Rec. at 6235.

Mr. FLYNN. I realize the fact that we are constantly crowding the Indian more and more off his reservations because we want more land for white settlement. *Id.* at 6236.

Mr. HARTMAN. Mr. Chairman, let us proceed by treaty to extinguish every right, if they have any, in the lands of the Indian reservations; let us purchase the lands and allot to them 160 acres each. . . . *Id.*

Mr. COFFEEN. There is much more land given to the Indians in reservations than is proper. They have too much. I join in the sentiment that we must, by treaty, by purchase, and relinquishment, or by some other methods, cut down this vast territory in reservations that often blocks the settlement of great tracts of Western country. That is one of the things that must be done. *Id.*

Mr. BLAIR. Here are 250,000 people . . . occupying an amount of territory which would yield support to at least ten millions of civilized people. *Id.* at 6237.

Mr. WILSON. Of course, if we are never to commence with a reduction of the reservations and of the appropriations, the Indian problem will not be settled. . . . There are places, Mr. Chairman, and there are Indian reservations, that if Congress would do its duty could be closed up and disposed of forever. *Id.*

In those instances when the Yankton measure was first singled out because of the lower settler acreage provisions and the higher interest rate, general references to "cession," "General Allotment Act," and other "common practices" support this same view. *Id.* at 6373, 6374.

And on June 16, 1894, when the debate centered on the Yankton agreement, reference to "public domain" and other similar comments are even more probative:

MR. McRAE. Certainly not until the treaty is confirmed; but these provisions change the methods of disposing of the lands that will become a part of the *public domain* under these agreements. . . .

MR. LYNCH. The Government obtains these lands at different prices in different cases. By some of the treaties the lands cost 75 cents or 80 cents or $1 an acre; and in one case, that of the Yankton Reservation, the Government pays $3.50 an acre. . . .

MR. LYNCH. These different methods of disposing of these surplus lands are absolutely necessary. In regard to the Yankton Reservation the committee were of the opinion that as the price of those lands was $3.75 an acre, $1.60 an acre would come too high for a poor man to buy, and therefore we concluded to reduce the amount which one man could enter there to 80 acres. Each reservation was taken up on its own merits, and disposed of on its own merits. *Id.* at 6425, JA at 380, 381, 382 (emphasis added).

In that same debate, others described the process with references to the same concepts and laws:

Mr. HERMANN. They do not become lands of the United States at all until after the ratification of the treaty made with the Indians. Then and only then do they become subject to our land laws. . . . In order to convince the Chair of that fact I ask his kind attention to the act approved February 8, 1887, the law providing for the allotment of lands in severalty among the Indian tribes, in which will be found this provision. . . . [T]hey are not public lands of the United States; they are not governed by any of the public land laws until they become segregated from the Indian lands and become in fact a part of our public domain. *Id.* at 6426, JA at 385, 386.

In other specific instances, remarks similar to those noted above, were again repeated:

We have endeavored for years and years to get the Shoshone Reservation, which contains three times as much land as is necessary, or in any manner used by the Indians, relinquished to the United States, so that people could settle on it and make homes and

go on and develop that part of the State. 26 Cong. Rec. 6431, 53d Cong., 2d Sess. (1894).

After the Chair found that a general point of order was not well taken, the bill passed the House that same day. *Id.* at 6427, 6431. Although the message that the bill had passed the House was immediately recorded in the Senate, it was not reported from the Senate Committee on Appropriations until July 10, 1894. *Id.* at 6439, 7230; S. Rep. No. 510, 53d Cong., 2d Sess. (1894).

The Senate debate started on July 18, 1894, and later that same day, the Senate specifically addressed the Yankton agreement. 26 Cong. Rec. 7616, 7627. As was the case in the House, nothing of substance in the Senate debates supports the argument of the Tribe that Congress did not intend this cession agreement to disestablish the original boundaries of the Yankton reservation. Minor unrelated changes were accepted or rejected on the basis of "business as usual." For example, see the "rule which has been pursued in all other Indian appropriations acts" comment and the "I doubt whether we ought to make a different provision in the opening of one of these reservations" comment. *Id.* at 7628. At the same time, the liquor prohibition provision was amended in final form without debate. *Id. See Rosebud,* 430 U.S. 584, 613-617 n.47, and citing *Dick v. U.S.*, 208 U.S. 340 (1908). *See also* State's Br. at 17-19, 33-34.

The next day, other provisions of the bill were discussed and approved including legislation initiating negotiations for the Uintah and Uncompahgre reservations in Utah that similarly support disestablishment arguments.[16] Other

[16] Both Utah measures were subsequently modified in later legislation. This Court in *Hagen* rejected an original boundary argument and held that the Uintah reservation was diminished. *Id.* The panel majority completely missed the point, citing the 1985 Tenth Circuit case with reasoning since disavowed as "unexamined and unsupported" by the Tenth Circuit and effectively undermined by this Court, which expressly noted this very point. *Yazzie*, 909 F.2d at 1400; *Hagen*, 510 U.S. 414. Pet. App. at 28 n.21. In later litigation, the United States conceded the Uncompahgre reservation no longer exists. The Tenth Circuit has since decided, however, that the principles of finality outweigh congressional intent. *Ute Indian Tribe v. State of Utah*, 114 F.3d 1513 (10th Cir. 1997). Reportedly, a petition for certiorari will be filed from that decision in the near future because of an overly narrow reading of *Hagen* and the inequitable result that the finality holding promises. *See* Brief of Duchesne County, Utah and Uintah County, Utah, as *Amici Curiae*.

reports were submitted for the record that also continue to reflect the familiar forces noted throughout the Yankton documents. Under a subheading of "Indian Lands and Their Purchase," a report by Mr. Donaldson noted:

> After the reservations were established by executive order or by law they *were and are still being diminished,* by an actual *decrease of reservation lines*, either by the demands of settlers, forcing reduction, or by the modern method of allotment, the Indians, by the latter method, being paid for the excess of the reservation they occupy. When reservations are *diminished* in gross the Indians are paid for the area of the reservation which the Government takes possession of and disposes of under the various laws.

26 Cong. Rec. 7689 (emphasis added).

After additional unrelated debate, the bill, as amended, passed the Senate the same day. *Id.* at 7708.

The House did not concur in the Senate amendments and requested a conference on July 21, 1894. *Id.* at 7783-7784. On July 23, 1894, the Senate insisted on its amendments and agreed to a conference. *Id.* at 7800. After the conference, the Senate still disagreed with some amendments and reported the same with a request for a further conference. *Id.* at 8015. The House noted the partial concurrence and printed the report of the committee of conference in the record. *Id.* at 8056.

On August 2, 1894, the House consented to a further conference, specifically noting that the subjects upon which no conclusion had been reached included:

> [T]he appropriation of money for lands purchased from the Nez Perce Indians of Idaho and lands pur-

chased from the Yankton Sioux in South Dakota, and lands purchased from the Siletz Indians of Oregon. *Id.* at 8136.

On August 6, the House again considered the matter. *Id.* at 8251. This debate, which extends throughout some 20 pages of the congressional record, contains additional references that support the conclusions noted above. The controversy continued to center around the amount and how the money should be paid, as well as the interest involved, but the comments leave no doubt as to the general view of Congress. *Id.* at 8255. Miscellaneous tributes were initially paid to Mr. Dawes (*Id.* at 8252), and references to "always been the practice" and "nearly universal customs" continued (*Id.* at 8255). Other comments describe the familiar forces:

> Mr. WILSON of Washington. All over the West . . . constantly letters to know when this reservation will be open to settlement. It is exceedingly valuable and fertile land, and will give an opportunity to build up a great agricultural community there. . . . This country is greatly interested in the result. We are gradually closing up our reservations; we are gradually getting them settled by the white people. *Id.* at 8256, 8257.

Later in the same debate the Yankton agreement was again specifically referenced. *Id.* at 8265. Representative Pickler of South Dakota made clear that it and the others represented "the same kind of a treaty we have always made." *Id.* He also noted again:

> [I]f that has not been the *universal practice* of the Government, and if we have not bought Indian lands during a period of time immemorial? Have we not also sold the lands to settlers? Is there anything *new* in that? . . . [T]he treaty for the Yankton Sioux Reservation; and *what can be said of that treaty can, in general terms, be said of the others.* The proposition that is before the House today is very simple. We are needing more lands for settlement. By an act of Congress we provided for sending out a commission to *treat with the Yankton Sioux Indians for their reservation.* . . . [W]e simply procure these lands in the same way we have always procured lands from the Indians. We make *no departure from our past policy*; we are following in the *same* line. . . . [W]hat is the *uniform* policy of the Government in these matters. The Government does not want to speculate off of settlers; so it buys lands from the Indians as fairly and as cheaply as it can, and then disposes of the lands to the settlers at such prices as will reimburse it for the money paid to the Indians.

> That is the policy pursued in all these cases. And until very recently the Government purchased the lands of the Indians and disposed of them to the settlers free, but lately it is charging the settler what it paid the Indians. . . . [A]nd these are treaties, just as *all other cessions* of land have been. . . . Let us settle with the Indians at once and give the settlers all over this country who want homes an opportunity to secure them. . . . Does not the gentleman know that heretofore we have bought the lands of the Indians and given the lands to settlers? Now we are buying land from the Indians and selling it to the settlers. . . . *Id.* at 8266, 8267-8269 (emphasis added).

> MR. LYNCH . . . My short experience on the Committee on Indian Affairs has taught me that in every instance the Government has lost in its deal by buying these lands of the Indians.
>
> MR. WILSON of Washington. Will the gentlemen be kind enough to state a sing[l]e case?
>
> MR. LYNCH. Why, in all of them. The highest price we ever paid was a dollar until the treaty with the Yankton Sioux Reservation came up; and even on that we shall lose. *Id.* at 8266.
>
> MR. WILSON. . . . And this [another] reservation is standing as a block in the way of the development and progress of the country. That is one reason why it is so important that action, and prompt action, should be taken upon this treaty. . . . I hope in return that they may be as generous to the people of the West, and help us to develop that empire, and throw open the reservations of the Government. *Id.* at 8271.

At the end of the next day, on August 7, 1894, the House considered the question and without substantial debate, receded from the disagreement to the Senate amendments, and agreed to the same. *Id.* at 8287. The Senate submitted a brief report on August 8, 1894, noting agreements and disagreements and this conference report was "concurred in." *Id.* at 8296. The bill was signed in the House on August 9, 1894, the Senate on August 10, 1894, and by the President on August 16, 1894. *Id.* at 8360, 8362, 8592. Act of Aug. 15, 1894, 28 Stat. 286.

One final point in the congressional ratification process is worthy of special notation. Here, as in the tribal negotiations, there were no references to Article XVIII and reservation status. The district court also confirmed this important omission. Other than one letter from a missionary, there was:

> [N]o other mention of Article XVIII in the legislative history of the ratification Act.

Yankton Sioux Tribe, 890 F.Supp. at 886; Pet. App. at 82-83.

The dissent in the court of appeals agreed with this finding:

> [N]owhere in Article XVIII nor in the legislative history of the 1894 Act is there any suggestion that the 1858 boundaries were to remain intact. . . .

Yankton Sioux Tribe, 99 F.3d at 1462 (emphasis added).

As a result, another presumption should be considered here. Although *Matter of Heff*, 197 U.S. 488, 499 (1905) was subsequently modified by Congress and overruled in *United States v. Nice*, 241 U.S. 591 (1916), the common sense presumption noted in *Heff* regarding congressional action and constancy in federal Indian law policy is as viable now as it was then: namely, that in matters of federal Indian law involving congressional action, courts will "presume" that "no radical departure is intended." *Heff*, 197 U.S. at 499. That presumption is important in this case in light of the significant omission in this record of Article XVIII reservation status discussions. In other words, if Article XVIII was intended by Congress to preserve reservation status in the face of a sum certain cession agreement, that would certainly constitute a "radical departure" in congressional federal Indian law policy. In South Dakota and elsewhere, previous cessions like this disestablished reservations. The Yankton documentation *confirms* that this process was simply business as usual. If Article XVIII was intended to change all of this, someone, somewhere, should have at least mentioned the point. The District would submit that nothing in the formal instructions, nothing in the tribal negotiations, nothing in the departmental recommendations and bill drafts, nothing in the House and Senate reports, nothing in the congressional debate and nothing in the 1894 Act itself can be cited to substantiate this Article XVIII reservation status argument. Congress did not intend to preserve the 1858 boundaries of the Yankton Sioux reservation.

The Presidential Proclamations opening the reservations to settlement were deemed especially significant in *Rosebud*, 320 U.S. at 602-603, and *Hagen*, 510 U.S. at 419-420. And the United States in *DeCoteau*, arguing in support of original boundaries, agreed that the Proclamation was "the most important administrative interpretation . . ." Brief of the United States at 22, *DeCoteau*, No. 73-1148. In this instance, the cession terminology of the Yankton Proclamation similarly reflects this same important construction:

> Whereas . . . the said Yankton tribe of Sioux or Dacotah Indians, for the consideration therein mentioned, *ceded, sold, relinquished, and conveyed* to the United States, *all their claim, right, title and interest in and to all the unallotted lands* within the limits of the reservation set apart to said tribe. . . . Whereas . . . *lands so ceded and sold* shall, immediately after the ratification of the agreement by Congress, be offered for sale through the proper land office, to be disposed of under the existing land laws

> of the United States, to actual and bona fide settlers only. . . . Whereas . . . *by said agreement ceded*, to the United States shall, upon proclamation by the President, be opened to settlement, and shall be subject to disposal only under the homestead and townsite laws of the United States. . . . Now, therefore, I Grover Cleveland, President of the United States, by virtue of the power in me vested by the Statutes hereinbefore mentioned, do hereby declare and make known that *all of the lands acquired from the Yankton tribe of Sioux or Dacotah Indians by the said agreement*, saving and excepting the lands reserved in pursuance of the provisions of said agreement and the act of Congress ratifying the same, will, at and after the hour of twelve o'clock, noon (central standard time), on the twenty first day of May, 1895 and not before, *be open to settlement*. . . .

Yankton Proclamation of May 16, 1895, 29 Stat. 865 (emphasis added).

II. JURISDICTIONAL HISTORY.

A. Settlement.

As the district court acknowledged and found, the settlement process in this area was successfully accomplished:

> Non-Indians rapidly settled and purchased the lands ceded by the Yankton Sioux. . . . White settlers *rapidly* entered and settled the opened areas of the reservation. . . . [E]vidence tends to show that the opened lands *quickly* lost their Indian character.

Yankton Sioux Tribe, 890 F.Supp. at 884, 887 (emphasis added). The court of claims documented a similar conclusion in 1980 in the following fashion:

> Settlement proceeded at a *rapid* pace. In the 75½ months [sic] remaining of the year 1895, over 56,000 acres were taken up by settlors. In 1896, over 13,000 additional acres were taken up, and in 1897, over 35,000 acres were taken up. Thus, over 100,000 acres were taken up in the first 3 years. During the first 5 years, almost 90 percent of the lands were taken up. Thus, it is clear from the record that there was an *extensive demand* for the type of agricultural lands present. . . .

Yankton Sioux Tribe, 623 F.2d 159, 171 (8th Cir. 1980) (emphasis added).

The panel majority mentioned none of this and, at the same time, set forth comments at odds with these express findings. *Yankton Sioux Tribe*, 99 F.3d at 1456-1457.

In implementing the Proclamation, the rest of the federal government simply treated the area in a manner that routinely conformed to the executive mandate. The standard requirement that the land be disposed of under the "existing laws of the United States" was readily accomplished in the proper land offices. In this instance, even the less desirable tracts, such as the one chosen by Southern Missouri as a future site, were filed upon at a relatively early date.

In less than 10 years after the opening, Mr. Lars K. Langeland completed all requirements and received a Certificate of the Register of the Land Office at Mitchell, South Dakota. United States Patent, March 1, 1904, Dist. App. at 1a. The Certificate established that his claim had been duly consummated pursuant to "the Act of Congress approved 20th May, 1862, 'To Secure Homesteads to Actual Settlers on the Public Domain,' and the acts supplemental thereto. . . ." *Id.* at 1, Dist. App. at 1a. On March 1, 1904, President Theodore Roosevelt confirmed that the Certificate had been deposited in the General Land Office of the United States and therefore:

> [G]ranted by the United States, unto the said Lars K. Langeland the tract of land above described, TO HAVE AND TO HOLD the said tract of land, with the appurtenances thereof, unto the said Lars K. Langeland and to his heirs and assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws and decisions of Courts, and also subject to the right

> of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law.

Id. at 1, 1904, Dist. App. 1a-2a.

Nothing in this documentation supports the conclusion of the panel majority. In fact, the entire Patent was in a standard printed format with the usual blank spaces for names, dates, descriptions and signatures. For the convenience of the Court, a copy of the Patent is reproduced as Dist. App. at 1a.

In general, the federal government's use of this standard format would not seem to support a claim that this property or this area was intended by Congress to be specially located or restricted because of some isolated clause in the 1894 Yankton Act. In more specific terms, the express reference to "the Act of Congress approved May 20, 1862, 'to secure homesteads to actual settlers *on the public domain*' " would seem to support the opposite conclusion. *Id.* at 1, Dist. App. at 1a. Now that *Hagen* has clarified the significance of the "public domain" concept, this aspect of the Patent and settlement process should be deserving of more detailed consideration.

B. The Position of the Department of the Interior.

The jurisdictional history also confirms that the area in question was not treated as an Indian reservation. The district court found that from the beginning "state courts exercised civil and criminal jurisdiction in the opened area of the reservation." DCO Pet. App. at 87. On this point, the panel majority conceded that the tribe had presented:

> [N]o evidence that it has attempted until recently to exercise civil, regulatory, or criminal jurisdiction over nontrust lands.

Pet. App. at 39.

In addition, the panel majority also agreed with the district that:

> State courts have exercised criminal jurisdiction over Indians on nontrust lands without objection from the tribe until recently.

Pet. App. at 38.

The Supreme Court of South Dakota reiterated:

> Since 1895, the year the reservation was opened, South Dakota courts have consistently maintained, without intervention by federal or tribal authorities, civil and criminal jurisdiction within the former reservation boundaries.

Pet. App. at 154-155.

The brief for the State of South Dakota details the significant citations and circumstances surrounding the exercise of this jurisdiction. State's Br. at 7-9, 41-46. That effort, of course, will not be repeated here. The treatment of a related argument in the opinion of the panel majority involving the position of the Department of the Interior, however, is deserving of more extended consideration.

In spite of the unequivocal concessions regarding the jurisdictional history, the panel majority pieces together and highlights conflicting points as if they were somehow more probative of congressional intent. The foremost example concerns the position of the Department of the Interior regarding reservation status. In an attempt to undermine the strength of a formal 1969 Memorandum to the Commissioner of Indian Affairs that specifically confirmed that "the effect of the 1894 Act was to eliminate reservation boundaries. . . .," which is in the record (JA at 519), the majority opinion discusses an earlier 2½ page informal letter by Felix Cohen, as acting Solicitor, that primarily addressed a different act, which is not in the record. *Yankton Sioux Tribe*, 99 F.3d at 1455; Pet. App. at 36-37; Letter of August 7, 1941, *Opinions of the Solicitor, Department of the Interior* 1063 (1979). This 1941 letter was not assigned a memorandum number, an Interior Decision (I.D.) or Public Lands Decision (L.D.) citation, and there is no indication that it was ever otherwise approved by the Department of the Interior at the time.

In addition, the United States and other *amici* in support of the Yankton Sioux Tribe also relied heavily on this letter—which now erodes their position for one very significant reason. Brief for Vine Deloria, Jr., *et al.* as *Amici Curiae* in Support of Appellee at 16, *Yankton Sioux Tribe*, 99 F.3d 1439 (No. 96-1581). At oral argument, the United States stressed that "especially great weight" should be given the opinion. See excerpts, Dist. App. *infra* at 6a. In the 1942 original edition of Felix S. Cohen's Handbook of Federal Indian Law, published subsequent to the August, 1941 letter, the text completely and expressly *undermines* every basis for the 1941 position. F. Cohen, Handbook of Federal Indian Law at 353 (1942 ed.). Significantly, the Handbook analysis leads off with a citation to *Perrin v. United States*, 232 U.S. 478 (1914) (conceded by the United States to have "assumed" Yankton reservation disestablishment) as authority for liquor "buffer" areas which "adjoined Indian country," non-reservation areas next to the "boundaries of land retained by the Indians." *Id.* at 353 n.26. The text also cites the other two non-reservation liquor prohibition cases, *United States v. Forty-three Gallons of Whiskey*, 108 U.S. 491 (1883) and *Dick v. United States*, 208 U.S. 340 (1908).

The 1958 edition of Federal Indian Law repeats verbatim the original text, and footnotes, including the lead citation to *Perrin*. U.S. Dep't of Interior, Federal Indian Law at 385 (1958 ed.). And even the 1982 edition of Felix S. Cohen's Handbook of Federal Indian Law, although it alters the text and the terminology and deletes the citations to both *Perrin* and *Dick, preserves the concept* of liquor restrictions in "buffer" areas, appropriately described as "areas *formerly* Indian country." F. Cohen, Handbook of Federal Indian Law at 307 (1982 ed.). Moreover, this 1982 text still cites *United States v. Forty-three Gallons of Whiskey* as initial authority for these "off" reservation "formerly Indian country" areas, and significantly adds an express reference to *Rosebud*, 430 U.S. 584, 611 (1977). As cited, *Rosebud*, 430 U.S. at 611 (and at 613-615) details the significance of a similar

liquor prohibition provision in the 1910 *Rosebud* act, that *Rosebud* held disestablished a portion of the Rosebud reservation. *Id.* at 307 n.206. The District appends complete excerpts from all three texts for the convenience of the Court. Dist. App. at 3a-5a.

Although these texts completely undermine the 1941 letter in every significant respect, other aspects of the argument lend even more credence to reservation disestablishment. For that reason, the letter still merits the more detailed discussion that follows.

The letter was actually directed to the interpretation of a 1934 Act removing the operation of the Indian liquor laws from former Indian lands. Act of June 27, 1934, 48 Stat. 1245 (sponsored by Representative Werner of South Dakota). The question involved the City of Wagner, South Dakota, which is within the 1858 Yankton reservation. The letter correctly concluded that the 1934 liquor law applied only to "lands outside the exterior boundaries of Indian reservations." However, it erroneously disagreed with the "administrative conclusion" of the Commissioner of Indian Affairs, that the "town and other ceded lands are outside an existing Indian reservation."

The substantive basis for this "matter of law" conflict over reservation status with the Commissioner of Indian Affairs was resolved in *DeCoteau*, where the overly simplistic distinction noted in the 1941 letter was authoritatively rejected. The 1941 letter maintained that:

> The act should be distinguished from other cession acts which ceded a definite part of the reservation and treated the remaining area as a diminished reservation.

Op. Solic. Dep't Interior at 1064.

DeCoteau made clear that this "whole vs. definite part" cession distinction was meaningless in terms of the scope and effect of congressional intent:

> It is true that the Sisseton-Wahpeton Agreement was unique in providing for cession of all, rather

than simply a major portion of, the affected tribe's unallotted lands. But, as the historical circumstances make clear, this was not because the tribe wished to retain its former reservation, undiminished, but rather because the tribe and the Government were satisfied that retention of allotments would provide an adequate fulcrum for tribal affairs. In such a situation, exclusive tribal and federal jurisdiction is limited to the retained allotments. 18 U.S.C. § 1151(c). See *United States v. Pelican*, 232 U.S. 442. With the benefit of hindsight, it may be argued that the tribe and the Government would have been better advised to have carved out a diminished reservation, instead of or in addition to the retained allotments. But we cannot rewrite the 1889 Agreement and the 1891 statute. For the courts to reinstate the *entire* reservation, on the theory that retention of mere allotments was ill-advised, would carry us well beyond the rule by which legal ambiguities are resolved to the benefit of the Indians. We give this rule the broadest possible scope, but it remains at base a canon for construing the complex treaties, statutes, and contracts which define the status of Indian tribes. A canon of construction is not a license to disregard clear expressions of tribal and congressional intent.

DeCoteau, 420 U.S. at 446-447 (emphasis in original).[17]

[17] Petitioner in *DeCoteau* relied on a warmed over version of this exact argument. Brief for Petitioner at 15-16, *DeCoteau*, No. 73-1148, excerpted in Dist. App. *infra* at 13a. The United States, as *Amicus Curiae*, in Support of the Tribe, submitted this same "whole vs. definite part" cession distinction ("no specific area ceded") argument in *DeCoteau* and in *Feather v. Erickson*, which was argued in tandem with *DeCoteau*. Brief for the United States at 14, excerpted in Dist. App. *infra* at 7a; Transcript of Oral Argument at 12, *Erickson v. Feather*, No. 73-1500. It was not well received at oral argument, as the *DeCoteau* opinion subsequently confirmed. But see the "described tract" argument set forth by the dissent in *DeCoteau*, 420 U.S. at 463-464.

Generally speaking, it is doubtful if there will be any arguments submitted in this case that have not already been submitted and rejected in *DeCoteau*. For example, the Tribe and the United States in *DeCoteau* also stressed that Congress never referred to the area as a "former reservation." Brief for the Tribe at 32 n.23 ("No Congressional act contains such a reference"), Brief for the United States at 27 ("Congress, since the opening of the Reservation, has continued to appropriate funds for the Sisseton-Wahpeton Reservation or Agency and has never referred to the Reservation as a 'former reservation' " . . . .). *DeCoteau*, No. 73-1148. The panel majority deemed this omission significant. 99 F.3d at 1464. The Court did not deem that fact to be significant in *DeCoteau*. In addition, Congress did refer to the area here as the "former Yankton reservation," as South Dakota has pointed out. Brief for Petitioner at 44, *South Dakota v. Yankton Sioux Tribe*, No. 96-1581 (August 7, 1997).

Importantly, the letter also failed to mention that in 1934 John Collier, as Commissioner of Indian Affairs, had already concluded, in a comprehensive formal Instruction Opinion, that cessions such as the Yankton cession Act disestablished Indian reservations, as the Department of the Interior had since repeatedly recognized:

> In this way the *exterior boundaries* of a reservation were further reduced. The lands thereby separated from a reservation were no longer looked upon as being a part of that reservation.

54 Interior Dec. 559, 560 (1934) (emphasis added).

And this Instruction Opinion was specifically approved by Fred W. Johnson, the Commissioner of the General Land Office and Harold L. Ickes, the Secretary of the Interior.

The United States should have told the court of appeals that the 1941 letter expressly conflicted with the fundamental premise in the Instruction Opinion of Commissioner Collier. As Charles Mix County has pointed out, in *Rosebud*, the United States reminded this Court of the 1934 Instruction Opinion, which they continued to rely upon for *traditional* confirmation that real *cessions disestablished reservations*. Memo. of the United States at 19-21, *Rosebud* (No. 75-562) and Brief for the United States, Co. Pet. App. at 79a "The Secretary noted that many reservation lands had been ceded for a sum certain and concluded that 'The lands thereby separated from a reservation were no longer looked upon as being a part of that reservation' (54 I.D. at 560)." *Id.* As the United States also pointed out, the Collier list in the 1934 In-

struction Opinion included some 26 "reservations." It did not include *either* the Yankton or Sisseton-Wahpeton (Lake Traverse) cession. Brief of the United States, Rosebud (No. 75-562), Co. Pet. App. at 80a.

In addition, the letter simply glossed over the other 1934 itemized list of the Department of the Interior that included the 1894 Yankton Act, submitted by Secretary of the Interior Harold L. Ickes and expressly incorporated in the House and Senate reports that accompanied the 1934 liquor law legislation, which also failed to recognize this "whole vs. definite part" distinction. H.R. Rep. No. 1681, 73d Cong., 2d Sess. (1934) and S. Rep. No. 1423, 73d Cong., 2d Sess. (1934). According to the letter, the list was simply "informative" not "determinative." Op. Solic. Dep't Interior at 1065.

Moreover, the fact that the Interior list began with a Rosebud Act and a Pine Ridge Act, which Mr. Cohen conceded disestablished areas of Indian reservations, should have supported the opposite conclusion. (*See Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977); *U.S. ex rel. Cook v. Parkinson,* 525 F.2d 120 (8th Cir. 1974), *cert. denied,* 430 U.S. 982 (1977)). Op. Solic. Dep't Interior at 1065. In this instance, however, it did not. (This 1941 letter was not briefed or discussed until after *Rosebud* was decided).

Instead, the 1941 letter cites two statutes enacted decades later. *Id.* at 1064. Because each statute referred to the Yankton reservation, the letter assumed that the 1858 reservation was a "still existing unit." *Id.* at 1064. As a result, according to the letter, these statutes represented a congressional confirmation of sorts that Congress never intended to disestablish the reservation in the first instance. *Id.* While this appears to be the earliest use of this type of "evidence" of congressional intent in cases of this nature, that is the only significant aspect of the argument. This Court, in *DeCoteau, Rosebud,* and *Hagen* repeatedly rejected the same type of argument because of the unreliable nature of this "evidence."

For example, the South Dakota Supreme Court in *Greger* pointed out that the *Rosebud* opinion expressly noted:

> The material presented by the parties reveals no consistent, or even dominant, approach to the territory in question. In light of the clear assumption of jurisdiction over the past 70 years by the State of South Dakota of the territory now in dispute, and acquiescence by the Tribe and Federal Government, this sporadic, and often contradictory, *history of congressional and administrative actions* in other respects carries but little force.

Greger, 559 N.W.2d 845 at Pet. App. 154 (citing *Rosebud,* 430 U.S. at 605 n.27) (emphasis added).

Secondly, in this instance, one of the statutes was directed to land that was, at the time, still held in trust by the United States as part of the Yankton Presbyterian Church and school reserve. Act of April 29, 1920, 41 Stat. 1468. The other statute described the judicial district of South Dakota and the southern division was stated to include, without description, the territory embraced on January 1, 1932 in the "Yankton reservation," just as the northern division was said to include territory in the "Lake Traverse reservation" (*See DeCoteau,* 420 U.S. 425). Act of June 11, 1932, 47 Stat. 300. Both descriptions were simply carried over from the text of earlier statutes. H.R. Rep. No. 599, 72d Cong., 1st Sess. (1932). In this light, the statutes are probative of very little.

The 1969 opinion, which pre-dated *DeCoteau,* but clearly recognized the significance of cession terminology and cession jurisprudence, should have been more instructive to the panel majority. The 1969 opinion cited with approval one of the principal cession decisions involving an entire South Dakota reservation, *DeMarrias v. South Dakota,* 319 F.2d 845 (8th Cir. 1963) (involving the 1891 Lake Traverse act construed in *DeCoteau*). It also aptly described the 1894 Yankton cession act and the 1891 Lake Traverse cession act as "in pertinent respects *identical.*" JA at 522 (emphasis added). In addi-

tion, the specific conclusion in the 1969 opinion recognized that the Yankton Act of August 15, 1894 did "eliminate reservation boundaries." And finally, the *Demarrias* decision was, in all substantial respects, later affirmed by this Court in *DeCoteau*.

In other instances, even the United States has recognized that Acting Solicitor Cohen sometimes "ignored" "authoritative rulings" and "current instructions of the Department of the Interior." Supplemental Memorandum for the Petitioner at 5, *Squire v. Capoeman*, 351 U.S. 1 (1956) (No. 134). According to the United States, he also cited in support of his position materials of "no current vitality," agency opinions "explicitly overruled" and court of appeals' opinions "explicitly rejected" by this Court, as the United States has explained to this Court in the past. *Id.* at 5. In that case, the United States correctly concluded that such views should be:

> [R]ejected as inaccurate and entitled to no weight as evidence of contemporaneous administrative practice.

Id. (footnote omitted).

In this case, the 1941 letter is also deserving of this limited consideration. *See also Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152-153 n.9 (1973) (views rejected). The 1941 letter, which fails to cite earlier Interior decisions and the 1934 Instruction Opinion, which was subsequently ignored and the premise of which was expressly rejected in *DeCoteau v. District County Court*, should not be significant here.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

KENNETH W. COTTON
WIPF & COTTON
P.O. Box 370
Wagner, SD 57380
(605) 384-5471
Counsel for Respondent

August 7, 1997

APPENDIX

APPENDIX TABLE OF CONTENTS

	Page
United States Patent issued to Lars K. Langeland (1904)	1a
Excerpt (p. 353) F. Cohen, Handbook of Federal Indian Law (1942 ed.)	3a
Excerpt (p. 385) U.S. Department of Interior, Federal Indian Law (1958 ed.)	4a
Excerpt (p. 307) F. Cohen, Handbook of Federal Indian Law (1982 ed.)	5a
Excerpt, Transcript of Oral Argument, *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 99 F.3d 1439 (8th Cir. 1996)	6a
Excerpt, Brief of the United States, *U.S. ex rel. Erickson v. Feather decided with DeCoteau*, 420 U.S. 425 (1975) (No. 73-1500)	7a
Instructions to Register and Receiver from Department of the Interior in relation to the Yankton Indian Lands opened to Settlement, 20 Interior Dec. 435 (1895)	8a
Excerpt, Brief for Petitioner, *DeCoteau v. District County Court*, 420 U.S. 425 (1975) (No. 73-1148)	13a
Excerpt, *DeCoteau v. District County Court*, 420 U.S. 425, 463-464 (1975)	14a
Excerpt, Transcript at 12, *Erickson v. Feather decided with DeCoteau*, 420 U.S. 425 (1975) (No. 73-1500)	15a

UNITED STATES PATENT

THE UNITED STATES OF AMERICA

To all to Whom these Presents shall Come, Greeting:
HOMESTEAD CERTIFICATE No. 12,889
APPLICATION 30,541

WHEREAS, There has been deposited in the General Land Office of the United States a Certificate of the Register of the Land Office at Mitchell, South Dakota, whereby it appears that, pursuant to the Act of Congress approved 20th May, 1862, "To Secure Homesteads to Actual Settlers on the Public Domain," and the acts supplemental thereto, the claim of Lars K. Langeland has been established and duly consummated in conformity to law, for the South half of the North West quarter and the North half of the South West quarter of Section six in Township ninety six North, of Range sixty five West of the fifth Principal Meridian in South Dakota, containing one hundred and sixty acres according to the official plat of the survey of the said land, returned to the General Land Office by the Surveyor General:

NOW, KNOW YE, That there is, therefore, granted by the United States, unto the said Lars K. Langeland the tract of land above described, TO HAVE AND TO HOLD the said tract of land, with the appurtenances thereto, unto the said Lars K. Langeland, and to his heirs and assigns as may be forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws and decisions of Courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore

therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law.

IN TESTIMONY WHEREOF, I, Theodore Roosevelt, President of the United States of America, have caused these letters to be made patent, and the Seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the first day of March, in the year of our Lord one thousand nine hundred and four and of the Independence [SEAL] of the United States the one hundred and twenty-eight.

By the President: T. Roosevelt

By T. M. McKean
Secretary.
C. H. Brush
Recorder of the
General Land Office.

Recorded South Dakota, Vol. 253 Page 399.

Filed for Record the 25th day of August A.D. 1904, at 11 o'clock A.M. and recorded in Book F of Patents on page 195.

Register of Deeds.
C. Aaron Jones

CERTIFIED COPY

I HEREBY CERTIFY THAT THIS IS A TRUE AND CORRECT REPRODUCTION OF INFORMATION APPEARING ON A RECORD FILED IN THE REGISTER OF DEEDS OFFICE CHARLES MIX COUNTY, LAKE ANDES, SOUTH DAKOTA

DATE ISSUED 7-3-97

/s/
Register of Deeds

Excerpt From F. Cohen, Handbook of Federal Indian Law 353 (1942 ed.)

* * * *

In connection with the power to regulate commerce with the Indian tribes there exists also the authority granted by the Constitution to do all things necessary and proper by way of carrying out its provisions.[23] Pursuant to this power and the power over the territory and other property belonging to the United States,[24] the Federal Government has imposed liquor restrictions on lands ceded to it by the Indians when these lands adjoined Indian country.[25] The purpose of this measure was to prevent sale of liquor on the boundaries of the land retained by the Indians. Except for these extensions of the Indian liquor laws to "buffer" areas the states would have had the exclusive police power thereon. Such extensions have been repeatedly upheld by the United States Supreme Court.[26] The power lasts only so long as Indians are present on the retained reservation lands and remain wards of the Government.[27] In 1934, Congress withdrew liquor restrictions from the "buffer" lands.[28]

* * * *

---

[23] U. S. Const., Art. I, sec. 8, cl. 18.

[24] U. S. Const., Art. IV, sec. 3, cl. 2.

[25] Act of December 19, 1854, 10 Stat. 598 (Chippewa); Act of March 1, 1893, 28 Stat. 693 (Indian Territory); Act of March 20, 1906, 34 Stat. 80 (Kiowa, Comanche, and Apache); Act of June 16, 1906, 34 Stat. 267 (Oklahoma, Indian Territory, New Mexico, and Arizona); Act of May 6, 1910, 36 Stat. 348 (Yakima); Act of June 20, 1910, 36 Stat. 557 (New Mexico and Arizona); Act of May 11, 1912, 37 Stat. 111 (Omaha); Act of July 22, 1912, 37 Stat. 197 (Colville); Act of February 14, 1913. 37 Stat. 675 (Standing Rock); Act of May 31, 1918, 40 Stat. 592 (Fort Hall); Act of June 4, 1920, 41 Stat. 751 (Crow).

[26] *Perrin* v. *United States*, 282 U. S. 478 (1914); *Dick* v. *United States*, 208 U. S. 340 (1908); *United States* v. *Forty-three Gallons of Whiskey*, 108 U. S. 491 (1883).

[27] *Perrin* v. *United States, supra.*

[28] Act of June 27, 1934, 48 Stat. 1245, 25 U. S. C. 254.

Excerpt From U.S. Dept. of Interior, Federal Indian Law 385 (1958 ed.)

In connection with the power to regulate commerce with the Indian tribes there exists also the authority granted by the Constitution to do all things necessary and proper by way of carrying out its provisions.[14] Pursuant to this power and the power over the territory and other property belonging to the United States,[15] the Federal Government has imposed liquor restrictions on lands ceded to it by the Indians when these lands adjoined Indian country.[16] The purpose of this measure was to prevent sale of liquor on the boundaries of the land retained by the Indians. Except for these extensions of the Indian liquor laws to "buffer" areas the States would have had the exclusive police power thereon. Such extensions have been repeatedly upheld by the United States Supreme Court.[17] The power lasts only so lond as Indians are present on the retained reservation lands and remain wards of the Government.[18] In 1934, Congress withdrew liquor restrictions from the "buffer" lands.[19]

* * * *

---

[14] United States Constitution, art. I, sec. 8, cl. 18.

[15] United States Constitution, art. IV, sec. 3, cl. 2.

[16] Act of December 19, 1854, 10 Stat. 598 (Chippewa); act of March 1, 1895, 28 Stat. 693 (Indian Territory); act of March 20, 1906, 34 Stat. 80 (Kiowa, Comanche, and Apache); act of June 16, 1906, 34 Stat. 267 (Oklahoma, Indian Territory, New Mexico, and Arizona); act of May 6, 1910, 36 Stat. 348 (Yakima); act of June 20, 1910, 36 Stat. 557 (New Mexico and Arizona); act of May 11, 1912, 37 Stat. 111 (Omaha); act of July 22, 1912, 37 Stat. 197 (Colville); act of February 14, 1913, 37 Stat. 675 (Standing Rock); act of May 31, 1918, 40 Stat. 592 (Fort Hall); atc of June 4, 1920, 41 Stat. 751 (Crow).

[17] *Perrin* v. *United States*, 232 U. S. 478 (1914); *Dick* v. *United States*, 208 U. S. 340 (1908); *United States* v. *Forty-three Gallons of Whiskey*, 108 U. S. 491 (1883).

[18] *Perrin* v. *United States, supra.*

[19] Act of June 27, 1934, 48 Stat. 1245, now covered by 18 U. S. C. 1154, 1156, and 1161.

Excerpt From F. Cohen, Handbook of Federal Indian Law 307 (1982 ed.)

On a number of occasions, treaties or federal statutes continued federal Indian country liquor restrictions in areas formerly Indian country, and these provisions were uniformly upheld.[206] All such provisions were repealed in 1934.[207] A related provision, 18 U.S.C. § 1155, continues the restrictions for Indian school sites in areas that were previously Indian country.

---

[206] *E.g.*, United States v. 43 Gallons of Whi[illegible]v, 93 U.S. 188 (1876). *See aslo* Rosebud Sioux Tribe v. Kneip, [illegible]0 U.S. 584, 611 (1977) (reference to statute retaining liquor laws in diminished reservation area).

[207] Act of June 27, 1934, ch. 846, 48 Stat. 1245.

Excerpt From Tr. of Oral Argument, *Yankton Sioux Tribe v. Southern Missouri Waste Mgmt.*, 99 F.3d 1439 (8th Cir. 1996) (No. 95-1581)

5/13/96

Yang: [T]he carefully considered Department of Interior Solicitor's opinion confirmed that the Yankton Sioux reservation had not been diminished or disestablished. Especially great weight should be given to that opinion because it was authored by Felix Cohen a noted authority on federal Indian issues. In that 1941 opinion, Solicitor Cohen emphasized that this Act was different from other surplus land Acts that did diminish reservations

Judge: Is that in the appendix?

Yang: Yes, that was a reference in one of the other amici briefs and supplied in the supplemental appendix by the State, Your Honor. In that 1941 opinion, Solicitor Cohen emphasized that the Act was distinguishable from other surplus land acts because their open lands were scattered among the Indian allotments rather than being located in one well defined and discreet part of the reservation. And since no subsequent congressional act had changed reservation boundaries, the reservation continued in the same form that it had prior to the 1894 Act.

* * * *

Excerpt From Br. of the United States, *Erickson v. United States, Ex Rel Feather, (Decided with DeCoteau v. District County Court*, 420 U.S. 425 (1975)) (No. 73-1500)

The only other Act of Congress that contains provisions relative to the boundaries and size of the Lake Traverse Reservation is the Act of March 3, 1891, *supra.* ratifying an Agreement of December 12, 1889 between three United States commissioners and the chiefs, headmen, and male adult members of the Sisseton and Wahpeton Bands. (Appendix at 7 contains the full text of the Act.) The Bands agreed to open their permanent reservation for settlement. The only express language of Congress pertinent to the question of disestablishment or diminishment of the Reservation is found in § 26 (reciting Article I of the 1889 Agreement) and § 30.

* * * *

A conclusion that these sections disestablish the permanent Lake Traverse Reservation, as described in Article III of the 1867 Treaty, or separate any tracts therefrom is untenable. No act of Congress has ever changed the 1867 Treaty boundaries. That boundaries of reservations are changed by Congress only by "unequivocal" specific description of the lands excluded from the reservation and specific delineation of the new boundaries is the explicit meaning of *Ceiestine, supra,* and is evident from examination of the many contemporaneous acts which opened Indian reservations for settlement,[6] including the Act of March 3, 1891, opening Lake Traverse and six other reservations. *Mattz v. Arnett, supra,* 412 U.S. at 504, fn. 22; *United States ex rel. Feather v. Erickson, supra,* 489 F.2d at 101-102. Significantly, of the seven reservations opened for settlement by the Act of March 3, 1891,[7] the portions of land excluded from the reservation and the new boundaries resulting therefrom are specifically delinerated by definite property lines for all but Lake Traverse.[8]

* * * *

Instructions From the Dept. of Interior to the Register and Receiver at Mitchell, South Dakota, 20 Interior Dec 435

YANKTON INDIAN LANDS OPENED TO SETTLEMENT.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 17, 1895.

REGISTER AND RECEIVER,
Mitchell, South Dakota.

GENTLEMEN: I have to call your attention to the proclamation of the President, dated May 16, 1895, together with the schedule of lands, copies of which are hereto attached,* by which the lands described in that schedule will be opened to settlement under the statutory provisions therein recited, at and after the hour of 12 o'clock, noon, central standard time, of the twenty-first day of May, 1895, being certain tracts embraced in the cession of the Yankton tribe of Sioux Indians, by agreement ratified and confirmed by the twelfth section of the act of Congress approved August 15, 1894 (26 Stats., pages 314 to 319).

You will observe that it is stipulated in Article 10 of the agreement referred to that—

> Any religious society, or other organization now occupying under proper authority for religious or educational work among the Indians any of the land under this agreement ceded to the United States,

* Schedule not included herein.

> shall have the right for two years from the date of the ratification of this agreement within which to purchase the land so occupied at a valuation fixed by the Secretary of the Interior, which shall not be less than the average price paid to the Indians for these surplus lands.

You will at the proper time be furnished with a copy of a "Schedule showing lands reserved for religious organizations, school and Agency purposes, etc., on the Yankton Reservation in South Dakota".

Any religious society or other organization applying to purchase lands under said Article 10 must make proof, after six weeks publication, of its occupancy of such lands on December 31, 1892, the date of the agreement, and pay for the same at the rate of $3.80 per acre, within two years from the date of the act ratifying the agreement.

With regard to the lands described in the schedule, you will observe that the act referred to provides—

> That the lands by said agreement ceded to the United States shall, upon proclamation by the President, be opened to settlement, and shall be subject to disposal only under the homestead and town-site laws of the United States, excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common school purposes and be subject to the laws of the State of South Dakota: Provided, That each settler on said lands shall, in addition to the fees provided by law, pay to the United States for the land so taken by him the sum of three dollars and seventy-five cents per acre, of which sum he shall pay fifty cents at the time of making his original entry and the balance before making final proof and receiving a certificate of final entry; but the rights of honorably discharged Union soldiers and sailors, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United

States, shall not be abridged except as to the sum to be paid as aforesaid.

That the Secretary of the Interior, upon proper plats and description being furnished, is hereby authorized to issue patents to Charles Picotte and Felix Brunot, and W. T. Selwyn, United States interpreters, for not to exceed one acre of land each so as to embrace their houses near the agency buildings upon said reservation, but not to embrace any buildings owned by the government, upon the payment by each of said persons of the sum of three dollars and seventy-five cents.

That every person who shall sell or give away any intoxicating liquors or other intoxicants upon any of the lands by said agreement ceded, or upon any of the lands included in the Yankton Sioux Indian Reservation as created by the treaty of April nineteenth, eighteen hundred and fifty-eight, shall be punishable by imprisonment for not more than two years and by a fine of not more than three hundred dollars.

Each applicant to enter any of these lands as a homestead must have the qualifications required of any applicant for homestead entry under existing law. He must pay for the land entered at the time of making his original entry the sum of fifty cents per acre and at the time of making proof, whether under Sec. 2291 or 2301 R. S., the further sum of $3.25 per acre in addition to the fees now required by law. No final commission will be collected where the party submits proof under Sec. 2301 R. S. and the commissions in the original entry and in final entry under Sec. 2291 R. S., will be computed at the rate of $1.25 per acre, the ordinary minimum price of public lands under the general provisions of section 2357 U. S. R. S. (See sections 2238 and 2290 U. S. R. S.)

It is stipulated by Article 8 of the agreement that the ceded lands shall be disposed of "to actual and bona fide

settlers only", while the act ratifying the agreement provides that "the rights of honorably discharged Union soldiers and sailors, as defined and described in sections 2304 and 2305 of the Revised Statutes of the United States, shall not be abridged". No mention is made of sections 2306 and 2307 of the Revised Statutes, under which soldiers and sailors, their widows and orphan children are permitted, with regard to the public lands generally, to make additional entries, to certain cases, free from the requirement of actual settlement on the entered tract (see pages 23 and 24 of the General Circular of February 6, 1892). It is therefore held that additional entries cannot be made for these lands under said sections 2306 and 2307, unless the party claiming will, in addition to the proof required on pages 23 and 24 of said circular, make affidavit that the entry is made for actual settlement and cultivation according to section 2291, as modified by sections 2301, 2304 and 2305 of the Revised Statutes, and the prescribed proof of compliance therewith will be required to be produced, and the additional payment will be required to be made before the issue of the final certificate.

Town-site entries will be made for said lands in accordance with the general laws applicable thereto (See Circular of July 9, 1886, 5 L. D., 265).

In addition to the usual original homestead receipt (form 4-137) for the fee and commissions, you will issue a receipt of form 4-140a for the purchase money paid when the original entry is made, and when the final payment is made, you will issue a receipt of like form in addition to the final homestead receipt (form 4-140) for the final commissions, except in cases where the party makes proof under Sec. 2301 R. S. when no final commissions will be collected and therefore, only one form of receipt (4-140a) will be issued.

You will report the purchase money in all cases upon your current cash abstracts, but, except when proof is

made under Sec. 2301 R. S., no cash certificate will be issued. In all other respects you will use the ordinary homestead and town-site blanks in connection with the entry of these lands, continuing your regular series of numbers, but indicating upon the entry papers and abstracts that the entries for these lands are made under the act of August 15, 1894, Sec. 12.

Should any of the parties named in the second paragraph of the portion of the act quoted, the applications in your office for the purchase of the lands therein referred to, you will forward the same through this office for the consideration of the Department.

No comment appears necessary upon the closing paragraph of the said section 12.

Very respectfully,

S. W. LAMOREUX,
Commissiofier.

Approved,
HOKE SMITH, *Secretary.*

Excerpt From Br. for the Pet., *DeCoteau v. District County Court*, 420 U.S. 425 (1975) (No. 73-1148)

The only other Act of Congress that contains provisions relative to the boundaries and size of the Lake Traverse Reservation is the Act of March 3, 1891, *supra*, ratifying an Agreement of December 12, 1889 between three United States commissioners and the chiefs, headmen, and male adult members of the Sisseton and Wahpeton Bands. (Appendix at 7 contains the full text of the Act.) The Bands agreed to open their permanent reservation for settlement. The only express language of Congress pertinent to the question of disestablishment or diminishment of the Reservation is found in § 26 (reciting Article I of the 1889 Agreement) and § 30.

* * * *

A conclusion that these sections disestablished the permanent Lake Traverse Reservation, as described in Article III of the 1867 Treaty or separate any tracts therefrom is untenable. No act of Congress has ever changed the 1867 Treaty boundaries. That boundaries of reservations are changed by Congress only by "unequivocal" specific description of the lands excluded from the reservation and specific delineation of the ne wboundaries is the explicit meaning of *Celestine, supra,* and is evident from examination of the many contemporaneous acts which opened Indian reservations for settlement,[6] including the Act of March 3, 1891, opening Lake Traverse and six other servations. *Martz v. Arnett, supra,* 412 U.S. at 504, fn. 22; *United States ex rel. Feather v. Erickson, supra,* 489 F.2d at 101-102. Significantly, of the seven reservations opened for settlement by the Act of March 3, 1891,[7] the portions of land excluded from the reservation and the new boundaries resulting therefrom are specifically delineated by definite property lines for all but Lake Traverse.[8]

* * * *

Excerpt From *DeCoteau v. District County Court*
420 U.S. 425, 463-464 (1975)

* * * *

* * * In contrast to the instant reservation, one other tribe agreed to "cede, relinquish, and forever and absolutely surrender to the United States all their claim, title and interest of every kind and character in and to" a *described tract*.[8] Another agreed to "cede, convey, transfer, relinquish, and surrender forever and absolutely, without any reservation" all their claim, title, and interest in *a described tract*.[9] Another agreed to "cede, sell, and relinquish to the United States all their right, title and interest in and to all that portion" of a named reservation *as specificall ydescribed*.[8] Another agreed to sell to the United States "all that portion" of the reservation *described by metes and bounds*.[9] Congress made an unmistakable change when it came to the lands ceded in the instant case. (Emphasis added).

* * * *

Excerpt From Tr., *Erickson v. United States ex rel. Feather (Decided With DeCoteau v. District County Court*, 420 U.S. 425 (1975)) (No. 73-1500)

* * * *

QUESTION: But you do have language of "cession".

MR. SACHSE: You do have language of "cession",

QUESTION: Isn't that even stronger?

MR. SACHSE: But there is no *specific area ceded*, what's ceded is what is not allotted—

QUESTION: But, as a matter of fact, it's treated as the public domain.

MR. SACHSE: I—I don't know what you mean by

QUESTION: Well, what happened after the ceded property?

MR. SACHSE: After the property was ceded—

QUESTION: Yes.

MR. SACHSE: —the government sold that land under—

QUESTION: Treated it like the public domain.

MR. SACHSE: Well, only in the exact same sense that it—

QUESTION: Well, it was handled as part of the public domain, by the same system that the public domain was handled.

QUESTION: Weren't they acting for the Indians?

MR. SACHSE: That is to say—and I'll try to get this in the—I think I may do better to break it down into historical perspective. (Emphasis added).

* * * *

No. 96-1581

Supreme Court, U.S.
FILED
SEP 24 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

STATE OF SOUTH DAKOTA,

Petitioner,

v.

YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,

Respondents,

and

SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR THE RESPONDENTS YANKTON SIOUX TRIBE AND DARRELL E. DRAPEAU

James G. Abourezk
Counsel of Record

Bobbie J. Rasmusson
Abourezk Law Offices, P.C.
P.O. Box 1164
Sioux Falls, SD 57101
(605) 334-8402

Michael H. Scarmon
Scarmon Law Office
P.O. Box 220
Elk Point, SD 57025
(605) 356-2878

Paul Bender
2222 North Alvarado Road
Phoenix, AZ 85004-1414
(602) 253-8192

Counsel for Respondents Yankton Sioux Tribe and Darrell E. Drapeau

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 16

ARGUMENT 18

I. THE LANGUAGE OF CONGRESS IN THE 1894 ACT OPENING THE YANKTON SIOUX INDIAN RESERVATION TO WHITE SETTLEMENT SHOWS CONGRESSIONAL INTENT TO PRESERVE THE BOUNDARIES OF THE RESERVATION AS ESTABLISHED BY THE TREATY OF 1858 22

II. THE LEGISLATIVE HISTORY AND THE HISTORICAL CONTEXT SURROUNDING THE PASSAGE OF THE 1894 ACT REFLECT THE INTENT OF CONGRESS TO MAINTAIN THE YANKTON SIOUX INDIAN RESERVATION AS ESTABLISHED BY THE TREATY OF 1858 35

III. THE PATTERN OF SETTLEMENT AND JURISDICTION SUBSEQUENT TO THE 1894 ACT DOES NOT OVERCOME THE CLEAR INTENT OF CONGRESS TO PRESERVE THE 1858 TREATY BOUNDARIES OF THE YANKTON SIOUX INDIAN RESERVATION 41

IV. THE RESULT IN THIS CASE IS, IN ALL EVENTS, DICTATED BY THE RULE THAT AMBIGUITIES IN STATUTES OR AGREEMENTS INVOLVING INDIANS MUST BE RESOLVED IN FAVOR OF THE INDIANS ... 47

V. THE "ALMOST INSURMOUNTABLE PRESUMPTION" OF DISESTABLISHMENT RELIED UPON BY THE STATE DOES NOT APPLY IN THIS CASE 48

CONCLUSION 50

TABLE OF AUTHORITIES

Page

CASES CITED:

Annis v. Dewey County Bank, 335 F.Supp. 133 (D.S.D. 1971) 45

Colautti v. Franklin, 439 U.S. 379 (1979) 30

County of Oneida, New York v. Oneida Indian Nation of New York, 470 U.S. 226 (1985) 20

County of Yakima v. Confederated Tribes and Bands of the Yakima Nation, 502 U.S. 251 (1993) 21

DeCoteau v. District County Court, 420 U.S. 425 (1975) ..... *passim*

F.P.C. v. Tuscarora Indian Nation, 362 U.S. 99 (1960) 20

Hagen v. Utah, 510 U.S. 399 (1994) ..... *passim*

Hassett v. Welch, 303 U.S. 303 (1937) 29, 30

Mattz v. Arnett, 412 U.S. 481 (1973) 6, 19, 23, 28

Perrin v. United States, 232 U.S. 478 (1914) 43

Rainwater v. United States, 356 U.S. 590 (1958) 29

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) .... *passim*

Rosebud Sioux Tribe v. South Dakota, 900 F.2d 1164 (8th Cir. 1990) 45

Seymour v. Superintendent, 368 U.S. 351 (1962) 19, 32

Shoshone Tribe v. United States, 299 U.S. 476 (1937) 27

Solem v. Bartlett, 465 U.S. 463 (1984) ..... *passim*

State v. Greger, 559 N.W.2d 854 (S.D. 1997) 3

State v. Spotted Horse, 462 N.W.2d 463 (S.D. 1990) 45

United States v. Dion, 476 U.S. 734 (1986) 20

TABLE OF AUTHORITIES – Continued

Page

United States v. Grey Bear, 828 F.2d 1286 (8th Cir. 1987) 20

United States v. Long Elk, 565 F.2d 1032 (8th Cir. 1977) 32

United States v. State of Montana, 457 F.Supp. 599 (D. Mont. 1978), *rev'd*, 604 F.2d 1162 (9th Cir. 1979), *aff'd*, *Montana v. U.S.*, 450 U.S. 544 (1980) 28

Washington v. Washington Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) 21, 47

Yankton Sioux Tribe v. Southern Missouri Waste Management District, 99 F.3d 1439 (8th Cir. 1996) ..... *passim*

Yankton Sioux Tribe v. Southern Missouri Waste Management District, 890 F.Supp. 878 (D.S.D. 1995) ..... *passim*

STATUTORY REFERENCES:

Treaty with the Yankton Sioux, 1858, ratified, 11 Stat. 743 (1859) ..... *passim*

Agreement with the Yankton Sioux or Dakota Indians, in South Dakota, 1892, ratified, 28 Stat. 286, 314 (1894) ..... *passim*

General Allotment Act of 1887 (Dawes Act), 24 Stat. 388 (1887) 5

Act of April 11, 1882, 22 Stat. 42 28

South Dakota Enabling Act, 25 Stat. 676 (Feb. 22, 1889) 45

Act of March 3, 1891, 26 Stat. 1039 28

TABLE OF AUTHORITIES – Continued

Page

Presidential Proclamation, 29 Stat. 865 (1895).....11, 25

Act of April 27, 1904, 33 Stat. 352 29

CONSTITUTIONAL PROVISIONS

S.D. Const., art. XXVI, § 18..... 45

OTHER AUTHORITIES

H.R. Rpt. 1356, 51st Cong. 1st Sess. 1890..... 36

S. Exec. Doc. 66, 51st Cong. 1st Sess. (1890).....36, 37

S. Exec. Doc. 27, 53rd Cong. 2nd Sess. (1894) ("Negotiations") ..... *passim*

Sen. Rpt. 196, 53rd Cong. 2d Sess. (1894) 8

F. Cohen, *Handbook of Federal Indian Law*, 603 (1982) 15

STATEMENT OF THE CASE

The question for this Court is whether the United States Court of Appeals for the Eighth Circuit was correct in ruling that the boundaries of the Yankton Sioux Reservation were not disestablished by Congress' enactment of an 1894 statute which purchased unallotted reservation lands for re-sale to white settlers.

A. Procedural background.

Unlike most boundary cases that come before this Court, this case had its genesis, not in a criminal action, but in an environmental dispute.

The case arose when a four county consortium in south-central South Dakota, Southern Missouri Waste Management District (hereafter "Southern Missouri") proposed construction of a landfill on private fee land within the boundaries of the Yankton Sioux Indian Reservation, boundaries which were established by the Treaty of 1858. 11 Stat. 743 (1858). Over the Tribe's objection, the South Dakota Board of Minerals and Environment issued a permit to Southern Missouri to proceed with the landfill.

The Tribe thereafter filed this action in the District Court for the District of South Dakota seeking an injunction to prevent the construction of the landfill, as well as a declaration that federal environmental regulations rather than the weaker state regulations should be applied to the proposed site.[1]

---

[1] The Tribe also contended that EPA had permitting authority over the Yankton Sioux Indian Reservation, and had not given such authority to the State. *See* JA 25.

JA 21-37.[2] Southern Missouri brought the State of South Dakota (hereafter "State") into the action as a third-party defendant. JA 76. The State claimed that the Reservation had been disestablished by the 1894 Act, 28 Stat. 286, 314 (1894).[3] JA 86.

After a five-day trial the District Court held that Congress did not intend to disestablish the 1858 Treaty boundaries of the Yankton Sioux Indian Reservation (hereafter "Reservation"). *Yankton Sioux Tribe v. Southern Missouri Waste Management District*, 890 F.Supp. 878 (D.S.D. 1996); App. 84. The State appealed the trial court's ruling on the boundary issue and the United States Court of Appeals for the Eighth Circuit affirmed. *Yankton Sioux Tribe v. Southern Missouri Waste Management District*, 99 F.3d 1439 (8th Cir. 1997); App. 1. The Eighth Circuit held that Congress did not intend to disestablish the Reservation boundaries, and, as well, the Act intended to preserve the boundaries of the Reservation. App. 21, 27. After a thorough examination of all the relevant factors, the Eighth Circuit concluded that "Congress intended by its 1894 Act that the Yankton Sioux sell their surplus lands to the government, but not their governmental authority over it," and held that the 1858 Treaty boundaries were to be maintained. App. 43-44.

---

[2] As used herein, "App." refers to the Appendix to the Petition for Writ of Certiorari; "Resp. App." refers to the Appendix to the Respondents' Opposition to Petition for Writ of Certiorari; "JA" refers to the Joint Appendix; "T" refers to the transcript at trial.

[3] The 1894 Act ratified a negotiated agreement between the government and the Yankton Sioux Indians which had been executed by the parties in 1892. Throughout this Brief, the 1892 Agreement and the 1894 Act are referred to as the 1894 Act.

Shortly thereafter, the South Dakota Supreme Court ruled in *State v. Greger*, 559 N.W.2d 854 (S.D. 1997), App. 125, that the Reservation had been disestablished.[4] This Court then granted the State's petition for a writ of certiorari to review the Eighth Circuit's decision.

B. Historical facts prior to the 1858 Treaty.

According to the earliest records dating from the beginning of the Eighteenth Century, the Yankton Sioux Tribe (hereafter "Tribe") held aboriginal title to thirteen million acres of land between the Des Moines and Missouri Rivers in the North-Central plains. T. 34-35; JA 571-72, 575. The lands of the Yankton Sioux have never been in, or a part of, the public domain and the Tribal government of the Yankton people has existed from the origins of the Tribe. JA 534-44. From the negotiation of the first Yankton Treaty in 1815 to the present, a government-to-government relationship has existed between the Yankton Sioux Tribe and the United States, and it is well established that the Yanktons have been the most peaceful of the Sioux tribes. JA 537-42, 567.

C. The 1858 Yankton Sioux-United States Treaty.

Under the terms of the 1858 Treaty between the United States and the Yankton Sioux Tribe, the Tribe

---

[4] Although the State was a party in *State v. Greger*, the Tribe was not. This appeal is the Tribe's first opportunity to raise the collateral estoppel and res judicata issues which are discussed in the Respondents' Brief in Opposition to the Writ of Certiorari. The State court exceeded its authority in *Greger* by ignoring the supremacy clause and refusing to defer to the previous federal decisions on this issue of federal law.

relinquished its aboriginal claim to more than 11 million acres of land in exchange for the exclusive and unrestricted use of a reservation of approximately four hundred thousand acres in what was later to become Charles Mix County, South Dakota; certain direct payments; scheduled annuities; and the construction of schools and agency facilities. 11 Stat. 743 (1858). App. 99-110. The Reservation was set aside as a permanent home for the Tribe, and the United States promised:

> [t]o protect the said Yanctons [sic] in the quiet and peaceable possession of the said tract of four hundred thousand acres of land so reserved for their future home, and also their persons and property thereon during good behavior on their part.

App. at 102.[5] A description of the boundaries of the Reservation is contained in the 1858 Treaty.[6]

Article XVIII of the 1892 surplus land sale Agreement negotiated between the Yanktons and the United States, which was incorporated in the 1894 Act, reaffirms the provisions of the 1858 Treaty. *See* 1894 Act, App. 111-24.

---

[5] A land survey later revealed that 430,495 acres were actually included in the area described as the Reservation. S. Exec. Doc. No. 27; JA 117.

[6] The 1858 Treaty describes the boundaries of the Reservation as follows:

> Beginning at the mouth of the Naw-izi-wa-koo-pah or Chouteau River and extending up the Missouri River thirty miles; thence due north to a point; thence easterly to a point on the said Chouteau River; thence down said river to the place of beginning, so as to include the said quantity of four hundred thousand acres.

App. 100-01.

No document subsequent to the 1858 Treaty describes new or different Reservation boundaries. *Id.*

D. Historical facts prior to the 1892 Agreement.

In the years preceding the 1892 Agreement, the Yankton people suffered persistent drought, floods, grasshopper plagues, and shortages of food in extremes never before, or since, experienced in that region. T. 41-42; JA 576-77. At the same time white settlers and businessmen exerted great pressure on the federal government to open up the Reservation land for settlement. T. 68-69, JA 573. The surge of immigrants from Europe at the end of the Nineteenth Century also created enormous pressure on the United States Government to find more land for white settlement. *Id.* With the enactment of the Allotment Act, Dawes Act, 24 Stat. 388, codified at 18 U.S.C. § 331 *et seq.*, and the subsequent allotment of Tribal lands, Tribal leaders ultimately agreed to enter into negotiations to sell "surplus" lands left over from the allotment process. By then, the Tribe's economy had been destroyed and there was increasing pressure of white expansionism. The culmination of the negotiations was the Agreement of 1892, selling the unallotted Tribal lands to the United States. *See* T. 30; S. Exec. Doc. 27, 53rd Congress, 2d Sess. (1894), Exhibit C-5, JA 108-358.

The Dawes Act radically changed the manner of Indian ownership of land. Prior to the Dawes Act, the lands of the Yankton Sioux Tribe were held communally. JA 580. Some Tribal members were provided with "assignments" of Tribal lands which they were allowed to farm, but ownership remained with the Tribe. JA 580. The Dawes Act created a new policy of forcing individual Indians to accept allotted tracts of reservation land for

the purpose "of promoting interaction between the races and of encouraging Indians to adopt white ways." *Mattz v. Arnett*, 412 U.S. 481, 496 (1973).

In accordance with the Dawes Act's policy, the government then allotted 167,325 acres of Yankton Reservation land to individual Indians. JA 98-99, 117. These allotments were scattered throughout the Reservation. JA 137. These initial allotments left 95,000 acres of land to be used for future allotments and for future use by the Tribe, including 852 acres reserved for government and religious purposes. JA 98-99. A surplus of approximately 168,000 acres of unallotted lands remained. *Id.* It is these "surplus" acres that the United States sought to acquire for settlement by non-Indian farmers, businessmen, and settlers. JA 573-77.

In 1892, the Secretary of the Interior appointed a three-member commission to negotiate with the Yankton Indians for the sale of their unallotted "surplus lands" within the reservation.[7] *Id.*; JA 98-101. The Department of Interior instructed the Commissioners to purchase whatever surplus lands the Yanktons were willing to sell. JA 98-99. If the Indians were unwilling to sell all of their surplus lands, the Commissioners were to "endeavor to obtain the relinquishment of such part thereof as they may be willing to part with." *Id.* Entering into the negotiations, the Commissioners were cognizant of the attempts of the government for over a quarter century to,

[7] The Secretary of Interior cited his authority as the Indian Appropriation Act for 1892 which enabled the Department to "negotiate with any Indians for the surrender of portions of their respective reservations, any agreement thus negotiated being subject to subsequent ratification by Congress." JA 98.

"civilize these Indians." JA 145. The commissioners stated that:

> the purchase of surplus lands was but a small part of our mission and of minor importance to both the Indians and the Government, the provisions connected therewith for the future welfare of the Indians being of greater importance to them and to the Government than the sale of their surplus lands.

JA 146.

E. Negotiations between the Yankton Sioux Indians and the United States.

1. Manner of sale of the surplus lands.

A key issue of the negotiations between the Yanktons and the United States was the manner of sale and the price to be paid for the surplus land. The method preferred both by the Tribe, and initially by the Government, was the "appraisement and sale" method, where individual parcels would be appraised for their value, then offered for sale at the appraised price, with the Government acting as sales agent for the Tribe. JA 135-39. However, the Commissioners feared that this method would result in only the most desirable land being sold. *Id.* They feared that such selective sale of tracts would require future government commissions to come to South Dakota to sell the less desirable surplus lands remaining unsold. JA 136. The Commissioners decided to proceed with a plan of direct sale to the United States; they made an offer to the Tribe and formulated an agreement based upon that plan. *Id.*

The Commissioners recognized that "the Indians had no intention of selling their whole reservation." JA 136-37. Instead, the Commissioners were concerned with

making an agreement that would intermix the "frugal, moral and industrious" settlers among the Tribal allotments within the reservation in order to "stimulate individual effort and make their [the Indians] progress much more rapid than heretofore." Exhibit 7; Sen. Rpt. No. 196, 53rd Cong. 2d Session (1894). As Commissioners Cole and Adams pointed out, "the surplus lands are not in one body, but scattered over the reservation and mixed up with the allotted lands of the Indians." JA 137. Throughout the entire history of the negotiations, contained in Senate Ex. Doc. 27, 53rd Cong. 2nd Sess. (1894), Exhibit 605, the Commissioners contemplated the continuation of the reservation by uniformly referring to the sale of the Tribe's "surplus" lands, but not of termination or disestablishment of the reservation itself.[8] JA 108-358.

2. Trust period.

Article IV of the 1894 Act established a trust period of twenty-five years, after which the Indians were to gain fee title to their allotted lands and take on the full duties and responsibilities of citizenship. App. 112-13. Five hundred thousand dollars of the purchase price for the land was to be held in trust by the Government for the Indians during this period. App. 113.

---

[8] The Commission's lengthy report begins with a description of the proposed congressional Act "relating to the disposition of the surplus lands" of the Yankton Tribe of Sioux or Dakota Indians. JA 108-109. Commissioner Cole told the Indians that the "Great White Father has sent us here to treat with you. He wants to give you a chance to sell your surplus lands because he thinks it will be good for you . . . He wants you to keep your homes forever. (How!) He only wants you to sell your surplus lands for which you have no use." JA 208.

The Government's allotment policy at the turn of the century, together with the enactment of surplus land acts, was intended to gradually phase out the reservation system, and to assimilate Indians into American society. *Solem v. Bartlett*, 465 U.S. 463, 468 (1984). Conventional wisdom then held that Indian reservations would, within a few years, be a thing of the past. *Solem*, 465 U.S. at 468. However, the trust status of Indian reservation lands was extended repeatedly by Congress until the entire allotment policy was expressly disavowed by Congress in the Indian Reorganization Act of 1934. *Id.* at n. 9.

3. Liquor provision.

During the negotiations, the Yanktons expressed serious concerns about the active and lucrative trade in alcoholic beverages that flourished both on their Reservation and surrounding it. JA 154-55, 603-07. Tribal leaders feared that opening portions of the reservation to white settlement would allow a flood of liquor into Indian country. *Id.* The Commissioners agreed to include a forceful provision prohibiting the sale of whiskey on the Reservation. 1892 Agreement, Article XVII, JA 154, 199.

4. Savings Clause.

In negotiating the 1892 Agreement, the parties made repeated references to the provisions of the 1858 Treaty. *See, e.g.*, JA 115-16, 239, 259-62, 306-07, 315. In this regard, the 1892 Agreement included an explicit savings clause, which is unique among Indian surplus land agreements of that era, both in its language and in its obvious intended effect. App. 16, 81. Article XVIII of the Agreement provides that:

> Nothing in this agreement shall be construed to abrogate the treaty of April 19, 1858, between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement and its ratification by Congress, all provisions of said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19, 1858.

App. 120.

As noted above, the 1894 Act makes no reference to new or altered Reservation boundaries, nor does it describe any new boundaries of the Yankton Reservation. Neither the Act nor the Agreement contains any language that can be construed as referring to the disestablishment of the Reservation.

Commissioner Cole reassured the Indians about the effects of the Agreement:

> I desire to congratulate you upon consummating the best treaty which any tribe of Indians has ever made – a treaty which if ratified by Congress and successfully carried out, will benefit your people for all time.

JA 324-25, 348.

John P. Williamson, a Presbyterian missionary, respected and trusted by tribal members, in response to a request by the Commissioners, stated in a letter that by signing the agreement the Indians would not be relinquishing their rights under the 1858 Treaty. The Rev. Williamson wrote:

> I can say to the Indians that I believe the terms of this agreement are the most liberal that could be granted them at this time, and that if this

> agreement is consummated I have no doubt that the stipulations will be faithfully carried out. Also, I consider the provisions for the care of the poor, for schools, and for court expenses, to be very judicious as being preparatory for full citizenship. ***And further there is no cause for apprehension that this agreement will in any way interfere with the treaty of 1858.***

JA 317-18 (emphasis added).

Article XVIII also dealt with the Tribe's concerns about their annuities. App. 120. Tribal members believed they would lose their annuities if they refused to approve the land sale. JA 587-89. The annuities clause in Article XVIII calmed the Tribe's fears that their refusal to sign the new Agreement would cause the government to stop provision of their promised annuities. *Id.*

5. Legislative History.

The extensive legislative history relied upon by the State includes only a fleeting reference to the Yankton surplus land sale. Exhibit 669, JA 362-449. Discussion in the United States House of Representatives with respect to the opening of the Yankton Reservation for non-Indian settlement dealt with the issue of whether or not the sale of lands to homesteaders would contravene the intent of the Homestead Act. JA 382-83. Congressional discussion was silent on the boundaries of the Yankton Sioux Indian Reservation. *Id.* No mention was made of any intent to disestablish the Reservation or of any understanding that disestablishment would be the result of the surplus land sale. *Id.*

F. Opening of the reservation for settlement.

On May 16, 1895, President Grover Cleveland issued a Proclamation opening the unallotted surplus reservation lands for settlement under the existing federal homestead laws. 29 Stat. 865 (1895); T. 26; JA 453-57. The lands sold by the Tribe were described as follows:

> unallotted lands ***within the limits of the reservation*** set apart to said tribe by the first article of the treaty of April nineteenth, eighteen hundred and fifty-eight, between said tribe and the United States. . . .

JA 453 (emphasis added).

The Proclamation included a "Schedule of Lands ***within the Yankton Reservation***, South Dakota, to be opened to settlement by Proclamation of the President," listing the legal description of the unallotted parcels of reservation land. JA 456 (emphasis added).

G. Subsequent History of the Reservation Area.

1. References to "reservation" in official documents.

As the Court of Appeals found, the lands of the Yankton Sioux Tribe consistently have been referred to since 1894 as the "reservation" both in official and unofficial documents. App. 33. Professor Herbert Hoover, who has written extensively about the Tribe and who presented the only historical testimony at trial, testified that the area at issue is nearly always referred to as the "reservation" in the ten thousand odd documents that he had reviewed. T. 264; *See* App. 33. References to "former" or other such language in regard to the Yankton Sioux Indian Reservation are extremely infrequent. *Id.*

Other government officials, charged with responsibility to the Yankton Indians, continued to describe the reservation area as continuing to exist within the 1858 Treaty boundaries. In 1903, Inspector S. F. O'Fallon, reporting on his examination of the sales of inherited land at the Yankton Agency, stated:

> ***The Yankton reservation is in Charles Dix [sic] County*** on the Southern border of the State of South Dakota. It is situated on the East bank of the Missouri river, having a river frontage of about 33 miles, and extending back from the river something like 20 miles. Besides the Missouri river, ***the reservation has several small creeks and Lake Andes***, quite a large body of water, now supplied by two artesian wells constructed by the Government. Three years ago a line of the Chicago, Milwaukee and St. Paul Railway was built ***through the center of the reservation East to West*** . . . After alloting [sic] all the members of this tribe from their tribal lands, the remainder was bought by the Government and has been taken as homesteads by white settlers.

T. 30; JA 468 (emphasis added).

In 1914, Congress held hearings investigating conditions on the Yankton Sioux Reservation. JA 477-79. In response to a question by Representative Charles D. Carter of Oklahoma about the size of the Yankton Reservation, Superintendent Leech stated that the reservation was "About 20 by 35 or 36 miles."[9] JA 479. This was the size of the Reservation described in the 1858 Treaty.

---

[9] During previous questioning, Leech had indicated that of the original 268,000 acres allotted to individual Indians, only 98,000 remained in their hands with the remainder sold under the 1894 Agreement and in subsequent individual sales. JA 477.

The Eighth Circuit further noted that Felix Cohen, perhaps the preeminent authority on federal Indian law, while serving as Acting Solicitor of the Department of Interior, had unequivocally concluded that the Yankton Sioux Indian Reservation was a "still existing unit in the acts of April 29, 1920, (41 Stat. 1468) and June 11, 1932 (47 Stat. 300)." JA 37 (*citing* Letter of August 7, 1941, *Opinions of the Solicitor, Department of the Interior* 1063 (1979)). In contrast, testimony by one of the State's witnesses, an employee with the Department of Game, Fish and Parks, disclosed at trial that his reference to the area as the "former" Yankton Sioux Reservation was inspired by a memorandum from the then Governor of South Dakota directing State employees to refer to the Yankton Sioux Reservation as the "former" Yankton Sioux Reservation. JA 709-10.

2. Maps

The Eighth Circuit found that maps of the area drawn after the 1894 Act were inconclusive as to the continuation of the Reservation. App. 33. However, Titus Marks, a realty specialist for the Bureau of Indian Affairs (BIA) area office in Aberdeen, South Dakota, testified that the BIA, which is charged with federal oversight of South Dakota Indian reservations, has continually recognized the 1858 Treaty boundaries in its maps. T. 356; JA 678.

Leech also stated that, although the allotment rolls had closed on June 18, 1892, the allotment process on the reservation was still proceeding, but was practically complete at the time of the hearing. JA 478.

3. Continuity of tribal governance.

In spite of the hardships and obstacles placed in the way of the Tribe, Tribal governance has existed continually through the time of the sale of the surplus lands in 1894 to the present. JA 541. During the third decade of the Twentieth Century, there was a radical shift from the federal policy of allotment and assimilation, to one of respect for traditional aspects of Indian culture, identification of individual rights and encouragement of tribal sovereignty and self-governance. F. Cohen, *Handbook of Federal Indian Law*, Ch. 2, Sec. D1, (1982).

At the beginning of this shift in Indian policy, the Yankton Sioux Tribe adopted its first Constitution and Bylaws in 1932, which was limited to provisions for setting up and empowering a tribal Business and Claims Committee. Exhibit 651; JA 483-88, 541. A broader Constitution was adopted in 1962, and a Law and Order Code in 1995. Exh. 652; JA 493.

4. Demographics.

Between 1970 and 1990 the Indian population of Charles Mix County, which includes the Yankton Sioux Reservation, increased by 116 percent, while the non-Indian population decreased by 21.4 percent. JA 615. According to the 1990 census, there were 1,994 American Indians and 4,275 non-Indians living on the "Yankton Reservation," which the Census Bureau defined according to its 1858 boundaries. App. 42. The Tribe has significantly bolstered the economy of the Reservation by the establishment, in 1991, of the Fort Randall Casino, which has decreased unemployment on the Reservation. The

casino has provided the basis for substantial Tribal economic development as well as for a positive economic impact on the non-Indian residents of Charles Mix County. App. 43. By 1993, there were 6,000 enrolled members of the Yankton Sioux Tribe, 3,400 of whom lived on the reservation. JA 545.

SUMMARY OF THE ARGUMENT

1. Congress expressed an intent to preserve the boundaries of the Yankton Sioux Reservation in the language of the 1894 Act opening the Reservation to white settlement. The Act contains no language of "diminishment," "disestablishment" or return of the land to the public domain. Congress did not describe new or altered boundaries of the Reservation, but rather, incorporated the boundaries of the 1858 Treaty into the Act.

2. The "cession" and "sum certain" language in Articles I and II of the 1894 Act, without a statutory expression of Congressional intent to diminish, does not raise a presumption of disestablishment. Both the Tribe and the United States Government preferred an "appraisement and sale" method of sale. The "direct" sale method, which led to the inclusion of the "cession" and "sum certain" language, was employed by the Commissioners, not for jurisdiction or sovereignty purposes, but because they feared that the appraisement and sale method would require future commissions to complete their work.

3. Article XVIII, the "savings clause," of the 1894 Act is unique, distinguishing the Yankton surplus land sales Act from other land sales acts. The savings clause twice provides that the 1858 Treaty is to be preserved. Article XVIII preserves the boundaries of the Reservation,

while at the same time opens the land within the Reservation to white settlement.

4. The other provisions of the 1894 Act are consistent with Congress' intent to preserve the boundaries of the Reservation. The provisions of the Act which reserved land for school purposes to be subject to the laws of the state indicate an intent to maintain intact the Reservation boundaries. If the Reservation had been disestablished, as the State contends, all of the unallotted land would be automatically subject to the laws of the state, making that language redundant.

In an attempt to curb the lucrative alcohol trade on the reservation and prevent harm to their members, the Yankton Indians insisted on the inclusion of a liquor provision in the 1894 Act which prohibited alcohol within the boundaries of the reservation forever. This provision is completely consistent with – and indeed supports – the continued existence of the Reservation.

5. The contemporaneous negotiation and legislative history supports the conclusion that the intent of Congress in 1894 was to maintain the boundaries of the Yankton Sioux Reservation. There is no discussion contained in the extensive negotiation history of the 1892 Agreement between the Tribe and the Government of altered boundaries or of the extinction of tribal governance over the reservation area. Instead, the negotiation history reveals a clear understanding by the Tribe and the Government that the 1858 Treaty provisions were to be preserved. The negotiation and legislative history of the 1894 Act are clearly distinguishable from those of the Sisseton-Wahpeton and Rosebud Reservations.

6. There is substantial evidence in the subsequent history of the area to support a finding that the intent of

Congress was to preserve the 1858 boundaries. The United States Government has consistently referred to the area as the "reservation" in statutes and documents following the enactment of the 1894 Act. In addition, maps of the area have continued to show the 1858 boundaries of the Reservation.

The Tribe has always maintained a continuum of tribal governance over the Reservation area. Currently, the Tribe is the largest employer within Charles Mix County. Tribal population on the Reservation is increasing, while the non-Indian population is decreasing.

7. Under the *Hagen/Solem* analysis, the evidence of this case supports the holding of the United States Court of Appeals for the Eighth Circuit that the intent of Congress was to preserve the 1858 Treaty boundaries.

8. The State of South Dakota has failed to demonstrate compelling and substantial evidence of congressional intention to disestablish the Yankton Sioux Indian Reservation. No presumption of disestablishment arises in this case under the clear language of the 1894 Act, the negotiation and legislative history, and the surrounding circumstances. The most the State can argue is that the evidence creates an ambiguity, which must be resolved in favor of the Indians.

ARGUMENT

Legal Analytical Framework

Both of the lower courts below have held that Congress did not intend to disestablish the boundaries of the Yankton Sioux Indian Reservation by the 1894 Act, 28 Stat. 314-19. In order to reach this decision, both Courts carefully followed the "analytical structure" developed

by this Court. App. 1-65; App. 66-97. *See Hagen v. Utah*, 510 U.S. 399, 410-11 (1994); *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). Under the *Hagen/Solem* analysis, a Court must examine three factors in the following order of probative importance in order to determine whether a reservation has been diminished or disestablished: (1) the statutory language used to open the reservation for settlement; (2) the historical context surrounding the passage of the applicable surplus land act; and lastly (3) the pattern of settlement subsequent to the Act. *Hagen*, 510 U.S. at 411.

"It is settled law" that some surplus land Acts diminished reservations, *see, e.g., Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District County Court*, 420 U.S. 425 (1975), and other surplus land acts do not, *see, e.g., Mattz v. Arnett*, 412 U.S. 481 (1973); *Seymour v. Superintendent*, 368 U.S. 351 (1962); *Solem v. Bartlett*, 465 U.S. 463, 469 (1984). "The first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries." *Solem*, 465 U.S. at 470.

The "most probative evidence" of the intent of Congress to preserve, diminish, or terminate the boundaries of an Indian reservation is the statutory language used to open the reservation to settlement by non-Indians. *Hagen*, 510 U.S. at 411. In order to determine Congress' intent, courts may also examine the historical context, including the legislative history surrounding the passage of the Act, being "careful to distinguish between evidence of the contemporaneous understanding of the particular Act and matters occurring subsequent to the Act's passage." *Id.* Finally, "and to a lesser extent," courts may examine events occurring immediately following the opening of the surplus lands as well as patterns of settlement, either

of which may provide some evidence of the intent of Congress. *Solem*, 465 U.S. at 471.

Guiding the entire legal analysis are established canons of statutory construction interpreting statutes affecting the rights of Indian tribes, canons "firmly rooted in the unique trust relationship between the United States and the Indians." *County of Oneida, New York v. Oneida Indian Nation of New York*, 470 U.S. 226, 247 (1985). As the Eighth Circuit observed, because the government is subject to a fiduciary standard in negotiating with Indian tribes, a strong presumption prevails that "reservation lands and boundaries are to remain intact." *United States v. Grey Bear*, 828 F.2d 1286, 1289 (8th Cir. 1987).

Thus, once Congress creates an Indian reservation for the benefit of a tribe, diminishment or disestablishment of its boundaries will never be lightly inferred. *Hagen*, 510 U.S. at 411; *Solem*, 465 U.S. at 472. "Great nations, like great men, should keep their word . . . " *F.P.C. v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J. dissenting). A heavy burden rests upon the party urging disestablishment to demonstrate "compelling and substantial evidence of a congressional intention to diminish Indian lands . . . " *Solem*, 465 U.S. at 472.

As a corollary to this settled approach, evidence supporting a claim of disestablishment must show congressional intent to terminate a reservation with sufficient clarity to overcome the "general rule that '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.' " *DeCoteau v. District County Court*, 420 U.S. 425, 444 (1975); *see also, United States v. Dion*, 476 U.S. 734, 738 (1986). Thus, this Court has repeatedly recognized that statutes alleged

to alter or to eliminate reservation boundaries "are to be construed liberally in favor of the Indians . . . " *Hagen*, 510 U.S. at 411 (quoting *County of Yakima v. Confederated Tribes and Bands of the Yakima Nation*, 502 U.S. 251, 269 (1993)).

Ambiguities that may arise in the interpretation of such statutes "are to be resolved in favor of the Indians . . . " *Hagen*, 510 U.S. at 411. Moreover, the terms of an agreement with an Indian tribe must be construed "in the sense in which they would naturally be understood by the Indians." *Washington v. Washington Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979).

Respondents believe that an application of these canons of construction leads convincingly to the conclusion that the 1894 Act, while opening the surplus or unallotted Reservation lands to settlement by non-Indians, did not terminate the Yankton Sioux Reservation. If the Court does not find that the 1894 Act clearly preserves the 1858 Treaty boundaries of the Reservation, we submit that it must agree that the situation created by the 1894 Act was, at worst (from the Tribe's perspective) an ambiguous one. The State has the burden of establishing that the 1894 Act ***unambiguously*** terminated the Reservation. *Solem*, 465 U.S. at 472. This, the State cannot do. Unless the Court is to abandon its correct and firmly established view that ambiguities in Congressional enactments respecting Indian tribes – including surplus land acts – must be resolved in favor of the Indians, it should hold that the Yankton Sioux Reservation has not been terminated. *See Hagen*, 510 U.S. at 411.

I. THE LANGUAGE OF CONGRESS IN THE 1894 ACT OPENING THE YANKTON SIOUX INDIAN RESERVATION TO WHITE SETTLEMENT SHOWS CONGRESSIONAL INTENT TO PRESERVE THE BOUNDARIES OF THE RESERVATION AS ESTABLISHED BY THE TREATY OF 1858.

A. The 1894 Act opening the Yankton Reservation to white settlement contains no language of diminishment or disestablishment, nor does it return Reservation land to the public domain.

In its brief, the State of South Dakota asserts that it has used the terms "disestablished" and "diminished" interchangeably to mean that the former reservation boundaries and status are "terminated" and that "Indian Country" status attaches only to remaining or non-extinguished allotments and dependent Indian communities. Brief of the State of South Dakota at p. 2, n. 2. The State is thus asking this Court to abolish the entire Reservation, leaving only the Indian owned allotments as Indian Country checkerboarded throughout.[10]

Under the meaning of "diminish," the Yankton Sioux Reservation would have been reduced in size by virtue of the 1894 statute. But if Congress had intended to diminish, there would have been new boundaries drawn in the 1894 statute.

---

[10] As the Court of Appeals for the Eighth Circuit noted, the terms "diminished" and "disestablished" are not synonymous. Disestablishment of the Yankton reservation boundaries, which is urged by the State in this appeal, describes the "relatively rare elimination of a reservation as opposed to the reduction in size of a reservation, or 'diminishment.'" App. 6 n.4. (citation omitted).

No such new boundaries exist.

The 1858 Treaty diminished the 11 million acre Yankton Sioux Reservation, as evidenced by the inclusion of a legal description of the new, altered Reservation contained in the Treaty. Even if the Tribe did not know how to draw new boundaries in 1892, certainly the government did, if indeed Congress intended to diminish the Reservation then. But no new description was ever contemplated, discussed, or drafted in the 1894 Act. It seems clear that the 1894 Act did not diminish the Reservation; the remaining question is whether that Act terminated, or "disestablished" the Reservation.

The most direct evidence of Congressional intent to "disestablish" any Indian reservation would be express statutory language using that term. The Court has recognized that "Congress was fully aware of the means by which termination [of a reservation] could be effected" when drafting surplus land legislation. *Mattz v. Arnett*, 412 U.S. 481, 504 (1973). There is, however, no direct or indirect language of disestablishment in the text of the 1894 Act, in the Presidential Proclamation executing the provisions of the Act, or in any other document concerning the negotiating and legislative history surrounding the Act. The Fifty-Third Congress could have stated its intention to eliminate the Yankton Sioux Indian Reservation by inserting such language if that was its intent.[11] In

---

[11] The Fifty-Third Congress knew how to unambiguously diminish and alter the boundaries of an Indian reservation. In the very same act that ratified the 1892 agreement between the Yankton Sioux and the government, Congress ratified an agreement between the Coeur d'Alene Indians and the government which provided "for a change of the northern line of their [Coeur d'Alene] reservation so as to exclude therefrom a

fact, the 1892 Agreement that is incorporated into the 1894 Act states precisely the opposite intention by providing that, "nothing in this agreement shall be construed to abrogate the Treaty of April 19, 1858," (the Treaty that established the Reservation) and that, "all provisions of said treaty . . . shall be in full force and effect, the same as though this agreement had not been made. . . . " App. 120.

As well, there is no reference in the Act, or in any of the related documents, to the Tribe's surplus land being "returned" to the "public domain," language that was central to this Court's decision in *Hagen v. Utah*, 510 U.S. 399 (1994). In fact, the Tribe holds aboriginal title – never extinguished – to the 1858 Reservation, and the Reservation has never been a part of the public domain. JA 470-72.

Finally, the 1894 Act states Congress' intention that a "part" or "portion" of the Yankton Reservation will be open to non-Indian settlement, plainly indicating that the Reservation would maintain its reservation status.[12]

---

strip of land on which the town of Harrison and numerous settlers are located." 28 Stat. 286, 322. Congress specifically stated that "for the purpose of segregating the ceded land from the diminished Coeur d'Alene Indian Reservation, [the new boundary lines of the reservation] shall be properly surveyed and permanently marked in a plain and substantial manner. . . . " *Id.*

[12] For example, the preface to the 1894 Act refers to the disposal of a "*portion of the land set apart and reserved to* said tribe. . . . " App. 112. Article I of the Agreement restricts the conveyance of title to the "unallotted lands *within the limits of the reservation* set apart to said Indians as aforesaid." App. 112-13. Article XIII recognizes the tribal rights of mixed-blood members as equal to other persons "who have been allotted lands *on the reservation described in this agreement* . . . " App. 118. Article XVII

Congress thus showed that the Yankton Sioux Act of 1894 was one of those surplus land acts that did not diminish or disestablish an existing reservation, but that merely opened the surplus land in an existing and continuing Reservation to settlement by non-Indians within the Reservation. *See Solem*, 465 U.S. at 469.

B. Article XVIII of the 1892 Agreement unequivocally expresses the intent of Congress to preserve the Yankton Sioux Indian Reservation boundaries following the sale of the unallotted Yankton Reservation lands.

Article XVIII, the "savings clause," distinguishes the Yankton surplus land Act from other such Acts, and the Yankton Reservation from other reservations which this

---

provides that no intoxicating liquors "shall ever be sold or given away upon any of the lands by this agreement ceded and sold to the United States, nor upon any *other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians* . . . " as described in the 1858 Treaty. (The plural reference to "reservations" includes the Tribe's claim to the Pipestone Reservation and quarry which is covered in Article XVI of the Agreement.) App. 120. The provisos attached to the Act refer to the agency buildings "*upon said reservation*" and set punishments for the selling of intoxicating liquors *upon any of the lands included in the "Yankton Sioux Indian Reservation as created by the treaty of April nineteenth, eighteen hundred and fifty-eight.* . . . " App. 123-24. (emphasis added).

In addition, President Cleveland's Proclamation opening the reservation for settlement included a "Schedule of Lands *within the Yankton Reservation, South Dakota*, to be opened to settlement by Proclamation of the President." 29 Stat. 865; JA 456. The only interpretation of this language is one consistent with the continued existence of the Reservation following the sale of the unallotted land.

Court has found to have been diminished or disestablished. Article XVIII twice indicates that the 1858 Treaty between the Tribe and the United States establishing the Reservation is to remain undisturbed. In its first sentence, the Article states:

> Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton Tribe of Sioux Indians and the United States.

App. 120.

The second sentence of the Article then states:

> And after the signing of this agreement, and its ratification by Congress, all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858.

Id.

The State argues that this provision goes well beyond a concern for the Tribe's annuities. However, Professor Hoover pointed out in unrefuted testimony that the Tribe was undoubtedly concerned about a cut-off of annuities based upon the government's earlier action in shutting off the annuities of another Sioux Tribe when, in the government's eyes, that tribe misbehaved. JA 588. If concern for annuities was the sole purpose of Article XVIII, that easily could have been taken care of by saying simply, "the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th,

1858."[13] The remainder of Article XVIII would have been entirely unnecessary. The only reasonable interpretation of Article XVIII, as it is actually written, is that it preserved intact the terms of the 1858 Treaty, including the Reservation's boundaries, and that the whites who purchased surplus lands could enter and live on those lands.

To presume, as the State urges, that reading Article XVIII to preserve the Reservation would prevent non-Indians from purchasing land and entering upon the Reservation, would be to reduce the Article to an absurdity. While the Tribe was at a linguistic disadvantage during the drafting of the 1892 Agreement, the government's agents and the members of Congress who approved the Agreement were not. The Agreement as a whole clearly provides both that the Reservation should be preserved and that surplus lands within it should be sold for settlement by whites. The savings clause can and should be read as being consistent with these dual purposes.

Article XVIII expressly and unambiguously states that the intention of the United States Congress was to recognize the 1858 Treaty as the primary instrument governing the Yankton Reservation, and that the 1892 Agreement served only to modify certain of its provisions. At the time it ratified the 1892 Agreement, Congress was aware that the 1858 Treaty provided a four hundred thousand acre reservation for the Indians' "quiet and peaceable possession . . . during good behavior on their

---

[13] The Court of Appeals found that, "Congress knew how to limit the reach of an annuities provision. . . . " App. 19 (citing *Shoshone Tribe v. United States*, 299 U.S. 476, 489 (1937) and language from a treaty with the Shoshone Indians of Wyoming).

part." App. 102; JA 99. There seems to be no question that the intent of Congress in including Article XVIII was to maintain the boundaries of the Reservation as described in the 1858 Treaty, while at the same time opening land within the Reservation for white settlement. As this Court has stated, allotment and sale of Indian land is "completely consistent with continued reservation status." *Mattz*, 412 U.S. at 497.

Article XVIII is the final substantive provision of the 1892 Agreement. Articles XIX and XX deal only with copying and signing the Agreement. As a summary of the effect of the preceding substantive provisions, Article XVIII contains an especially clear expression of firm congressional intent that the Yankton Sioux Reservation continues to exist following its opening for white settlement.[14]

Contrary to the State's assertions, the Crow Reservation is not analogous to the Reservation in this case. See *United States v. State of Montana*, 457 F.Supp. 599, 601 (D. Mont. 1978), *rev'd*, 604 F.2d 1162 (9th Cir. 1979), *aff'd*, *Montana v. U.S.*, 450 U.S. 544 (1980). Congress divested the Crow Tribe of discrete portions of the Crow Reservation through a series of legislative enactments. *Id.* Each of those agreements specifically described the boundaries of the ceded portions of the reservation land without *restating* the original boundaries. *Id.* See also Preamble, Act of April 11, 1882, 22 Stat. 42; Section 31, Act of March 3,

---

[14] Based upon his exhaustive historical research into the Yankton Sioux Tribe and its Reservation, Dr. Hoover concluded that the intent of Congress and the Yankton Indians was to maintain the boundaries as established by the Treaty of 1858. JA 597-600.

1891, 26 Stat. 1039; Article I, Act of April 27, 1904, 33 Stat. 352.

In the case of the Yankton Sioux Reservation, however, the 1894 Act did not describe the parcels of land involved in the sale. The only reference to the Yankton boundaries occurred in the 1858 Treaty, and it is these boundaries, expressly incorporated by reference in Article XVIII, that describe the resulting, unchanged Reservation area. This is the conclusion reached both by the trial court and by the Eighth Circuit, and is the only conclusion consistent with all of the historical facts.[15]

Article XVIII is a true "savings" clause, incorporating by reference the provisions of an earlier act, the 1858 Treaty, in order to give the prior provisions effect. Generally, when a statute adopts a part or all of another statute by specific reference, the original statute is given effect by its express provisions, notwithstanding intervening amendments or modifications. *Hassett v. Welch*, 303 U.S. 303, 314 (1937); *Rainwater v. United States*, 356 U.S. 590,

---

[15] We also note the lack of a similar savings clause in the Act of March 19, 1889, 26 Stat. 1035, opening the lands of the Sisseton and Wahpeton Indians for settlement, which the State has tried to allege is the functional equivalent of the Yankton Act. *DeCoteau v. District County Court*, 420 U.S. 425, 455-60 (1975).

Similarly, the savings clauses in the serial Rosebud Acts, which provided that "nothing in this agreement shall be construed to deprive the . . . Indians of the Rosebud Reservation, South Dakota, of any benefits to which they are entitled under the existing treaties or agreements, not inconsistent with the provisions of this agreement[.]" are clearly limited in effect and are not the equivalent of the broad reach of Article XVIII of the Yankton Act. *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 623, n.11 (1977) (Marshall, J. dissenting.)

593 (1958). All of the provisions of the prior enactment are read as though written into the subsequent statute. *Hassett*, 303 U.S. at 314. *See also* App. 17; *Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

C. Article VIII and the other school lands provisions of the 1894 Act support the intent of the Fifty-Third Congress to retain the boundaries of the Yankton Sioux Indian Reservation.

Article VIII of the 1894 Act provides that "[s]uch part of the surplus lands hereby ceded and sold to the United States, as may now be occupied by the United States for agency, schools, and other purposes shall be reserved from sale to settlers until they are no longer required for such purposes." App. 116.

A similar provision in the Act opening the Cheyenne River Reservation for settlement was addressed by the Court in *Solem v. Bartlett*, 465 U.S. at 474. The Court found that the provision "strongly suggest[s] that the unallotted opened lands would for the immediate future remain an integral part" of the reservation. *Id.* The Court added that "[i]t is difficult to imagine why Congress would have reserved lands for such purposes if it did not anticipate that the opened area would remain part of the reservation." *Id.* This "set aside" provision is totally absent from the Sisseton-Wahpeton Agreement upon which the State heavily relies. *See DeCoteau*, 420 U.S. at 455-60.

An even more direct reflection of the intent of Congress is found among the provisos appended to the 1892 Articles of Agreement. Congress there spoke about the status that the Yankton Sioux lands would have following the opening of their reservation for white settlement:

> The lands by said agreement ceded, to the United States shall, upon proclamation by the President, be opened to settlement, and shall be subject to disposal only under the homestead and town-site laws of the United States, excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common-school purposes and ***be subject to the laws of the State of South Dakota***.

App. 123 (emphasis added).

If the intent of Congress had been to disestablish the Yankton Reservation, ***all*** of the prior reservation land would be automatically subject to the laws of South Dakota, making the italicized language completely unnecessary and irrelevant. The inclusion of this provision for State jurisdiction over two sections of each township clearly indicates a Congressional understanding that Reservation status was to continue for the area within the 1858 Treaty boundaries. A limited provision for State jurisdiction would not have been included in the Act if the intent of Congress was to disestablish the Reservation and return the entire area to State jurisdictional control.

Dr. Herbert Hoover, the Tribe's historical expert, testified at trial that the "set aside" lands, or administrative districts, were dispersed throughout the Reservation area to be used for Tribal purposes long after the opening of the Reservation for settlement. JA 609-11. The placement of agencies and school lands throughout the Reservation area would have created a massive "checkerboard" of jurisdiction if Congress intended to otherwise disestablish the Reservation boundaries. This Court has recognized that any interpretation which would result in a

confusing pattern of "checkerboard" jurisdiction is disfavored. *Seymour v. Superintendent*, 368 U.S. 351, 358 (1962). Further, the United States Court of Appeals for the Eighth Circuit has observed that a court "cannot assume that Congress would intend to change [a] reservation to an area without defined boundaries and, in addition, create a confusing checkerboard pattern of jurisdiction." *United States v. Long Elk*, 565 F.2d 1032, 1039 (8th Cir. 1977).

D. The language of purchase contained in Article I and Article II of the 1894 Act, when taken in context with the other provisions of the Act and surrounding circumstances, fails to create a presumption of disestablishment.

This Court has stated that no "particular form of words" are required, nor is there magic language which is dispositive of a finding on the issue of disestablishment. *Hagen*, 510 U.S. at 411. In order for a presumption against the continuation of tribal governance to arise, the language conveying reservation land at a set price must be coupled with a further "statutory expression of congressional intent to diminish." *Id.* No such statutory expression exists in the 1894 Act. Indeed, the other provisions of that Act clearly preclude any presumption that might otherwise arise from the "cession" and "sum certain" language contained in the Act's first two articles, as each of the courts below held. App. 21, 84.

Further, the sum certain provision for the sale of the Yankton land was neither the intended nor the preferred form of disposal by the Yanktons of their surplus lands. JA 136. The government's original instructions to the Commission designated "appraisement and sale to the

highest bidder" as the intended sale option. JA 100. The Indians strongly favored this method of sale, which would have involved the appraisal of each parcel and its subsequent offer for sale. JA 135-36. The Commissioners, fearing that the less desirable lands would remain unsold, thus requiring future commissions to finish their work, opted instead for the direct sale method. *Id.* Rather than being a clear expression of Congressional intent to divest the Yanktons of their entire Reservation, the sum certain provision of the Agreement and 1894 Act were nothing more than an accommodation to the Commissioners' desire to complete their work at one time. As the Eighth Circuit correctly determined, the sum certain price in the 1894 Act was included "for reasons other than issues of jurisdiction and sovereignty." App. 15-16.

E. Article XVII, the liquor provision of the 1894 Act, is consistent with the preservation of the boundaries of the Reservation.

The State asserts that the alcohol prohibition contained in Article XVII of the 1894 Act is inconsistent with an intention of Congress to preserve the Reservation. However, as the Eighth Circuit explained, the Yankton Indians had a particular concern with the introduction of intoxicating spirits onto and through their reservation. App. 23-24. The Indians' concern, resulting in the inclusion of Article XVII, was derived from the great harm that the lucrative alcohol traffic was inflicting on tribal members. JA 154-55, 605-07. This concern was shared by the federal government. JA 555-56.

The inclusion of a provision in the Agreement that liquor be banned from the Reservation is completely consistent with continued Reservation status, given Congress' plenary power over Reservation affairs. Placing responsibility on the federal government for liquor control is, moreover, ***inconsistent*** with transfer of plenary jurisdiction over the area to the State of South Dakota, as the State contends.[16]

Further evidence of Congress's intent to maintain the Reservation appears in the legislative history of the 1894 Act as part of the Commissioners' report to the Congress that:

> The Indians very generally expressed their fear that upon the opening of the Yankton Reservation to settlement by white people, drinking saloons would be established in their midst, to the great injury of their people, and it was made an imperative condition of the sale, by the Indians, that whisky should be excluded. It is certainly to the credit of these people that they demand that this condition should be put into the agreement, and we hope that Congress will fix a penalty for the violation of this provision which will make it most effective in preventing the introduction of intoxicants ***within the limits of the reservation***.

JA 154-55. (Emphasis added).

---

[16] The Eighth Circuit distinguished the liquor provision in *Rosebud* from the Yankton case, explaining that the Rosebud Act only provided for a twenty-five year prohibition of alcohol, while the Yankton Indians were insistent that liquor be prohibited forever, irrespective of future acts of Congress affecting their Reservation. App. 23-24. The Eighth Circuit held that Article XVII was "not surplusage in the same manner as the liquor provision in *Rosebud*, and is not inconsistent with the intent to preserve the 1858 boundaries." JA 24.

Because this discussion concerned the effect of the Act ***after passage***, the Congress and the Commissioners without question contemplated a continuation of the Reservation's boundaries.

II. THE LEGISLATIVE HISTORY AND THE HISTORICAL CONTEXT SURROUNDING THE PASSAGE OF THE 1894 ACT REFLECT THE INTENT OF CONGRESS TO MAINTAIN THE YANKTON SIOUX INDIAN RESERVATION AS ESTABLISHED BY THE TREATY OF 1858.

An examination of the legislative history and surrounding circumstances relating to the 1894 Act confirms the conclusion that Congress had no intent to alter the boundaries of the Yankton Sioux Indian Reservation when it passed the 1894 Act. The historical context surrounding the negotiations leading up to the 1894 Act reveal circumstances which distinguish the Yankton Sioux Reservation from both the Lake Traverse and Rosebud Reservations, which were the subject of this Court's decisions in *DeCoteau* and *Rosebud*, and upon which the State relies heavily.

A. The legislative history of the Yankton Sioux Reservation is clearly distinguishable from the history of the Sisseton-Wahpeton Indian Reservation.

Unlike the Yankton Agreement, the Sisseton-Wahpeton Agreement was negotiated contemporaneously with the allotment of the reservation lands. *DeCoteau*, 420 U.S. at 434-35. Pursuant to the 1889 agreement with the government, the Sisseton-Wahpeton Indians agreed to sell all of their unallotted lands on the condition that

"each tribal member, regardless of age or sex, receive an allotment of 160 acres . . . " *Id.*

The Sisseton and Wahpeton bands had payments of their annuities discontinued after the Sioux outbreak in Minnesota in 1862. *See DeCoteau*, 420 U.S. at 434-35; S. Exec. Doc. No. 66, 51st Cong. 1st Sess. (1890) at 2. Payment of these back annuities and the allotments for all tribal members were foremost in the minds of the Indians, with the only controversy being over whether to terminate the reservation before, or at the same time, as the annuities were paid. S. Exec. Doc. No. 66 at 7; H.R. Rpt. No. 1356, 51st Cong. 1st Sess. (1890) at 1.

The Indians felt that the additional allotments and money would fully compensate them for their land and that it "would not be proper for them also to reserve a large quantity of land" for future educational and other tribal purposes. *Id.*

In contrast, Article VIII of the 1894 Act specifically provided for the set aside of land for schools, courts and other tribal purposes. In addition, at the time of the Yankton negotiations, about 95,000 acres of the Yankton Sioux Reservation remained unallotted and were therefore still tribal lands. JA 117. The Yankton Sioux Indians viewed all land held by any or all of them to be communal tribal property, thus completely belying the State's contention that the Yankton Sioux must have understood that the sale of their surplus lands would mean the end of their tribal lands. JA 144.

The *DeCoteau* Court relied on certain unambiguous statements of Sisseton-Wahpeton tribal spokesmen regarding the intent of the Indians as to their Reservation

lands, such as, "[w]e never thought to keep this reservation in our lifetime . . . We don't expect to keep reservation." *DeCoteau*, 420 U.S. at 433. The Court considered this evidence to be indicative of the Sisseton-Wahpeton tribe's intent to accede to the disestablishment of their reservation boundaries. The principal chief of the Lake Traverse Indians, Gabriel Renville, clearly confirmed this intention when he said:

> Let them first settle our claim [loyal scout claim] and then we will talk about our surplus lands. We are now citizens and can talk with you as such, and do not care to talk about shoe pacs, etc., but cash. We can buy for ourselves what we need if payment is made in cash, ***and then we do not care to have an agency here after the surplus lands have been sold.***

Id. at 435, n. 16 (*quoting*, S. Exec. Doc. No. 66 at 19-20 (emphasis added)).

The *DeCoteau* Court held that:

> the historical circumstances make clear, this [cession of all unallotted land] was not because the tribe wished to retain its former reservation undiminished, but rather because the tribe and the Government were satisfied that retention of the allotments would provide an adequate fulcrum for tribal affairs.

Id. at 446.

In contrast to the Sisseton-Wahpeton agreement, there is nothing in the legislative history of the negotiations between the Government and the Yankton Sioux Tribe to suggest that the Reservation would not be maintained, or that future services would not be provided through the Yankton agency. The contemporaneous history reveals that the Yankton Sioux did not exchange or barter their reservation for their allotments as part of the

1894 Act. These allotments had been set prior to any negotiations for the sale of the surplus lands. As well, the contemporaneous history of the Yankton Sioux transaction does not reveal any expressions by Tribal spokesmen that either they, or any other Tribal member, saw the sale of the surplus lands as terminating the Reservation.

Unlike the agreement in *DeCoteau*, the 1894 Yankton Act expressly called for certain lands to be set aside for agency, school and other future purposes. These provisions are inexplicable unless Congress intended to maintain the boundaries of the Reservation. Neither is there any indication that the Tribe nor the United States Government saw the retention of allotments by the Yankton Sioux as providing an "adequate fulcrum for tribal affairs."

B. The legislative history of the Yankton Sioux Reservation is clearly distinguishable from the history of Rosebud Sioux Indian Reservation.

Clear distinctions also exist in the circumstances surrounding the surplus land acts which opened to white settlement several counties originally included in the Rosebud Indian Reservation. In *Rosebud v. Kneip*, this Court found in the legislative history repeated references to the fact that the size and shape of the Rosebud Reservation would be changed. *Rosebud*, 430 U.S. at 591. Among these are the following:

> [t]he cession of Gregory County . . . will leave your reservation a compact, and almost square tract, and would leave your reservation about the size and area of Pine Ridge Reservation.

Id. at 593.

> I am here to enter into an agreement which is similar to that of two years ago, except for the manner of payment . . . You will still have as large a reservation as Pine Ridge after this is cut off.

Id. at 595.

> There is no question but what the Indians have no use for the land that is proposed to be ceded by this bill; that the tract is only a very small portion of the Rosebud Reservation, and is really only a corner of the reservation, which will be left compact and in a square tract and a reservation about equal in size to the Pine Ridge Reservation, in South Dakota . . .

Id. at 595.

The *Rosebud* Court concluded that such language evinced a clear intent to change the boundaries of the reservation. No such language regarding the Yankton Sioux Indian Reservation exists, either in the legislation itself or in the legislative history surrounding the sale of the surplus lands.

C. The United States Government's instructions to the Commissioners are inconsistent with an intent to disestablish the Reservation.

The Commissioners were instructed to attempt to purchase only that part of the surplus lands within the Yankton Indian Reservation that the Indians were willing to sell. JA 98-100. The instructions from the Department of Interior stated:

> If they [the Yankton Sioux] are unwilling to cede all the surplus land you will endeavor to obtain

> the relinquishment of such part thereof as they may be willing to part with.

Id. at 99.

The Indians, therefore, had complete control of the amount of unallotted land within their Reservation that they wished to sell. This Tribal control over the amount of Reservation land to be opened to settlement is obviously inconsistent with an understanding that the Reservation was to be terminated. Applying the supposed "almost insurmountable presumption" of disestablishment, however, the State apparently argues that, had the Yankton Indians agreed to "cede, sell, relinquish and convey" only one acre of their land for a set price, the result would have been to disestablish the entire 430,495 acre Reservation.

Addressing the language in the Instructions to the Commissioners, the Eighth Circuit stated that:

> [t]hese instructions are consistent with the mission to secure land for settlement and to expose Tribal members to white settlers. Had the intent been the elimination of the reservation, ***it would have been necessary that all surplus lands be purchased*** [as the only option for the commissioners].

App. 29 (emphasis added). The fact that the Commissioners were not required to acquire all the surplus land flies in the face of the State's contentions that Congress intended to do away with the entire reservation.[17]

---

[17] The State also argues that the legislative history of the 1894 Act supports an inference of diminishment, focusing on an out-of-context dialogue contained in the transcript of a House hearing on the 1894 Act in which the words, "public domain" were used. JA 382-83. The words, however, were used in a discussion of the meaning and applicability of the Homestead Act, not with regard to the continuation of Reservation status. *Id.*

III. THE PATTERN OF SETTLEMENT AND JURISDICTION SUBSEQUENT TO THE 1894 ACT DOES NOT OVERCOME THE CLEAR INTENT OF CONGRESS TO PRESERVE 1858 TREATY BOUNDARIES OF THE YANKTON SIOUX INDIAN RESERVATION.

A. The *de facto* evidence is unreliable.

At the trial in this case, the State relied almost entirely upon testimony relating to demographic and jurisdictional history of the area subsequent to the 1894 Act, urging the trial court and the Court of Appeals to rule that the Yankton Sioux Reservation had been subject to so-called *de facto* disestablishment. The State, lacking support for its position in the proper historical record, leans heavily on *de facto* disestablishment in its brief in this Court. The Court, however, has never based a disestablishment decision on such evidence. *See Solem v. Bartlett*, 465 U.S. 463, 481 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 615 (1977); *DeCoteau v. District Court*, 420 U.S. 425, 445 (1975).

In *Solem*, the Court stated that the subsequent history of a reservation area can merely provide "one additional clue" as to what Congress intended in opening land on a particular reservation to non-Indian settlers. *Solem*, 465 U.S. at 472. The controlling factor remains the clearly stated intention of Congress at the time of the enactment of the particular surplus land Act as found on the face of the Act, and in light of the contemporaneous historical

context. Subsequent *"de facto"* evidence cannot disestablish a reservation that Congress did not intend to disestablish at the time the surplus land legislation was enacted.

Indicia of subsequent demographics and jurisdictional assertions, are, therefore, "at best, confusing and unenlightening." *Rosebud*, 430 U.S. at 604 n. 27. This is true especially when there is substantial evidence on the face of the Act and in the contemporaneous record that Congress did not intend to disestablish the Reservation. *Solem*, 465 U.S. at 472.

The State's reliance on *de facto* evidence must also be closely scrutinized in light of the fact that the conventional wisdom at the turn of the century was that the allotment policy would lead to the eventual demise of the reservation system a generation after the opening of reservations. *Solem*, 465 U.S. at 468. This "turn-of-the-century assumption" was followed by a drastic sea-change in federal policy in the 1930's – a change that repudiated the allotment policy and encouraged tribal reorganization and reestablishment of the tribal land base and tribal sovereignty. *Id.*

B. The rare use of the term "former" in a few documents does not indicate the intent of the Congress to disestablish the boundaries of the Yankton Sioux Indian Reservation.

In its *de facto* argument, the State relies on several unrelated, and informal statements in the century-long historical record which refer to the "former" Yankton

Reservation.[18] However, as the Eighth Circuit noted, Dr. Herbert Hoover testified at trial that he had examined nearly ten thousand documents related to the Yankton surplus land act and subsequent events and found only a few, infrequent references to the "former" reservation, such as those few relied on by the State.[19] App. 33.

C. Maps showing the Yankton Sioux Indian Reservation are inconsistent in their treatment of the area.

As in prior diminishment/disestablishment cases which have been decided by this Court, each side in this case presented maps at trial as evidence supporting its claims. The Eighth Circuit found, however, that the maps ultimately prove little except that there was some confusion both inside and outside the government about the

---

[18] The State argues that this case should be controlled by *Perrin v. United States*, 232 U.S. 478 (1914). This argument has been rejected by each of the courts below and even by the South Dakota Supreme Court, which in its latest decision regarding the Yankton Sioux Indian Reservation acknowledged that *"Perrin* **cannot** be considered *res judicata* as it did not specifically deal with diminishment . . . " App. 157, n. 13. The trial court and the Eighth Circuit similarly determined that *Perrin* dealt solely with the issue of whether or not Congress had the authority to criminalize liquor sales on land sold to non-Indians pursuant to surplus land acts. App. 25 n. 18.

[19] The attempt by the State to create "new facts" is evidenced by the trial testimony of one of the State's witnesses, Ron Catlin, an employee of the South Dakota Department of Game, Fish and Parks, who conceded during cross-examination that Governor William Janklow, during his prior term as Governor, issued a memorandum to State employees directing them to use the term "former Yankton Sioux Reservation." JA 709-10.

status of the Reservation. App. 33. In fact, if one were to accept the State's arguments, portions of the Cheyenne River Reservation, ruled to be undiminished by this Court in *Solem*, would have been found to be *de facto* terminated by a General Land Office map in 1910. JA 722.

As late as 1914, during questioning by a Congressional panel, A. W. Leech, Superintendent of the Yankton Agency, was asked how large the reservation was. In response, he stated "[a]bout 26 by 35 or 36 miles," which is the size of the area encompassed by the 1858 boundaries.[20] JA 478-79. These same boundaries and dimensions are still recognized by the Bureau of Indian Affairs today, according to Real Estate specialist Titus Marks of the Bureau's Area Office in Aberdeen, South Dakota. JA 678.

D. Assertions of jurisdiction by the State of South Dakota do not constitute evidence of disestablishment.

After the opening of the unallotted lands of the Yankton Sioux Reservation to white settlement, the State of South Dakota immediately began a policy of asserting state jurisdiction on tribal lands, attempting to displace Tribal authority. *See, e.g.*, Exh. 17, (letter of Indian agent resisting claim of State of South Dakota for land as "indemnity for school lands"), T 30. *See also* Exh. 78, T 95, JA 534. The Yankton Indians resisted these initial incursions into their sovereignty, but the State has never let up

[20] In its brief, the State argues that the reservation has been diminished to "one mile square." However, as Professor Hoover explained in his testimony at trial, the "mile square" referred to by the State is the ***agency area*** clearly referred to in the negotiation history. JA 120, JA 611.

in its efforts to assert its authority over Tribal lands, as is evident from the current appeal.

At trial, the State relied almost entirely on *de facto* evidence of State assertions of authority over the Reservation area. The State is essentially claiming adverse possession, not of land ownership, but of jurisdiction – an unusual and incorrect theory of reservation termination.

Both in its Enabling Act and in its Constitution, the State of South Dakota has foresworn jurisdiction over Indian lands. 25 Stat. 676 (Feb. 22, 1889), Resp. App. 1; Const. of South Dakota, art. XXVI, § 18, Resp. App. 2.[21] The State has since had three separate opportunities to assume jurisdiction legally over Indian Country in South Dakota but failed to do so. *Annis v. Dewey County Bank*, 335 F.Supp. 133 (D.S.D. 1971); *See also, State v. Spotted Horse*, 462 N.W.2d 463, 466-68 (S.D. 1990), *citing Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164 (8th Cir. 1990).

[21] South Dakota Constitution, article XXVI, § 18 provides:

> That we, the people inhabiting the state of South Dakota, do agree and declare, that we forever disclaim all right and title to the unappropriated public lands lying within the boundaries of South Dakota; and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States;. . . .

E. The current demographic trends support affirmance of the Court of Appeal's ruling.

The State argues that the "justifiable expectations" of the non-Indian population of Charles Mix County would be destroyed if the boundaries are maintained intact by this Court. However, the sky has not fallen in on the multitude of Indian reservations throughout the United States where reservation boundaries have been maintained.

This Court in *DeCoteau* dismissed an identical argument that "an end to state jurisdiction would be calamitous for all the residents of the area, Indian and non-Indian alike." *DeCoteau*, 420 U.S. at 449. This Court stated that "[t]hese competing pleas are not for us to adjudge, for our task is a narrow one," i.e., to interpret the intent of Congress in passing the Act opening the reservation for settlement. *Id.*

The demographics of the Yankton Sioux Reservation are moving in a direction consistent with Tribal sovereignty. The Yankton Sioux Tribe is now the leading employer, not only within the boundaries of its Reservation, but within all of Charles Mix County. Its casino employs hundreds of workers, and allows the Tribe to invest in other economic development projects. App. 43; JA 696-97. Tribal population has been increasing, while the non-Indian population within the Reservation has steadily decreased as the rural economy of the county flounders. JA 615.

As the Eighth Circuit found below, even if *de facto* diminishment were possible, in spite of the lack of Congressional intent in the 1894 Act and its legislative history, the record would not support it here. App. 43.

IV. THE RESULT IN THIS CASE IS, IN ALL EVENTS, DICTATED BY THE RULE THAT AMBIGUITIES IN STATUTES OR AGREEMENTS INVOLVING INDIANS MUST BE RESOLVED IN FAVOR OF THE INDIANS.

The preceding analysis of the text, history and context of the 1894 Act conclusively shows, we believe, that the Act did not terminate the Yankton Sioux Reservation. Even if this were not clear, however, the Tribe would be entitled to prevail in this case through application of the rule that ambiguities in surplus land acts be resolved in favor of the Indians. *Hagen*, 510 U.S. 411. That canon of interpretation has a strong and reasoned basis in public policy, as well as in the trust relationship that exists between the U.S. and the tribes. *Id.*

The traditional solicitude toward Indian tribes by this Court is based in part upon the bargaining realities of the relationship between the tribes and the government. *DeCoteau*, 420 U.S. at 444. The Court has recognized that, when the United States government negotiated with Indian tribes, the government was by far the stronger of the two parties. *Washington Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. at 676. The Indians were negotiating in a language with which they were neither fluent nor conversant, and were at the mercy of non-Indian negotiators who were experienced both in business and in negotiating. *Id.* The Indians relied – at their peril – upon interpreters who were paid by the government, and in the case of the Yankton Sioux Tribe, interpreters who were promised choice land if the Tribe could be convinced to go through with the surplus land sale. JA 187-88. In particular, the Yankton Sioux Tribe was approached to sell their surplus lands at a time when

drought and grasshoppers had devastated their crops, and were extremely vulnerable to promises of what was for them, large sums of money. JA 576-77.

This Court's precedents properly require that ambiguities which arise in such a situation be resolved in favor of the Indians. *Hagen*, 510 U.S. at 411. We submit there are no ambiguities here – that Congress clearly did not intend to terminate the Yankton Reservation through the 1894 Act. But even if some doubts were to exist regarding Congress' intent, those doubts could not lead to a finding of disestablishment. Such a finding is proper only where the State meets its unambiguous burden of demonstrating congressional intent to terminate the Reservation. That burden has not been satisfied here.

V. THE "ALMOST INSURMOUNTABLE PRESUMPTION" OF DISESTABLISHMENT RELIED UPON BY THE STATE DOES NOT APPLY IN THIS CASE.

Not being able to demonstrate compelling and substantial evidence of a Congressional intention in 1894 to terminate the Reservation, the State seeks to prevail by reversing the normal presumption of continuation of reservation status, replacing it with a presumption of reservation termination. It attempts this by using the "cession" and "sum certain" language in the 1894 Agreement.

Under this Court's precedents, no such presumption flows mechanically from the mere presence of two brief clauses in a surplus land Act, irrespective of the remainder of the Act, the legislative history, and the relevant surrounding circumstances. A mechanical rule of that kind would conflict with the Court's repeated admonitions that disestablishment and diminishment cases must

be decided on the basis of Congress' actual intent when enacting the relevant surplus land Act.

The presumption invoked by the State is described in *Solem*. In order for it to arise, language conveying reservation land at a set price *must be* coupled with further "statutory expression of Congressional intent to diminish." *Solem*, 465 U.S. 470-71. If the only language in the Act relevant to Congressional intent is the language of cession and sum certain, and if there are no contrary indications in the legislative history and surrounding circumstances, it may then be proper to employ a presumption of diminishment. *Id.* But such a presumption is improper when the language of the Act, the legislative history, and the historical context indicate, as they do in this case, the strong probability that Congress ***did not*** intend disestablishment. Here, as we have shown in this brief, and as the Eighth Circuit held, all signs point toward an intention and understanding on the part of both the Tribe and the United States that the Reservation was to continue.

To employ a presumption of disestablishment in that situation would be to abolish – indeed to reverse – the rule that those challenging the continuation of reservation status have the burden of demonstrating termination by clear and convincing evidence. It would also reverse the time-honored rule that ambiguities in statutes and agreements involving Indians are to be ***resolved in favor*** of the Tribes, and not against them. *See Hagen*, 510 U.S. at 411.

CONCLUSION

The decision of the United States Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

JAMES G. ABOUREZK
Counsel of Record
BOBBIE J. RASMUSSON
ABOUREZK LAW OFFICES, P.C.
P.O. Box 1164
Sioux Falls, SD 57101
(605) 334-8402

MICHAEL H. SCARMON
SCARMON LAW OFFICE
P.O. Box 220
Elk Point, SD 57025
(605) 356-2878

PAUL BENDER
2222 North Alvarado Road
Phoenix, AZ 85004-1414
(602) 253-8192

22

No. 96-1581

Supreme Court, U.S.
FILED
OCT 24 1997
CLERK

In The

Supreme Court of the United States

October Term, 1997

STATE OF SOUTH DAKOTA,

Petitioner,

v.

YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,

Respondents,

and

SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

REPLY BRIEF OF THE STATE OF SOUTH DAKOTA

MARK W. BARNETT
Attorney General
State of South Dakota
Counsel of Record

JOHN PATRICK GUHIN
Deputy Attorney General
500 East Capitol Avenue
Pierre, SD 57501-5070
Telephone: (605) 773-3215
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

24pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION..... 1

ARGUMENT..... 1

I. THE "ALMOST INSURMOUNTABLE PRESUMPTION" OF DISESTABLISHMENT CREATED BY "CESSION AND SUM CERTAIN" LANGUAGE IN THE 1894 YANKTON AGREEMENT HAS NOT BEEN OVERCOME 1

A. The "Almost Insurmountable Presumption" Arose Notwithstanding Allegations Regarding Other Factors..... 3

B. The "Almost Insurmountable Presumption" Arose Notwithstanding the Fact That Lands Retained by the Tribe Were Scattered Throughout the Area About to Be Disestablished..... 4

C. The "Almost Insurmountable Presumption" Arose Notwithstanding That the Original Proposal by the Government Was for "Appraisal and Sale to the Highest Bidder."..... 4

D. The 1894 Act May Not Be Reasonably Read to Alter Only a Few Words of the 1858 Treaty..... 6

II. CONTRARY TO THE ARGUMENTS MADE BY THE TRIBE AND THE UNITED STATES, OTHER PROVISIONS OF THE 1894 AGREEMENT SUPPORT DISESTABLISHMENT 8

A. The Liquor Provision Strongly Indicates Disestablishment 8

TABLE OF CONTENTS – Continued

Page

B. The Provision of the Act Reserving Sections 16 and 36 for Schools Demonstrates Disestablishment 9

III. THE NEGOTIATIONS BETWEEN THE TRIBE AND THE UNITED STATES AND THE EXECUTIVE PROCLAMATION DEMONSTRATE DISESTABLISHMENT 10

A. The Negotiations Between the Tribe and the United States Indicate a Recognition of Disestablishment 10

B. The Presidential Proclamation Indicates Disestablishment 11

IV. THE JURISDICTIONAL HISTORY OF THE AREA FOLLOWING THE 1894 ACT STRONGLY SUPPORTS DISESTABLISHMENT 12

A. The Parties Do Not Dispute the State's Exclusive Exercise of Jurisdiction in the Area.... 12

B. Contrary to the Argument of the United States, the *Perrin* Case Demonstrates Disestablishment..... 13

C. The 1941 Opinion of the Acting Solicitor Has Been Shown to Be Based Upon Faulty Premises of Law and to Be Contradicted by the Author and Subsequent BIA Announcements..... 15

D. The Tribe's Other Arguments as to Reservation Status Are Without Merit 16

E. Land and Population Developments Strongly Support Disestablishment 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES CITED:

DeCoteau v. District County Court, 420 U.S. 425 (1975) ..... *passim*

Dollar Savings Bank v. United States, 86 U.S. 227 (1873) 6

Hagen v. Utah, 510 U.S. 399 (1994) ..... *passim*

Perrin v. United States, 232 U.S. 478 (1914) ...13, 14, 15

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977)..... *passim*

Russello v. United States, 464 U.S. 16 (1983)..... 4

Solem v. Bartlett, 465 U.S. 463 (1984) ..... *passim*

South Dakota v. Bourland, 508 U.S. 679 (1993)..... 16

State v. Greger, 559 N.W.2d 854 (S.D. 1997) 12, 13

United States v. Forty-three Gallons of Whiskey, 93 U.S. 188 (1876) 8, 15

Yankton Sioux Tribe v. United States, 623 F.2d 159 (Ct. Cl. 1980) 5

Yankton Sioux Tribe v. United States, No. 332-D (Ct. Cl. Trial Div. Oct. 18, 1979) 10

Yankton Sioux Tribe v. Southern Missouri Waste Management District, 99 F.3d 1439 (8th Cir. 1996) 14

STATUTORY REFERENCES:

18 U.S.C. § 1151(a) 20

18 U.S.C. § 1151(b) 20

18 U.S.C. § 1151(c) 20

27 Stat. 1017 (Apr. 11, 1892) 11

TABLE OF AUTHORITIES – Continued

Page

Agreement with the Yankton Sioux or Dakota Indians, in South Dakota, 1892, ratified, 28 Stat. 286, 314 (1894) ..... *passim*

Treaty with the Yankton Sioux, 1858, ratified, 11 Stat. 743 (1859) 6, 10, 11

OTHER AUTHORITIES:

59 Fed. Reg. 16649 (Apr. 7, 1994) 15

H.R. Rep. No. 7613, 59th Cong., 2d Sess. (1907) 10

S. Exec. Doc. No. 27, 53d Cong., 2d Sess. (1894) 8

S. Exec. Doc. No. 66, 51st Cong., 1st Sess. (1890) 17

INTRODUCTION

This brief replies to the arguments of the Tribe and the United States on the issue of whether the Yankton Reservation has been disestablished.[1] As we demonstrate below, these arguments are fatally flawed in that they seek to systematically avoid the force of the "almost insurmountable presumption" of disestablishment created by the use of "cession and sum certain language" in the Yankton Agreement; they likewise virtually ignore the century long, exclusive exercise of jurisdiction in the now disputed area by the State of South Dakota. Other arguments unsuccessfully attempt to create ambiguity where none actually exists. In sum, the presumption arising from "cession and sum certain language" applies here. It has not been shown to have been overcome, and the reservation should be found to be disestablished.

ARGUMENT

I. THE "ALMOST INSURMOUNTABLE PRESUMPTION" OF DISESTABLISHMENT CREATED BY "CESSION AND SUM CERTAIN" LANGUAGE IN THE 1894 YANKTON AGREEMENT HAS NOT BEEN OVERCOME.

This Court has found that an "almost insurmountable presumption" of diminishment, *Solem v. Bartlett*, 465 U.S. 463, 470-71 (1984), or a "nearly conclusive presumption" of diminishment, *Hagen v. Utah*, 510 U.S. 399, 411 (1994), arises from "cession and sum certain" language used in a surplus land act. *See also DeCoteau v. District County Court*, 420 U.S. 425, 445-46 (1975).

---

[1] As used herein, "App." refers to the Appendix to the Petition for Writ of Certiorari; "JA" refers to the Joint Appendix; "TB" refers to the Brief on the Merits of the Tribe and Darrell Drapeau; "USB" refers to the Brief on the Merits of Amicus Curiae United States; "SDB" refers to the Brief on the Merits of the State of South Dakota; "DCO" refers to the District Court's Opinion below.

Neither the Tribe nor the United States denies that Articles I and II of the Yankton Surplus Land Act (Agreement with the Yankton Sioux or Dakota Indians, in South Dakota, 1892, ratified, 28 Stat. 286, 314 (1894)), App. 112-13, provide for a "cession" of lands for a "sum certain." Accordingly, the "almost insurmountable presumption" of diminishment obtains here. Unless other features of the 1894 Agreement and its history fully and decisively contradict a finding of diminishment or disestablishment – and they do not – the Tribe cannot prevail.[2] *See Yankton Sioux Tribe v. South Dakota*, App. 47 n.29 (Magill, J., dissenting) (discussing weight of evidence needed to overcome the presumption).

Neither the Tribe nor the United States directly argues that the "almost insurmountable presumption" has been overcome in this case and thus they essentially concede it cannot be overcome.[3] Instead, in the face of this stark legal and factual background, the Tribe and the United States take three tacks to avoid the presumption, none of which have merit.

---

[2] Following the lead of this Court, we have used the terms "diminishment" and "disestablishment" interchangeably to denote the elimination of the boundaries of the reservation within the affected area. *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 598 n.20 (1977) referring to *DeCoteau* as recognizing "disestablishment" and *Solem*, 465 U.S. at 469 n.10, stating *DeCoteau* found Lake Traverse Reservation "diminished." Thus, within the affected area, "Indian country" status attaches to remaining or nonextinguished "allotments," *see* 18 U.S.C. § 1151(c); *DeCoteau*, 420 U.S. at 427-28 & n.2, and "dependent Indian communities." 18 U.S.C. § 1151(b). The State has respected, *see generally* T 645-646, JA 685-86; T 732, and will continue to respect the special status, jurisdictional and otherwise, of such lands in accordance with developing federal law. *See Solem*, 465 U.S. at 467; *United States v. Stands*, 105 F.3d 1565, 1571-1572 (8th Cir. 1997).

[3] The United States in two sentences at USB 12 indicates that it might be prepared to argue the point, but its discussion slides into assertions relating to modes of construction. *See* USB 13-14.

A. The "Almost Insurmountable Presumption" Arose Notwithstanding Allegations Regarding Other Factors.

The Tribe and the United States first argue that if other factors cut against diminishment or disestablishment, the presumption does not apply. TB 48-49; USB 10-11. This turns the presumption recognized by this Court on its head. Where there is "cession and sum certain" language, the powerful presumption of disestablishment exists and neither the Tribe nor the United States cites any authority to the contrary.[4] Other factors can help the tribal case only if they can somehow overcome the presumption. Thus, the *Solem* court did not qualify its recognition of when the presumption arises by stating that it would be contingent on factors such as other language in the agreement, *Solem*, 465 U.S. at 474; the negotiating history, *id.* at 476-77; the congressional history, *id.* at 477-78; or the subsequent treatment of the area, *id.* at 478-480. Likewise, the recognition of the presumption in *Hagen*, 510 U.S. at 411, is unqualified.

The repeated argument that the Tribe should prevail because other factors are ambiguous is simply wrong. Even if the meaning of the factors were ambiguous (and we demonstrate below that they *buttress* the presumption), any such ambiguity would fall far short of the clear-cut proof necessary to overcome the presumption, and the State would prevail.

---

[4] Neither the United States nor the Tribe has even attempted to refute the State's explanation of "great weight" of the presumption as flowing both from Indian law and international law understandings. *See* SDB 16 n.8.

B. The "Almost Insurmountable Presumption" Arose Notwithstanding the Fact That Lands Retained by the Tribe Were Scattered Throughout the Area About to Be Disestablished.

The United States also argues that the "cession" and "sum certain" language should be accorded little respect here because the "ceded lands were scattered over the reservation." USB 11. This argument finds no support in this Court's decisions or in history. In the first place, the presumption exists because of the powerful and plain import of "cession" and "sum certain" language in the operative sections of the 1894 Agreement. That language is no less powerful and plain when the allotments are scattered throughout the reservation prior to their sale. And it is too late in the day for such an argument. Disestablishment of the Lake Traverse Reservation was found even though "trust allotments are scattered in a random pattern throughout the 1867 reservation area." *DeCoteau*, 420 U.S. at 428; *see also id.* at 466 (Douglas, J., dissenting).

C. The "Almost Insurmountable Presumption" Arose Notwithstanding That the Original Proposal by the Government Was for "Appraisal and Sale to the Highest Bidder."

The Tribe appears to argue that the 1894 Agreement cannot be read as a "cession and sum certain" arrangement despite its plain language because an *original* suggestion of the government was for an "appraisal and sale to the highest bidder" and not for a "cession and sum certain" agreement. *See* TB 7-8, 32-33; *see also* USB 3 n.2. What matters, however, is not a never-adopted proposal, but the final cession and sum certain arrangement. *See generally Russello v. United States*, 464 U.S. 16, 23-24 (1983). The history of the disestablishment of the Sisseton Reservation confirms this analysis. In the Sisseton case, the instructions to the negotiators indicated that it might be " 'inadvisable' " for the Tribe to sell all of its surplus lands. *DeCoteau*, 420 U.S. at 434. Nonetheless, all the surplus lands *were* sold, and the Court's

analysis proceeded on the basis of what actually occurred to find that the reservation had been disestablished.[5]

Second, both the United States (USB 3 n.2) and the Tribe (TB 32-33) appear to argue that the Tribe ultimately was willing to adopt the direct sale method instead of the appraisal and sale method because only by the direct sale method could the Tribe sell all of its land. But both ignore the further implication of their argument: The desire of the Tribe to sell all of its surplus land should have raised the presumption, even for the majority below, that the Tribe desired the reservation to be disestablished. As the majority stated (in analyzing the original intent question) at App. 29: "Had the intent been the elimination of the reservation, it would have been necessary that all surplus lands be purchased."

Third, this argument has already been litigated. The Tribe, in *Yankton Sioux Tribe v. United States*, 623 F.2d 159, 176 (Ct. Cl. 1980), urged that the 1894 Agreement should be "revised for the purposes of this case" to constitute an "appraisal and sale" arrangement but the court of claims found that the facts did not support the revision:

> it appears from the record that the Indians were willing to sell the subject lands directly to the United States for a proper price. At most, it could be said there was a split among members of the tribe as to how they wanted to dispose of the land.

Id.[6]

---

[5] The Tribe implies at TB 6 and 36 that "95,000 acres" remained in its possession after 1894. In fact, as the Interior document set out at JA 98-99 establishes, the "95,000 acres" in question consisted of "allotments made" but simply not yet "examined and approved." *See also* Exh. 605, JA 117.

[6] The court stated that there "may have been some overreaching" but it could not conclude that "such behavior amounted to fraud or duress." *Yankton Sioux Tribe v. United States*, 623 F.2d at 176.

D. The 1894 Act May Not Be Reasonably Read to Alter Only a Few Words of the 1858 Treaty.

The United States argues that, in light of Article XVIII, the Act may "reasonably be read as simply opening the surplus lands" while preserving reservation boundaries and the Tribe's "right of self-government within them." USB 14. According to the United States "the [1894] Agreement thus modifies only that portion of Article 10 of the 1858 Treaty [Treaty with the Yankton Sioux, 1858, ratified, 11 Stat. 743 (1859)] that excluded white settlers from the Reservation" (*Id.*) or, in other words, only the first part of the first sentence of Article 10 (about 45 words).[7]

The United States, in presenting this argument, fails to prove (or even assert) that the "almost insurmountable presumption" created by "cession and sum certain" language has been overcome. The United States also ignores the fact that the primary focus of disestablishment litigation is the "operative language" of an agreement. *See, e.g., Hagen,* 510 U.S. at 412-14; *Solem,* 465 U.S. at 472, 473 n.15, 474; *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 593 n.15 (1977). Indeed, *Hagen* might have been decided differently had the placement of critical agreement language been different. *See generally Hagen,* 510 U.S. at 413; *see also Solem,* 465 U.S. at 474-75. The United States, contrary to the case law, seeks to subordinate the "operative language" of the 1894 Agreement in favor of other language, and its argument should be rejected.

Next, the United States fails to point to *any* precedent, in *any* context, in which a savings clause has negated the heart of an agreement or a statute. *See generally Dollar Savings Bank v. United States,* 86 U.S. 227, 236 (1873): ("broad construction" of a "proviso" in an act of the legislature will not be allowed when it is "plainly repugnant to the body of the Act").

---

[7] The United States thus reads at least one provision "out of a statute," contrary to its own statutory construction argument. *See* USB 13.

In addition, we note that the United States (USB 12-13) and the Tribe (TB 26) both put some emphasis on the fact that Article XVIII contains two separate sentences which are claimed to preserve reservation boundaries. Neither sentence references reservation boundaries, however, and the second sentence does, in fact, refer directly to the preservation of "annuities," App. 120, a critical matter for the Tribe. *See* T 54-55, JA 588-89. *See also* SDB 21-23 (other monetary claims of concern to the Tribe). Neither the Tribe nor the United States can point to anything in the record which substantiates the position that the Tribe as a whole, or even one of its members, or the United States, intended that one or both sentences of Article XVIII preserves reservation boundaries. Indeed, as we have pointed out in our opening Merits Brief, reading the agreement to accomplish the cession of lands for sum certain without altering reservation status would be directly contrary to the common understanding of the day. *Solem,* 465 U.S. at 468, relates:

> The notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century.

The United States thus urges an understanding on the part of the United States and the Tribe which was "unfamiliar" to both and asserts that this imagined joint understanding was incorporated, *sub silentio,* into Article XVIII of the Agreement. The argument is without merit.

While the Tribe and both amici go to great lengths to discuss canons of construction, they unaccountably have failed to address the argument that because Article XVIII is *itself* internally ambiguous, it cannot overcome the extraordinarily clear provisions of Articles I and II, which create the "almost insurmountable presumption" of disestablishment. As stated in *DeCoteau,* 420 U.S. at 447, "A canon of construction is not a license to disregard clear expressions of tribal and congressional intent." Because a "clear expression of tribal and congressional intent" to disestablish is created by the use of "cession and sum certain" language, a canon of construction

does not allow Article XVIII to overcome that expression. *See also Rosebud,* 430 U.S. at 597-598.[8]

II. CONTRARY TO THE ARGUMENTS MADE BY THE TRIBE AND THE UNITED STATES, OTHER PROVISIONS OF THE 1894 AGREEMENT SUPPORT DISESTABLISHMENT.

A. The Liquor Provision Strongly Indicates Disestablishment.

The United States admits that *Rosebud,* 430 U.S. at 613-14, found that a liquor prohibition in a surplus land act "indicated diminishment of the reservation." USB 17. Additional Yankton legislative history not present in *Rosebud* strengthens the argument for disestablishment here. In particular, the statement of the Acting Commissioner of Indian Affairs to Congress identifies the legal justification for the article as "the decision of the Supreme Court in *United States v. Forty-three Gallons of Whiskey,* (93 U.S., 188). . . . " S. Exec. Doc. No. 27, 53d Cong., 2d Sess. (1894) (hereinafter "Negotiations") at 6-7, JA 121. *United States v. Forty-three Gallons of Whiskey,* 93 U.S. 188, 195 (1876) determined that Congress could prohibit the introduction of liquor *outside of a reservation*. Citation of this case (one of only two case citations discovered in the "Negotiation" document) provides weighty evidence of the perception that reservation status would be lost through the agreement.[9]

---

[8] We also note that neither the Tribe nor the United States has responded to the point that if the canon of construction does apply, it should operate in *favor* of disestablishment because, in 1894, Congress would have perceived that disestablishment would "benefit" the Indians. *See generally* Prucha, II *The Great Father* 631 (1984); Cohen, *Handbook of Federal Indian Law* 78 (1942).

[9] In light, inter alia, of the legislative history made in this case, the "Indian country" argument of the United States based, inter alia, on events in 1913 and 1948, *see* USB 18 & n.12, should be rejected for the 1894 Congress clearly appreciated that it was eliminating the reservation status of Yankton as demonstrated above.

The United States also argues that the Yankton liquor provision lacks force because it treats, in different language, the ceded lands and the lands retained in Indian ownership. The different treatment was merited, of course, because the lands were intended to have a truly different status resulting from the 1894 Act.

Both the United States (USB 20) and the Tribe (TB 34) also rely on a statement within the Commissioner's Report referring to intoxicants within the "limits of the reservation," *see* JA 154-55, as evidence of continuing reservation status. The 1894 Agreement itself did not, however, simply refer to a "reservation" in the liquor article but added the term "*as described* in the treaty . . . dated April 19th, 1858. . . . " App. 120 (emphasis added). Furthermore, the enforcement provision of the 1894 Act which adopted the agreement referred to "lands included in the Yankton Sioux Indian Reservation *as created* by the treaty of April nineteenth, eighteen hundred and fifty-eight. . . . " 28 Stat. 286 (1894). App. 124 (emphasis added). Thus, each document refers back to the *1858* boundaries, a reference which would be superfluous if the 1858 reservation were understood to remain in existence.

B. The Provision of the Act Reserving Sections 16 and 36 for Schools Demonstrates Disestablishment.

The 1894 Act reserves sections 16 and 36 of each congressional township "for common-school purposes." App. 123. *Rosebud,* 430 U.S. at 599-602, noted substantially similar language in the act at issue and also quoted language of the South Dakota Enabling Act which indicated that school land grants could not be effective until the reservation status of the affected counties had been " 'extinguished and such lands . . . restored to . . . the public domain.' " *See also DeCoteau,* 420 U.S. at 442 (similar provision at Sisseton.)

The United States now urges this Court to distinguish *Rosebud* because the Yankton Act "simply 'reserve[s]' the sixteenth and thirty-sixth sections from settlement without taking the further step of granting them to the State, as

contemplated by the enabling act when a reservation is extinguished." USB 17. This is a distinction without a difference, however, for 8,000 acres of school land were, in fact, conveyed by the United States to South Dakota in 1895. *See Yankton Sioux Tribe v. United States*, No. 332-D at 67 (Ct. Cl. Trial Div. Oct. 18, 1979). (Unreported decision lodged with Clerk.) *See also* Merits Amicus Brief of Dante, et al. 4a-6a.

III. THE NEGOTIATIONS BETWEEN THE TRIBE AND THE UNITED STATES AND THE EXECUTIVE PROCLAMATION DEMONSTRATE DISESTABLISHMENT.

A. The Negotiations Between the Tribe and the United States Indicate a Recognition of Disestablishment.

The record of negotiations between the Yankton Tribe and United States shows that both believed that the 1894 Agreement being negotiated was equivalent to the 1858 Treaty of the Yanktons (which disestablished a large part of their reservation) and the agreement just negotiated by the United States with the Sisseton Indians (which disestablished the Lake Traverse Reservation). *See* Negotiations at 54, 56, 58, 59, 68, 71; JA 225, 226, 231, 236, 239, 270, 278-79. The inescapable conclusion is that the United States and the Yankton Tribe correctly perceived that the 1894 Yankton Agreement would also disestablish the reservation. *See also* Merits Amicus Brief of Lewis County at 8.

The Tribe and the United States essentially ignore this strong indicator of intent and center on the lack of comments in the negotiation record to the effect that the cession of land would "leave your reservation a compact, and almost square tract. . . . " USB 21; TB 38. Such comments are not found in the Yankton negotiating record because the entire reservation was disestablished, as was the Sisseton Reservation. *See DeCoteau*.[10]

[10] The United States argues that disestablishment was shown in *DeCoteau* by a comment from a tribal spokesman who stated that the reservation "was given us as a permanent home, but now *we have decided to sell*." USB 21 (emphasis added). Despite the argument of the United States to the contrary (USB 21-22), a similar analysis should be made of statements in the *Yankton* record regarding the "sale" of lands. *See* Negotiations at 81, JA 309.

Both the United States and the Tribe focus on a comment of Reverend Williamson, whom, we are told, "found" that the agreement would not " 'in any way interfere with the treaty of 1858.' " USB 23; *see also* TB 11. Both should concede that Williamson's statement was incorrect and that, by the 1894 Agreement, the Tribe gave up the "quiet and peaceable possession" of a sizeable part of the tract of "four hundred thousand acres," guaranteed by the 1858 Treaty. App. 102. And both should concede that the Tribe lost the 1858 Treaty right to exclude "white persons" from the reservation by the 1894 Agreement. App. 108. Finally, Reverend Williamson presumably shared in the common turn-of-the-century understanding that reservation status was lost when tribal ownership was lost, *see Solem*, 465 U.S. at 468, and his statement should be read to include that perception.

B. The Presidential Proclamation Indicates Disestablishment.

Rosebud, 430 U.S. at 602-603 establishes that a Presidential Proclamation utilizing cession language constituted an "unambiguous contemporaneous statement" of disestablishment. The Yankton Proclamation likewise contains cession language, Exh. 602, JA 453. The United States, without citing *Rosebud*, apparently attempts to distinguish it by asserting that the Yankton Presidential Proclamation refers to a "Schedule of lands within the Yankton Reservation. . . . " *See* USB 23. *See also* Brief of Amici Curiae Standing Rock Sioux Tribe, et al. at 18. However, the *Rosebud* Proclamation also, at least twice, referred to "Indians of the Rosebud Reservation." *See Rosebud*, 430 U.S. at 602. Furthermore, the Executive Proclamation in the case of the Lake Traverse Reservation, where disestablishment was found, referred to a "Schedule of lands within the Lake Traverse Reservation. . . . " *See* 27 Stat. 1017, 1018 (Apr.

11, 1892). *See generally DeCoteau,* 420 U.S. at 442.[11] The attempt to distinguish the Proclamations is without merit. *See also Hagen,* 510 U.S. at 419-20 (importance of Presidential Proclamation).

IV. THE JURISDICTIONAL HISTORY OF THE AREA FOLLOWING THE 1894 ACT STRONGLY SUPPORTS DISESTABLISHMENT.

A. The Parties Do Not Dispute the State's Exclusive Exercise of Jurisdiction in the Area.

This Court's holdings establish that a long history of undisputed state jurisdiction strongly supports de jure and de facto disestablishment.[12] Such a history is present here. *See Solem,* 465 U.S. at 471-72; *see also Hagen,* 510 U.S. at 420-21; *Rosebud,* 430 U.S. at 603-604. This Court has also stressed the importance of the assumption, by the State, of "unquestioned actual assumption of . . . jurisdiction over the unallotted lands" in question. *Rosebud,* 430 U.S. at 603. However, as neither the United States nor the Tribe disputes, (1) the " 'United States has not attempted to exercise criminal jurisdiction in the area,' " SDB 37 (quoting *State v. Greger,* 559 N.W.2d 854, 866 (S.D. 1997) (App. 154). (2) the "Tribe has not exercised civil or criminal jurisdiction on nontrust lands of the area for the last century," SDB 39, and, (3)

> All criminal offenses on nontrust land (91% of the region) are handled in state courts. Since 1895, the year the reservation was opened, South Dakota

[11] The failure of the Tribe and the United States to seriously dispute the thesis that the Yankton and Sisseton Agreements are "functional twins" with at least seventeen points of identity amounts to a virtual concession of the accuracy of this assessment. *See* Merits Amicus Brief of Dante, et al. at 15-19.

[12] The Federal allegations with regard to the State's "concession" on the force of subsequent events are without merit. *See* USB 7, 20; Pet. Cert. at 23.

> courts have consistently maintained, without intervention by federal or tribal authorities, civil and criminal jurisdiction within the former reservation boundaries.

SDB 35 (quoting *State v. Greger,* App. 154-55).

The United States expresses its primary interest as maintaining law enforcement within the area. USB 1. This implicitly affirms the argument of the State that if the "federal government" had such jurisdiction for the past century it "could quite naturally be expected to have exercised it." SDB 34. Similarly, the Tribe should be expected to have exercised its jurisdiction, and the State's consistent exercise of jurisdiction should have been actively challenged by the federal government or the Tribe. (In fact, the Tribe identifies only one internal BIA letter relating to indemnity school lands which it sees as resistance, but the letter is marginally relevant at best. See TB 44.) The state's century long exclusive exercise of jurisdiction has thus created "justifiable expectations" for those resident in the area that such a system will continue. *See, Rosebud,* 430 U.S. at 604-605.[13]

B. Contrary to the Argument of the United States, the *Perrin* Case Demonstrates Disestablishment.

The United States brushes aside the consistent jurisdictional history (USB 28) and relies on two of its own actions to argue that the evidence is too " 'rife with contradictions and inconsistency' " to demonstrate a congressional intent to diminish. First, the United States asserts that its continuing inconsistent treatment was demonstrated by its litigation position in *Perrin v. United States,* 232 U.S. 478 (1914). The United States argues that it took the position there that the "reservation had not been diminished" and implies that the

[13] Evidence as to the exclusive nature of state jurisdiction is even *stronger* in this case than in the most recent case in which it was relied upon as a factor in finding disestablishment. *See Hagen,* 510 U.S. at 441 (Blackmun, J., dissenting); *see also, Rosebud,* 430 U.S. at 616 n.1-2 (Marshall, J., dissenting).

significance of the *Perrin* case lies in this position. USB 24. We agree that *Perrin* is significant but disagree that its importance flows from the federal position. Rather, it flows from the conflict of the federal position and that of the defendant and, more importantly, the resolution of the question by this Court.

To begin, we note that the United States is wrong when it asserts that the defendant took the same position that it took. USB 24-25. In fact, Mr. Perrin admitted that he had sold alcohol at his drugstore in Dante, as the indictments had charged, but explicitly asserted in his Assignments of Errors that the drugstore sales were "not upon the said Indian reservation." Transcript of Record at 28, 29, *Perrin v. United States*, No. 707 (1913). Similarly, in the *Perrin* Brief for Plaintiff in Error at 2, Mr. Perrin asserted that the crime "attempted to be alleged" did not pertain to an act "upon any existing Indian reservation." Indeed, the United States explicitly recognized that the reservation status of the involved land was at issue because of Mr. Perrin's arguments, and it stated in its Brief for the United States in *Perrin* at 2 that Mr. Perrin had earlier

> challenged the jurisdiction of the court on these grounds: (1) The sale was on his property and not on a reservation.

But the critical nature of *Perrin v. United States* is not, as the United States implies, the position that the United States took in that litigation. *See* USB 24. Instead, it is the action of this Court. At a minimum, as the United States conceded in the court below, *Perrin* "assumed diminishment." Brief for the United States as *Amicus Curiae* In Support of Plaintiffs-Appellants at 19 n.10, *Yankton Sioux Tribe v. Southern Missouri Waste Management District*, 99 F.3d 1439 (8th Cir. 1996) (No. 96-2647). Furthermore, we would submit that *Perrin* found disestablishment by referring to the "ceded lands formerly included in the Yankton Sioux Indian Reservation." *Perrin*, 232 U.S. at 480. The *Perrin* court also referred to the "original reservation" as embracing 400,000 acres and contrasted that situation with the existing "allotments" of 100,000 acres. *Id.* at 486. Moreover, the *Perrin* opinion was unnecessary if there was no finding of disestablishment for liquor

was already illegal within reservations. *See Perrin*, 232 U.S. at 484 (quoting *United States v. Forty-three Gallons of Whiskey*, 93 U.S. at 197).[14]

C. The 1941 Opinion of the Acting Solicitor Has Been Shown to Be Based Upon Faulty Premises of Law and to Be Contradicted by the Author and Subsequent BIA Announcements.

The second main fact which the United States asserts demonstrates a record "rife with contradictions" (USB 24) is a 1941 letter of the Acting Solicitor. We have pointed out that the letter is based upon faulty premises of law. *See* SDB 43; USB 25. We note further that the United States is unable to cite *any* instance that the erroneous letter was relied upon. This anomalous, legally wrong, letter does not create a record "rife with contradictions."[15]

Finally, the United States informs us that: "The official position of the Department of the Interior *remains* that the Reservation was not diminished." USB 25 n.17 (emphasis added). In fact, the Commissioner of Indian Affairs in 1894 recognized that the Yankton lands would be "restored to the public domain," *see* Exh. 11, JA 450. Department of the Interior officials have referred to the "former" Yankton reservation, *see, e.g.*, Exh. 664, JA 474 (1910); Exh. 665, JA 480

---

[14] *Perrin* relied upon *Dick v. United States*, 208 U.S. 340 (1908) as a case "in point." *Perrin*, 232 U.S. at 485. *Dick*, 208 U.S. at 352 found that ceded Nez Perce lands were not "Indian country" and that the State therefore had complete jurisdiction over Indians in the ceded area, except for liquor purposes, based upon a provision similar to that at issue in *Perrin*. See also *Rosebud*, 430 U.S. at 613 n.47 (discussing *Dick* and *Perrin*.) *See generally* Merits Brief of Lewis County.

[15] The United States apparently denies that the Acting Solicitor contradicted his own opinion a year later. USB 25 n.17. Acceptance of this federal theory, however, demands that we assume that the Acting Solicitor meant to characterize reservation areas as " 'buffer' areas" in 1942. *See* Cohen, *Handbook of Federal Indian Law* 353 (1942). *See generally* SDB 43; Merits Brief of Southern Missouri Waste Management District 42-50.

(1921) and, along with other federal agencies, treated the reservation as disestablished. *See*, SDB 37-42. In 1932 and 1962, Interior approved tribal constitutions which did *not* claim reservation status. Exh. 651, JA 483-88; Exh. 652, JA 493-513. In 1969 an Associate Solicitor's opinion found that the 1894 Act "diminish[ed] the area over which the [Yankton] tribe might exercise its authority." Exh. 628, JA 525. Finally, *as recently as 1994*, the EPA, after consultation with Interior, stated that the "Yankton Sioux Reservation was disestablished by the Act of 1894." *See* 59 Fed. Reg. 16649 (Apr. 7, 1994), Exh. 662, JA 532-33. The record in this case suggests, as did the record in *South Dakota v. Bourland*, 508 U.S. 679, 696-97 (1993), that the United States has not fairly represented the position of an agency of the federal government.

D. The Tribe's Other Arguments as to Reservation Status Are Without Merit.

The Tribe, in its "Summary of the Argument," asserts that it "has always maintained a continuum of tribal governance over the Reservation area." TB 18. It is notabie that nowhere in its fifty-page brief does the Tribe attempt to substantiate this claim and, indeed, it cannot be substantiated. *See generally* App. 39; DCO App. 87-88; SDB 46-47.

The Tribe also contends that weight should be given to the assertion that its casino is a substantial moneymaker and has become a significant employer in the area. *See, e.g.*, TB 18, 46. The creation and expansion of the casino occurred, however, in the *absence* of recognized reservation status, and there is no allegation that the viability of the casino is tied to reservation status.

The tribe also makes an argument as to the use of the term "reservation" in various records. The Tribe fails to note that its own expert admitted that it cannot be known whether a federal officer was using the term to denote a legal reservation or simply a place where Indians live, without appropriate

"context." T 96-97, 103-104, JA 621-23.[16] Similarly, a BIA Realty Officer testified that twenty years after this Court decided *DeCoteau*, which found that the Lake Traverse Reservation had been disestablished, the BIA is still using certain maps showing Lake Traverse Reservation boundaries; the Realty Officer also admitted that one cannot tell from simply looking at a BIA map whether its purpose is to show actual reservation boundaries. T 367.

The Tribe argues, in addition, that the retention of lands by the United States for the Indian agency and for schools indicates reservation status would be retained, implying that no such lands were retained at Sisseton. TB 30. *See also* USB 15-16. The Tribe is simply wrong in distinguishing the two cases. In both, lands were ceded by the Tribe to the United States for the agency and for schools. *See DeCoteau*, 420 U.S. at 435 n.16 quoting S. Exec. Doc. No. 66, 51st Cong., 1st sess. 1 (1890): (" 'the Government should own the lands on which the agency and school buildings are located.' "); 420 U.S. at 438 n.19: (" 'Indian title' " to lands occupied by the " 'agency and missionary societies' " will be " 'extinguished.' "); *Id.* at 442-43: (" 'Federal Indian agents have remained active in the area' "). Similar lands were made available to the United States at Rosebud. *See* 33 Stat. 254, 257 (1904). *See also Rosebud*, 430 U.S. at 621-622 (Marshall, J. dissenting). In addition, the dissent of Justice Blackmun in *Hagen*, 510 U.S. at 432, quotes a statement in the Utah negotiations to the effect that " 'your Agency will be continued just the same as now.' " In all three cases disestablishment was found. Contrast *Solem*, 465 U.S. at 475 n.18. In any

---

[16] The Tribe's expert, although testifying that the number of references to a "former" Yankton reservation was "relatively small" admitted that "I couldn't say" what percentage of times the term appeared in the documents. T 265. The expert's knowledge of the documents was not as complete as the Tribe would imply; the expert was forced to admit that Exh. 665, JA 480, which used the term "former Yankton-Sioux Indian Reservation," was "new to me today." T 268.

event, the retention of small amounts of land by the government is no more than would be expected and says little about the retention of the boundaries of the reservation.

Finally, we note the Tribe's insistence that recognition of reservation boundaries is demanded by the "drastic sea-change in federal policy in the 1930s." TB 42. The Tribe does not tell us how the 1894 Agreement can be altered by this "sea-change." Moreover, neither the Tribe nor the United States has acted as if the 1930s' "sea-change" affected this Tribe. Thus, the tribal constitution in 1932 does not claim reservation status or assert jurisdiction over any land base, Exh. 651, JA 483-88, and members of the tribal council could be from any part of Charles Mix County, although the 1858 reservation boundary includes only one-half of the county. Even the constitution adopted in 1962, and effective today, fails to claim reservation boundaries and status. Article VI, Section 1 states:

> The territory under which this Constitution shall exist shall extend to all original Tribal lands *now owned by the Tribe* under the Treaty of 1858.

Exh. 652, JA 499 (emphasis added). Both constitutions were approved by the BIA.

We agree, of course, that the reversal of federal policy produced constitutions for numerous tribes which *did* claim jurisdiction over all territory within the original confines of certain reservations. These claims were frequently *rejected* by this Court. *See, e.g., Hagen*, 510 U.S. at 441 (Blackmun, J., dissenting); *Rosebud*, 430 U.S. at 616 n.1 (Marshall, J., dissenting); *DeCoteau*, 420 U.S. at 443). That the post "sea-change" constitutions adopted by *this* Tribe and approved by the BIA do not claim reservation boundaries makes the Tribe's claim to boundaries here all the more tenuous.

E. Land and Population Developments Strongly Support Disestablishment.

The two critical demographic developments – landownership and population – each confirm disestablishment. *See Hagen*, 510 U.S. at 421-22; *Solem*, 465 U.S. at 471-72;

Rosebud, 430 U.S. at 604-05; *see also DeCoteau*, 420 U.S. at 428. The United States and the Tribe ignore the landownership factor and attempt to cloud the population statistics.

First, it is of critical importance that only nine percent of the land within the purported reservation is today in trust status. *See* T 645, JA 685; App. 42 n.25. *See also* BIA Map at App. 159.[17] Both the United States and the Tribe simply ignore this fact, but it is critical because, prior to the decisions below, trust status defined the maximum reach of tribal and federal authority over non-Indians who could not participate in tribal government. Thus, before 1995, the State exercised unrestricted civil and criminal jurisdiction, and had for a century, over all persons on the non-Indian lands which now constitute more than 90 percent of the purported reservation; all persons, Indian and non-Indian, shared in the governance of the area.

Under the regime sought to be imposed, non-Indians engaging in activities anywhere within the newly recognized "reservation" will be subject to the maze of civil and criminal jurisdiction characteristic of reservations generally but will not be able to participate in tribal governance of the area.

Second, 68 percent of the persons resident in the purported reservation are non-Indians, according to the United States Bureau of the Census. Exh. 614, JA 527-529. Thus, the decision sought to be affirmed would substitute a new minority government of less than one-third based on tribal membership (and thus, to a degree, race) for the present government of all persons.[18]

---

[17] *United States v. Stands*, 105 F.3d 1565-71, 1572 (8th Cir. 1997) indicates that not all trust land is "Indian country". Thus, the nine percent figure is the maximum amount of "Indian country" in the area.

[18] Both the United States and the Tribe attempt to rely on assertions of Professor Hoover as to tribal members resident on the reservation. *See* USB 30 (citing both the 32 percent census figure and "the Tribe's own figures" showing 44 percent tribal residents); TB 16 (citing Hoover at JA 545 for the proposition that 3,400 Indians lived on the reservation in 1993). Professor Hoover's numbers are surely unreliable. The record reflects that

In sum, the record demonstrates that less than ten percent of the land is trust land and less than one-third of the persons within the now disputed area are Indians. This area thus falls directly into the category of those "predominantly [68%] populated by non-Indians with only a few [9%] surviving pockets of Indian allotments. . . . " *Hagen*, 510 U.S. at 420.

CONCLUSION

For the foregoing reasons, the State of South Dakota respectfully requests that the judgment of the Court of Appeals be reversed and that this Court find that the area has lost "reservation status" under 18 U.S.C. § 1151(a), and that the only "Indian country" remaining in the area is found in the unextinguished allotments, 18 U.S.C. § 1151(c), and "dependent Indian communities" pursuant to 18 U.S.C. § 1151(b).[19]

Respectfully submitted,

MARK W. BARNETT
Attorney General
Counsel of Record

JOHN PATRICK GUHIN
Deputy Attorney General
500 East Capitol Avenue
Pierre, SD 57501-5070
Telephone: (605) 773-3215

Hoover obtained his statistics simply by calling the tribal office. T 240-243. See JA 641-643. The Tribal Chairman, in turn, admitted that the tribal resident population statistics were not based upon any actual count, but merely took the total membership of the Tribe and divided it in half. T 313-15, JA 652-53.

[19] Neither the Tribe nor the United States now disputes that, if this case is reversed, "Indian country" status is limited to the lands listed above. The State, of course, will continue its special treatment of these lands in accordance with federal law. *See also,* n.2, *supra. See generally* Merits Amicus Brief of Charles Mix County at 30 n.11; Brief of Duchesne County, et al., On Writ of Certiorari; Petition for Writ of Certiorari *Duchesne County v. Ute Indian Tribe,* No. 97-570 (Sept. 29, 1997).

(23)

Supreme Court, U.S.
FILED
NOV 21 1997
CLERK

No. 96-1581

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

STATE OF SOUTH DAKOTA,
Petitioner,
v.

YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,
Respondents,
and

SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

SUPPLEMENTAL BRIEF OF RESPONDENT, SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, IN SUPPORT OF PETITIONER, STATE OF SOUTH DAKOTA

KENNETH W. COTTON
WIPF & COTTON
P.O. Box 370
Wagner, South Dakota 57380
(605) 384-5471
Counsel for Respondent

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

51pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
ARGUMENT	1
I. THE PREVIOUS SUBMISSIONS OF THE UNITED STATES REGARDING THE DISESTABLISHMENT EFFECT OF CESSION AGREEMENTS ARE CLEARLY CORRECT	1
A. Introduction	1
B. Excerpts Containing The Complete Oral Arguments Of The United States Confirm This Position	2
II. NOTHING IN THE YANKTON DOCUMENTS SUBSTANTIATES THAT ARTICLE XVIII WAS INTENDED TO ALTER THE FUNDAMENTAL ATTRIBUTES OF THE YANKTON CESSION	3
A. The United States Has Not Addressed The Decision Of The State Supreme Court In *Greger* Because The Arguments Set Forth In That Opinion Cannot Be Readily Refuted	3
B. Article XVIII Does Not Figure Prominently In The Yankton Documentation	5
1. The "Form Agreement" the United States has lodged with the Clerk undermines the significance of Article XVIII	5
2. The Transcript of the Yankton Negotiations Confirms that Article XVIII was Understood to Address Annuities and not Reservation Boundaries	7
3. The Formal Report of the Yankton Commissioners does not Refer to Article XVIII or Mention any Retained Reservation Boundaries	7

TABLE OF CONTENTS—Continued

Page

4. The Commissioner of Indian Affairs Simply Listed the Terms of Article XVIII (And Later Concluded in His Annual Report that the Agreement would Restore the land to the "Public Domain") 8

III. THE ARTICLE XVIII ARGUMENT OF THE UNITED STATES DOES NOT FOLLOW THE REASONING OF *ROSEBUD* AND IT SHOULD BE REJECTED 9

IV. THERE IS NOTHING NEW IN THIS OR ANY SAVINGS CLAUSE ARGUMENT 10

CONCLUSION 10

APPENDIX:

Transcript of Oral Argument at 13-21, *Mattz v. Arnett*, 412 U.S. 481 (1973) (No. 71-1182) 1a

Transcript of Oral Argument at 9-24, *Erickson v. Feather decided with DeCoteau v. District County Court*, 420 U.S. 425 (1975) (73-1148) 7a

Transcript of Oral Argument at 18-30, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562) 18a

Transcript of Oral Argument at 18-27, *Hagen v. Utah*, 510 U.S. 399 (1994) (No. 92-6281) 27a

TABLE OF AUTHORITIES

CASES CITED: Page

City of New Town v. United States, 454 F.2d 121 (8th Cir. 1972) 10

DeCoteau v. District County Court, 420 U.S. 425 (1975) ..... *passim*

Hagen v. Utah, 510 U.S. 399 (1994) ..... *passim*

Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985) 10

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) 5, 9, 10

South Dakota v. Greger, 559 N.W.2d 854 (S.D. 1997) 4, 5

Yankton Sioux Tribe v. Southern Missouri Waste Management, 99 F.3d 1439 (8th Cir. 1996), *cert. granted sub nom. South Dakota v. Yankton Sioux Tribe*, 117 S.Ct. 2430 (1997) (No. 96-1581) 3, 4, 10

OTHER AUTHORITIES:

26 Cong. Rec., 53d Cong., 2d Sess. (1894) 6

S. Ex. Doc. No. 27, 53d Cong., 2d Sess. (1894) 7

Robert L. Stern, et al., *Supreme Court Practice*, (7th ed. 1993) 4

Letter from Commissioner J.T. Morgan of the Department of Interior to Commissioners (July 27, 1892) 5

Annual Report of the Commissioner of Indian Affairs (1894) 8

Report of the Secretary of the Interior, H. Exec. Doc. Vol. 14, 53d Cong., 3d Sess. (1894-95) 8

Transcript of Oral Argument, *Hagen v. Utah*, 510 U.S. 399 (1994) (No. 92-6281) 1, 2

Brief for Respondents Yankton Sioux Tribe and Darrell E. Drapeau, *South Dakota v. Yankton Sioux Tribe*, (August 7, 1997) (No. 96-1581) 5

Brief for the United States as *Amicus Curiae* Supporting Respondents, *South Dakota v. Yankton Sioux Tribe*, (September 24, 1997) (No. 96-1581) 1, 5, 10

TABLE OF AUTHORITIES—Continued

Page

Appendix to Brief of Respondent Southern Missouri Waste Management District, *South Dakota v. Yankton Sioux Tribe*, (Apr. 28, 1997) (No. 96-1581) 6, 8

Appendix to Brief of Charles Mix County, South Dakota, as *Amicus Curiae* in Support of Petitioner State of South Dakota, *South Dakota v. Yankton Sioux Tribe*, (May 7, 1997) (No. 96-1581) 10

SUPPLEMENTAL BRIEF OF RESPONDENT, SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, IN SUPPORT OF PETITIONER, STATE OF SOUTH DAKOTA

This Supplemental Brief of Respondent Southern Missouri Waste Management District, in Support of Petitioner State of South Dakota, is submitted in response to the *Amicus Curiae* Brief for the United States, pursuant to Rule 25(5).

ARGUMENT

I. THE PREVIOUS SUBMISSIONS OF THE UNITED STATES REGARDING THE DISESTABLISHMENT EFFECT OF CESSION AGREEMENTS ARE CLEARLY CORRECT.

> MR. MANN: Well, the language in *DeCoteau* said that the Indians cede, sell, relinquish and convey to the United States all their claim, right, title, and interest in the land in question, and the statute in *Rosebud* stated that the Indians cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all the land in question.
>
> *It would be rather difficult, I think, to construe that language as language that allowed the Indians to retain sovereignty over the land.*
>
> QUESTION: I think you're probably right. . . .

Tr. of Oral Argument at 25, *Hagen*, (No. 92-6281), Dist. Supp. App. at 31a-32a (emphasis added).

A. Introduction.

The United States, as *amicus curiae*, recently submitted a Brief in this case because of a "strong interest in protecting the integrity of reservation boundaries." Br. for the United States Supp'g Respt's at 1, *South Dakota v. Yankton Sioux Tribe*, (No. 96-1581). The arguments of the United States generally reflect that position.

What is not clear from the Brief of the United States is the context in which the United States has submitted

other, often conflicting cession arguments, as well as other similar arguments to this Court in similar cases. In those instances, this Court has, more often than not, squarely rejected the overall position of the United States—and for good reason. In the process, the cession concessions of the United States have never been questioned. The purpose of this Supplemental Brief is to place the new arguments of the United States in proper context and summarize the reasons why this Court should, once again, reaffirm its own clearly correct cession jurisprudence.

B. Excerpts Containing The Complete Oral Arguments Of The United States Confirm This Position.

As an overview, we have appended, for the convenience of the Court, excerpts containing the complete arguments of the United States from each of the transcripts of the oral arguments, such as that highlighted above. Tr. of Oral Argument at 13-21, *Mattz*, (No. 71-1182), Dist. Supp. App. at 1a-6a, Tr. of Oral Argument at 9-24, *Erickson v. Feather decided with DeCoteau*, (No. 73-1148), Dist. Supp. App. at 7a-17a, Tr. of Oral Argument at 18-30, *Rosebud Sioux Tribe*, (No. 75-562), Dist. Supp. App. at 18a-26a, Tr. of Oral Argument at 18-27, *Hagen*, (No. 92-6281), Dist. Supp. App. at 27a-33a.

In context, the transcripts shed a different light on the present views of the United States. For example, since the decision of this Court in *DeCoteau*, the United States candidly and repeatedly has acknowledged that Congress routinely intended cession statutes such as this to disestablish reservation areas. Dist. Supp. App. 18a-33a. The United States has never attempted to circumvent this type of cession since *DeCoteau*, openly acknowledging, as in *Hagen*, that it would be "rather difficult" to support any other construction. *Id.* at 32a. In this case, the United States ignored that analysis and instead supported the "narrower" position ultimately adopted by the Court below:

> The key question in interpreting the 1894 statute and agreement is whether Congress intended that the tribe's governmental authority be transferred with the land sale. Amicus *United States* argues that the 1858 treaty gave the tribe governmental authority within the treaty boundaries and that Article XVIII *requires* that the agreement be read to preserve that right. Although the cession language in Articles I and II could be viewed as describing a transfer of tribal governmental authority as well as land, thereby changing the 1858 treaty boundaries, the *narrower* reading is that the 1894 act simply authorized the conveyance of real property . . . . leads to the conclusion that Congress intended by its 1894 act that the Yankton Sioux sell their surplus land to the government, but not their governmental authority over it.

Yankton Sioux Tribe v. Southern Missouri Waste Mgmt. Dist., 99 F.3d 1439, 1448, 1457 (8th Cir. 1996), Pet. App. at 19-20, 43-44 (emphasis added).

Nothing of substance could be cited by either the United States or the panel majority to support this anomalous and otherwise "rather difficult" construction. Dist. Supp. App. at 32a. Moreover, the District would submit that the prior views of the United States summarized above preclude this "narrower" view—at least in the absence of some *affirmative* evidence of congressional intent to the contrary. In this respect, generic arguments loosely tied to Article XVIII will not suffice. Article XVIII was not intended to alter the fundamental attributes of the Yankton cession—*and not a single word in any of the Yankton documentation says otherwise.*

II. NOTHING IN THE YANKTON DOCUMENTS SUBSTANTIATES THAT ARTICLE XVIII WAS INTENDED TO ALTER THE FUNDAMENTAL ATTRIBUTES OF THE YANKTON CESSION.

A. The United States Has Not Addressed The Decision Of The State Supreme Court In *Greger* Because The Arguments Set Forth In That Opinion Cannot Be Readily Refuted.

The Supreme Court of the State of South Dakota demonstrated that point in *South Dakota v. Greger*, 559

N.W.2d 854 (S.D. 1997) and the manner in which the United States has treated that decision should at least be brought to the attention of this Court. In the past, this Court has granted petitions in cases such as this to resolve conflicts between the state and federal courts. *See, e.g., DeCoteau*, 420 U.S. at 428 n.2; *Hagen*, 510 U.S. at 409. The District assumes that similar considerations were important in this instance because of the conflict on this federal question between the decision of the Eighth Circuit Court of Appeals in this case, *Yankton Sioux Tribe*, 99 F.3d 1439, and the decision of the Supreme Court of the State of South Dakota in *Greger*. Robert L. Stern, *et al., Supreme Court Practice*, Sec. 4.9 at 181 (7th ed. 1993). We further understand that this Court is the final arbitrator of matters of federal law decided by either federal or state court—which brings us to the omission of the United States that merits special attention. That is, the manner in which the Brief for the United States completely *ignores* the decision of the Supreme Court of the State of South Dakota in *Greger*. *In this respect, Greger is not cited, mentioned or discussed on any page in any argument in the Brief for the United States.*

The District thinks the treatment accorded the Supreme Court of the State of South Dakota by the United States is significant in several respects. Even apart from fundamental considerations of comity, the notion that a 30-page unanimous opinion of a State Supreme Court, documented in all substantial respects, could be wholly ignored in this fashion in a friend of the Court brief submitted by the United States, is truly remarkable. Irrespective of whether or not one agrees with the District's position (that the *Greger* Court was correct and that the points relied upon in *Greger* are not responded to simply because they cannot be readily refuted), the fact that the United States did not even attempt to do so remains significant. It colors the entire Article XVIII submission of the United States.

One example from *Greger* clearly illustrates the point. In the brief, the United States goes to great lengths to

fashion an argument that depicts continued federal recognition of the Yankton reservation. The *Greger* Court convincingly dispels that notion by simply highlighting an important and uncontested jurisdictional fact. *Greger*, 559 N.W.2d at 859-861, 866, Pet. App. 154-155. For a century, the State of South Dakota, and not the federal government, has been the party exercising jurisdiction over the contested area, which certainly would not have been the case if the area had remained within the limits of an Indian reservation. *Id.* In this light, the Article XVIII argument, supported by isolated references by Congress to a "Yankton reservation," decades apart, and other unrelated sources that the United States now recounts, pales in comparison to this *uncontroverted* assertion of state jurisdiction. Br. for the United States Supp'g Resp'ts at 24-26, *South Dakota v. Yankton Sioux Tribe*, (No. 96-1581).

In other instances this Court has given great weight to a history of reliance on State jurisdiction. *Rosebud*, 430 U.S. at 605; *Hagen*, 510 U.S. at 421. The United States cannot avoid this factor by simply refusing to address the opinion of the Supreme Court of the State of South Dakota.[1]

B. Article XVIII Does Not Figure Prominently In The Yankton Documentation.

1. The "Form Agreement" the United States has lodged with the Clerk undermines the significance of Article XVIII.

The instructions of the Commissioner of Indian Affairs to the Yankton Commissioners are silent with regard to anything like Article XVIII. *See* Letter from Comm'r

[1] The manner in which the United States summarily disregards the dissent by Judge Magill in the court of appeals should also be noted. In the Brief for the United States the dissent is mentioned only in the "Statement" (in one sentence) and there it is unfairly characterized as relying on Article I and Article II "alone." Br. for the United States Supp'g Resp'ts at 6, *South Dakota v. Yankton Sioux Tribe* (No. 96-1581).

J.T. Morgan of the Dep't of Interior to Comm'rs (July 27, 1892), *reprinted in* Br. of Resp't So. Mo. Waste Mgmt. Dist. at app. 49a (Apr. 28, 1997) (No. 96-1581). Likewise, the "form agreement" enclosed with the instructions (and now "lodged" with the Clerk of this Court by the United States) contains no such language. *See* Form Agreement *ibid*. The "form agreement" does, however, contain "cession language" which this Court has subsequently described as being "precisely suited" to disestablishment. *DeCoteau*, 420 U.S. at 445. The members of Congress obviously did not see the inclusion of Article XVIII as preserving reservation boundaries or as inconsistent with the instructions. Indeed, Congress perceived that the Commisioners had obtained the "cession" in accordance with "past policy" and following "in the same line."

> MR. PICKLER. Certainly these commissioners have general instructions from the Secretary of the Interior to do what they do. He lays down the rules and regulations to guide them, and fixes the general scope of their duties. . . . That commission was organized by the Secretary of the Interior and was sent out with general instructions. . . . These commissioners went out in good faith; the Secretary of the Interior gave them their instructions; they kept within their instructions; they have made an agreement for these lands; and now Congress ought to live up to the agreement. . . . [W]e simply procure these lands in the same way we have always procured lands from the Indians. We make no departure from our past policy; we are following in the same line.

26 Cong. Rec. 8265, 8267, 53d Cong., 2d Sess. (1894), J.A. 405-522.

Nothing in the congressional debate in fact refers to Article XVIII, much less does it indicate any intent to retain reservation boundaries.

2. The Transcript of the Yankton Negotiations Confirms that Article XVIII was Understood to Address Annuities and not Reservation Boundaries.

The transcripts that record the Yankton negotiations are also silent with reference to any reservation boundary discussion even remotely related to Article XVIII. S. Ex. Doc. No. 27 at 47-101, 53rd Cong., 2d Sess. (1894), J.A. at 203-359. There is certainly no discussion that even arguably supports retained reservation boundaries in the face of this cession. The United States evidently concedes this fact because *no transcript excerpts* are set forth or cited by the United States (or anyone else) in support of a different conclusion. Annuities, and not reservation boundaries, were the only subject of discussion. *Id.* In addition, even the possibility of any other understanding with respect to reservation boundaries is completely undermined by repeated references to cessions of the past, including the Sisseton-Wahpeton cession construed in *DeCoteau—another critical point the United States never addresses.*

3. The Formal Report of the Yankton Commissioners does not Refer to Article XVIII or Mention any Retained Reservation Boundaries.

When the Yankton Commissioners formally reported back to the Commissioner of Indian Affairs (as reported to Congress), the Commissioners stated (under a subheading of "Baseless Claims") only that:

> The Indians, partly through ignorance and partly through craft, presented to us a long list of claims and grievances. They claim that they had not received their dues under the treaty of 1858; that they had a claim against the Government for land in Iowa and many such baseless and imaginary wrongs. We did not find it difficult to meet these charges to the satisfaction of most of the Indians. . . .

S. Ex. Doc. No. 27 at 21, 53d Cong., 2d Sess. (1894), J.A. at 155.

Nothing else about Article XVIII was even mentioned.

4. The Commissioner of Indian Affairs Simply Listed the Terms of Article XVIII (And Later Concluded ~~in~~ His Annual Report that the Agreement would Restore the land to the "Public Domain").

In his Report to the Secretary of the Interior, the Commissioner of Indian Affairs did list Article XVIII in chronological order and stated without any further comment that:

> Article XVIII provides that nothing in the agreement shall be construed to abrogate the treaty of April 19, 1858, and that the Yankton Indians shall continue to receive their annuities under said treaty.

Id. at 4, J.A. at 115.

The Commissioner of Indian Affairs' formal views on the Yankton agreement were set forth in his Annual Report. Annual Report of the Comm'r of Indian Affairs (1894). He concluded that the agreement would restore the lands to the public domain (as did the Secretary of the Interior). *Id.* at 28, excerpted in Br. of Resp. So. Mo. Waste Mgmt. Dist. in Supp. of Pet'r at app. 42a; Report of the Sec'y of the Interior, H. Exec. Doc. Vol. 14, 53d Cong., 3d Sess. at IX (1894-95), excerpted in Br. of Resp. So. Mo. Waste Mgmt. Dist. in Supp. of Pet'r at app. 44a. After the Proclamation and Opening the next year, the Yankton Reservation was deleted from the official cartographic Departmental maps showing Indian reservations in the United States, which was appended each year to the Annual Report.

As a result, the contemporary administrative record really does not support the claim of the United States that the: "federal government's *conduct* with respect to the Yankton Sioux Reservation, while not entirely consistent, *suggests* that no diminishment was intended." Br. for United States as *Amicus Curiae* Supp'g Resp'ts at 24, *South Dakota v. Yankton Sioux Tribe* (96-1581) (emphasis added).

III. THE ARTICLE XVIII ARGUMENT OF THE UNITED STATES DOES NOT FOLLOW THE REASONING OF *ROSEBUD* AND IT SHOULD BE REJECTED.

In the final analysis, the entire argument of the United States also ignores the most important part of the "cession" discussion in *Rosebud*. *Rosebud* is instructive and applicable to the Article XVIII argument. In the process of explaining why it made no difference that the operative cession language in the 1904 Rosebud Act was technically *misused*, the Court in *Rosebud* concluded that this type of *ambiguity* was relatively *unimportant* insofar as the *meaning* of the *entire act* was concerned:

> The use of the word "cession" in the 1904 Act, which was not consented to by the required extraordinary majority of the Tribe, does not make the *meaning* of the Act *ambiguous* as *between* diminution of the Reservation boundaries on the one hand, and merely opening up designated lands for settlement by non-Indians, on the other. The word is technically misused, but the *meaning* is quite clear. It was *intended* to accomplish, in 1904, precisely what it was intended to accomplish in 1901.

Rosebud, 430 U.S. at 597-598 (emphasis added).

Any ambiguity involving Article XVIII, which, of course, is not even in the operative language of the Yankton agreement, cannot, *following the reasoning of Rosebud*, be determinative of the *meaning* of the Yankton Act. The fundamental error of the panel majority was the failure to recognize this important conceptual distinction, which the United States failed to make. To paraphrase *Rosebud*, the Yankton cession was intended to accomplish in 1894 precisely what similarly referenced cessions accomplished in 1891 (*DeCoteau*) and in *all* previous years.

IV. THERE IS NOTHING NEW IN THIS OR ANY SAVINGS CLAUSE ARGUMENT.

The last point that needs to be made is that there is really nothing new in this savings clause argument or any savings clause argument. Prior to the decisions of this Court in *DeCoteau* and *Rosebud*, which placed the issue in a proper historical perspective, similar savings clause arguments were routinely submitted in support of a recognition of original reservation boundaries. In fact, the court of appeals relied on the one case (decided before *DeCoteau* and *Rosebud*) that found such a savings clause argument to be persuasive. *Yankton*, 99 F.3d at 1448, 1450, citing *City of New Town v. United States*, 454 F.2d 121 (8th Cir. 1972), Pet. App. at 20, 24. *But see Yankton*, 99 F.3d at 1460 n. 31, Pet. App. at 50. However, subsequent to *New Town*, this Court decided the two cases that should have authoritatively put savings clause arguments to rest. In *DeCoteau*, this Court made the significance of the cession process crystal clear. *See also Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985). And in *Rosebud*, the savings clause argument was mentioned only in the dissent. *Rosebud*, 430 U.S. at 623. *See also Oregon*, 473 U.S. 753.[2] The United States participated in these cases and is surely aware of the arguments that were advanced and rejected. In the court of appeals, the precedent of this Court would have been better served if more attention could have been directed to the significance of *DeCoteau*, *Rosebud* and *Oregon*.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

---

[2] The United States essentially ignores the cession analysis in *Oregon*, 473 U.S. 753, mentioning the decision only once to note that it quoted a savings provision. Br. for the United States as *Amicus Curiae* Supp'g Resp'ts at 12, *South Dakota v. Yankton Sioux Tribe* (No. 96-1581).

Respectfully submitted,

KENNETH W. COTTON
WIPF & COTTON
P.O. Box 370
Wagner, South Dakota 57380
(605) 384-5471
Counsel for Respondent

November 1997

APPENDIX

APPENDIX

TABLE OF CONTENTS

	Page
Transcript of Oral Argument at 13-21, *Mattz v. Arnett*, 412 U.S. 481 (1973) (No. 71-1182)	1a
Transcript of Oral Argument at 9-24, *Erickson v. Feather decided with DeCoteau v. District County Court*, 420 U.S. 425 (1975) (72-1148)	7a
Transcript of Oral Argument at 18-30, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562)	18a
Transcript of Oral Argument at 18-27, *Hagen v. Utah*, 510 U.S. 399 (1994) (No. 92-6281)	27a

APPENDIX

Transcript of Oral Argument at 13-21, *Mattz v. Arnett*, 412 U.S. 481 (1973) (No. 71-1182).

[13] ORAL ARGUMENT OF
HARRY R. SACHSE ON BEHALF OF THE
PETITIONER AS AMICUS CURIAE

MR. SACHSE: Mr. Chief Justice, and may it please the Court:

The United States agrees with the position taken by Mr. Sclar and by the petitioner in this case. What I want to try to do is put this 1892 Act into a little bit of historical perspective.

As Mr. Sclar said, the Yuroks always lived in this area. Twice they had their reservation recognized by Executive Order, 1855 and 1891. The 1891 Act was an obvious reaction to the legal problems that had been recognized in the 1889 Court of Appeals case.

In 1892 it may be that the House of Representatives set out to take from these Indians much of what had been theirs. But what the House set out to do, the Senate corrected. And there is a very marked contrast between the Act that was finally passed and the Act that was introduced in the House. The Act as it was finally passed in our view is quite clearly a special allotment Act similar to a number of other allotment Acts that were passed in that general time and which did not terminate the reservation in question.

I would like to first mention something about the [14] General Allotment Act. I think that's important in this. By the 1880's most of the Indian reservations had been created. But there was a pressure by the settlers around those reservations to get some of the land in the reservatons. They felt the Indians were not utilizing that land. And on the other hand there was a pressure to keep faith with the Indians and not to take from them what had

recently been given to them. A sort of compromise was worked out in the General Allotment Act of 1887 called the Dawes Act. It has subsequently been repudiated in the Indian Reorganization Act of 1934. The Dawes Act set up this system, that whenever the President thought it was wise to do so, he could require all the Indians within a reservation to take allotments of a particular number of acres each. This would usually leave considerable land in the reservation that was not allotted. The President then with the consent of the Indians, which it was assumed in those days he could obtain, would open the rest of the reservation for homesteading, but the fees charged to the homesteaders would be used for the benefit of the Indians who lived on the reservation.

Now, that was the General Allotment Act. The General Allotment Act did not require the President to open any particular reservation in this way. And Congress passed a number of special allotment Acts. We have listed those that have been in litigation on page 22 of our brief, Footnote 18. [15] These special allotment Acts would take the matter out of the hands of the President and tribe and Congress would say, "We want allotments made on a particular piece of land. We want, once the allotments are made, we want to open the rest of it to settlement, and we want funds collected from the settlers to be administered by the Government for the benefit of the Indians that lived on that land."

Many of the special allotment Acts made particular reference to the General Allotment Act saying that the allotments would be made under the terms of the General Allotment Act.

It's very significant that the funds obtained in such an Act were to be used for the benefit of the Indians who remained in the reservation. And this meant, of course, a continued Federal involvement with that reservation, both in handling the land transactions and in administering the funds that would be created by this procedure.

In our view, the 1892 Klamath River Act is that kind of special allotment Act. In our brief when we cited the language of the Act, we put in dark provisions, the part added by the Senate, which together with the final paragraph that had been there all along make this Act exactly a special allotment Act of the area of that reservation that was affected.

QUESTION: Ultimately homesteaders' land would be [16] within the reservation?

MR. SACHSE: That's correct.

Now, this Court early—

QUESTION: Would you take the same position even if some was allotted, some was homesteaded and the people and all the restrictions on the allotments had expired and the allotted lands had been sold to whites?

MR. SACHSE: Unless Congress had in some—we don't reach that issue here because there still is allotted restricted land in this reservation.

QUESTION: Well, let me ask you. In an Indian reservation that's along a river, who owns the bed of the river?

MR. SACHSE: Well, in this case, this Court in *Donnelly* has already held that the Indians own the bed of that river. It has never been taken from them.

QUESTION: And that has never been allotted to anybody, has it?

MR. SACHSE: It has never been allotted to anybody. That's still communely held Indian land as far as we are concerned, and there is not a word in the 1892 Act—

QUESTION: Whether the reservation exists or whether it doesn't, and regardless of who owns the river bed, is there some treaty or some law defining Indian fishing rights? Or is it just ancestral fishing rights that have been—

[17] MR. SACHSE: It's somewhere between the two. There were ancestral fishing rights, but this Court in *Donnelly* held specifically that the 1891 Extension that ran

snaking 40 miles down the river was done specifically to preserve the fishing rights that the Indians had.

QUESTION: Which were what?

MR. SACHSE: I think the exclusive rights to fish in that river.

QUESTION: The exclusive right to fish there?

MR. SACHSE: Since it was made an Indian reservation, the purpose of which is that this area is to be reserved for the Indians, and since surplus lands were sold but nothing was done—

QUESTION: You would say, then, I suppose, that since the Indians owned then and still own the bed of the river, that even if all of the riparian land was in other ownership, the Indians would have the exclusive right to fish in the river?

MR. SACHSE: I would say—yes, I would say that. But I don't think this case requires us—

QUESTION: Don't you have to hold that? Because there is some river riparian land that is not owned by the Indians.

MR. SACHSE: Well, here is the way I would analyze this case, but I think what you have raised is also a possible [18] analysis, a possible way to handle the case.

The 1891 Act established an Indian reservation, a mile on both sides of the river including the river and going all the way down to the sea. This Court in *Donnally* held that one of the primary purposes of establishing that reservation was to secure to the Indians fishing rights of that river. That reservation has never been abolished. The 1892 Act which let other people than Indians settle in this area while preserving also Indian settlement, simply did not abolish the reservation. So the reservation is still an area of Federal jurisdiction and protection, except to the extent that Public Law 280 has given the State of California certain criminal and civil jurisdictions in it. Public Law 280 specifically reserves federally granted fishing rights and these were granted by Executive Order as this Court held in *Donnelly*.

QUESTION: That still leaves the question of what—you said "exclusive."

MR. SACHSE: No. Let me say this. The issue was not argued below as to exactly what the consequences of this being held to be an Indian reservation. The court went up on the question it was not a reservation.

QUESTION: The scope of the Indian rights and whether or not the kind of fishing the Indians now want to do is the kind of a fishing right that was historically exercised has not been settled.

[19] MR. SACHSE: That is correct. And we have only asked this Cout to determine the question of whether this remains Indian country, whether this remains an Indian reservation, with a remand after that has been determined to the California courts.

QUESTION: You think that it may be irrelevant whether the reservation exists or not if it's true that the Indians still own the bed of the river.

MR. SACHSE: I don't think it would be irrelevant. I think it would matter from the standpoint of criminal and civil jurisdiction. It would only be irrelevant if the Court were to find that Public Law 280 had granted such total jurisdiction to the State of California that even if it is a reservation all that is left is the ownership of the river. So I think it still is relevant.

I would like to get back to the specific point that this Court is faced with, and that is has this allotment process terminated the reservation. And because I am running out of time, I would just mention this very quickly. That in *United States v. Celestine*, the Court first had to determine this problem, 215 U.S. And in that case the Court held in a careful opinion that the General Allotment Act is inconsistent with termination of a reservation, that allotments under that Act and even disposal of lands to non-Indians does not terminate a reservation. In *United States v. Nice* at 241 U.S.—these [20] are all in our brief—the Court held that a special allotment Act should be interpreted in accordance with, policy in the

General Allotment Act and that a special allotment Act on the Sioux reservation though it required the Sioux to take, on that reservation, allotments, required the President to dispose of the extra land, did not terminate Federal jurisdiction, did not terminate the reservation, did not terminate Federal jurisdiction even as to the land that was disposed of to non-Indians.

This same policy is recognized more recently by this Court in *Seymour v. Superintendent* and also has been codified by Congress in its definition of Indian country as including all the land within the boundaries of an Indian reservation whether patented or allotted or not.

There have been two very recent cases we mention in our brief also, one in the Eighth Circuit, *City of New Town*, and another in the Supreme Court of South Dakota, *State v. Molash*, that had this same consistent interpretation of special allotments Acts indistinguishable from the 1892 Klamath River Act.

In closing, since I assume I am out of time, I refer the Court to page 17 of our brief where we have samples of language that Congress used when it did want to discontinue a portion of a reservation. "The Smith River Reservation is hereby discontinued," Congress said. Or. "The reservation lines [21] of the Ponca and Otoe and Missouria Indian reservations be, and the same are hereby abolished." There has been no confusion between an Act that simply opens the reservation to allotment and settlement and one that abolishes the boundaries of a reservation.

Thank you.

* * * *

Transcript of Oral Argument at 9-24, *Erickson v. Feather decided with DeCoteau v. District County Court*, 420 U.S. 425 (1975) (No. 73-1148).

[9] ORAL ARGUMENT OF
HARRY SACHSE, ESQ., FOR THE
UNITED STATES AS AMICUS CURIAE

MR. SACHSE: Mr. Chief Justice, and may it please the Court:

I want to say a word first about any Indian reservation, before talking about this one, because it seems to me that the discussion so far has been a bit confusing about that.

In almost every Indian reservation in the country there's land that has been allotted to Indians, there's land that has been sold in fee simple to people who are not Indians. There's often a large non-Indian population inside an Indian reservation.

One of the characteristics of this reservation is that there's such a large Indian population inside, and that there's a going tribe, with an organized government and an agency of the BIA, and a very alive and viable situation.

Basically, and without trying to get into all of the details of it, the State in which an Indian reservation is [10] situated has full jurisdiction over non-Indians who live inside an Indian reservation, both civil and criminal jurisdiction. This Court held so in a number of cases, starting in the Nineteenth Century with *McBratney* and *Draper* which were criminal cases. And Justice Frankfurter laid this out in a good deal of detail in *Cake vs. Egan* and the *Metlacotla* cases in about 380—

QUESTION: Is that civil as well as criminal?

MR. SACHSE: Civil as well as criminal.

QUESTION: *Cake v. Egan*—

QUESTION: Irrespective of whether they live on allotted lands?

MR. SACHSE: Irrespective of where they live within the—

QUESTION: But in present actions with an Indian, they're going to be subject to federal law.

MR. SACHSE: Correct. If the transaction is with an Indian or affects the vital interests of the tribe, they're going to be subject to federal law. The exact extent of that is the kind of thing that's still debated before you, in a case such as the *Maserie* case that's under advisement.

QUESTION: And it may be debated eventually in this case, I take it?

MR. SACHSE: And may eventually be debated here.

Now, I think I need to review some law concerning [11] this Treaty as well as—this reservation, as well as the facts.

First, briefly to the facts:

A permanent reservation was established by Treaty in 1867, with surveyed boundaries. And it's this reservation, which is much smaller than the land the Indians had previously had. They had already had their big loss of land, and this was what was left to them, after great amounts of land had been taken away from them.

Then, by an agreement in 1889, made specifically under the General Allotment Act; and at a time when the Indians were in great distress, that the moneys owed to them by the federal government had not been paid to them, it was the middle of winter.

The federal government negotiated with the tribe to do what's known as open its reservation. That is, to allow the sale of surplus land within the reservation. And in this agreement and then in the Act of Congress that ratified it, there are numerous references to the General Allotment Act. There is no such thing as was true with the north half of the Colville Reservation, where a particular part of the reservation was cut off and express language was used, saying that that has been removed from the reservation.

You've heard some talk about the public domain. What's important in this Act is there is no language saying [12] that this was returned to the public domain.

QUESTION: But you do have language of "cession".

MR. SACHSE: You do have language of "cession", that is correct.

QUESTION: Isn't that even stronger?

MR. SACHSE: But there is no specific area ceded, what's ceded is what is not allotted—

QUESTION: But, as a matter of fact, it's treated as the public domain.

MR. SACHSE: I—I don't know what you mean by that.

QUESTION: Well, what happened after the ceded property?

MR. SACHSE: After the property was ceded,—

QUESTION: Yes?

MR. SACHSE: —the government sold that land under—

QUESTION: Treated it like the public domain.

MR. SACHSE: Well, only in the exact same sense that it—

QUESTION: Well, it was handled as part of the public domain, by the same system that the public domain was handled.

QUESTION: Weren't they acting for the Indians?

MR. SACHSE: That is to say—and I'll try to get this in the—I think I may do better to break it down into historical perspective.

[13] But the Indians were paid for the land. How were they paid for it? It was put in the Treasury of the United States, to be used for their benefit. In other words, it's a bookkeeping entry from one government place to another. The money—the Indian Agency was maintained, the money was appropriated by the government as needed for the Indians. The land was opened for homesteading but only for homesteading, not for any purpose.

BEST AVAILABLE COPY

You have the exact same actual dynamics that occurred in the south half of the Colville Reservation, which this Court held in *Seymour v. Superintendent*, did not abolish that reservation.

The same dynamic that was done in *Mattz v. Arnett*, as to that reservation; namely, the non-Indians got what they wanted, the Indians got what they could. The non-Indians got the right to settle that land. The Indians got the money from the settlement of that land, which was small enough.

The question remaining is: What happened to the federal jurisdiction? What happened to the jurisdiction of the tribe?

And I want to approach that problem now.

QUESTION: Would it be fair to say that the United States in those transactions was acting as the broker for the Indians, to announce publicly that settlers could come in and buy it for $2.50 an acre?

[14] MR. SACHSE: It's exactly so, and we quote in our brief where one of the Senators objected to the cession idea, to the fact that the government would pay the money immediately.

And one of the other Senators explained to him, said: This doesn't mean anything, because this is just a bookkeeping transaction in the Treasury. We get right back the money that we're going to pay to the Indians, as we sell off the land.

Now, in some later Acts, the government decided to do it the other way, to not pay the Indians at first, to only pay the Indians as the land was sold.

But the practical effect of both kinds of Acts is identical, that the Indians kept, lived on the allotted land, the unallotted and was opened up for homesteading, because it was thought in this—this was said to the Indians in the negotiations, and the Court talked about this in *Mattz*—this Court talked about this in *Mattz vs. Arnett*.

The excuse for doing this kind of thing was that it was for the benefit of the Indians to do it, that it was better

for them to live next to a high caliber of citizen who would be farming his land, and so forth. That's the kind of language that was used.

And that was the same whether the Indians said they ceded it first, or said—or the government acted as agent, disposing of it.

And, by the way, this language "cession" in the *Ash* [15] *Sheep* case, which we discuss in our brief, is used in connection with an arrangement where the government only acted purely as agent, where they simply—whenever someone wanted a piece of the land, would sell it to him then, and give the money to the Indians. The word "cede" was used.

But obviously with no technical—

QUESTION: What impact, if anything, did the cession have, followed by the sale for homesteading or the settlement for homesteading? What happened as a consequence, or what was the impact with respect to the jurisdiction of the State, if anything?

MR. SACHSE: Of the State? None. None.

The cession of the land or the selling in fee simple of land inside an Indian reservation, say, as in the reservation in *Mattz*—in *Seymour vs. Superintendent*, the south half of the Colville. That then is land owned by a non-Indian inside an Indian reservation.

QUESTION: Well, yes, but you would apparently think the State has civil and criminal jurisdiction over non-Indians on that.

MR. SACHSE: Clearly.

QUESTION: How about the State's trespass law?

MR. SACHSE: The State's—the State's trespass law would clearly apply to non-Indians, but that would be—to the extent that it is applying—

[16] QUESTION: Well, how about to the owner—how about the owner of the deeded land, the ceded land, he now has a fee simple title to it—

MR. SACHSE: Okay.

QUESTION: —and he wants to keep people off his land, and he does it in the name of the State's trespass law. May he do so?

MR. SACHSE: I don't think he could keep an Indian from—

QUESTION: Really?

MR. SACHSE: It seems to me that inside an Indian reservation—

QUESTION: Well, let me talk to them about—

MR. SACHSE: Yes?

QUESTION: —a non-Indian. Can he keep a non-Indian off in the name of the State's trespass law?

MR. SACHSE: Clearly, yes.

QUESTION: So the State's law does apply there.

MR. SACHSE: What I'm saying is that in a transaction between an Indian and a non-Indian—

QUESTION: Well, I didn't ask you about transaction, Mr. Sachse, I asked you about the State's trespass law.

Does the State—after the land is deeded, does the State's trespass law apply to that land?

Certainly it doesn't—

[17] MR. SACHSE: It applies to that land as to non-Indians but not as to Indians.

QUESTION: So an Indian—

MR. SACHSE: The State's criminal law does not apply to Indians inside an Indian reservation.

QUESTION: And so it just—so the State sovereignty just doesn't apply to that land, no matter who it's owned by, as far as keeping an Indian off of it is concerned?

Is that your thesis?

MR. SACHSE: I think that's correct. That would be under federal law or under tribal law, if it's a matter affecting an Indian inside an Indian reservation.

Now, the General Allotment Act left a lot of questions unresolved. And the early questions that were unresolved was whether a reservation existed at all after there had been allotments, and whether even allotted land was Indian land under federal jurisdiction.

And the Court first addressed that question in 1909, in *U.S. v. Celestine*, in which it held that even though land had been allotted to an Indian and patented to the Indian, that the land remained inside the Indian reservation, that no land was removed from an Indian reservation until it specifically removed by Congress from the reservation.

That proposition was extended in 1916, in *United* [18] v. *Nice* which held that the tribal relations of the Indians continues and that federal liquor laws would apply to Indians anywhere within the reservation. But, the important thing was this, that the States were claiming, just as the State claims here, that opening a reservation and alloting lands to Indian meant that federal jurisdiction and tribal jurisdiction would only apply on the allotted lands. This creates several problems, one's the obvious one of having to check plat books to see whose jurisdiction applies where, the other one's even a bit more complicated, these red dots move around, the Tribe buys new land, land can be consolidated. As under a recent act of Congress, this Tribe has an active program of purchasing new land which Congress described as within the reservation. Thereby, again recognizing that the reservation still existed.

QUESTION: Must have been the situation for a good many years?

ANSWER: Thats right.

QUESTION: Hasn't been a great deal of trouble about it, has there?

ANSWER: Well, I think there has. What has really occured is that there has been no law and order on a lot [19]of Indian reservations. And part of the problem has been that the federal government hasn't done its job, the State hasn't done their job, and the tribes have been too weak to do anything.

QUESTION: Well, what is the State's job? What does this State—on an Indian reservation?

MR. SACHSE: In this—in a reservation—

QUESTION: On an Indian reservation, what is the State's responsibility, if any?

MR. SACHSE: The State's responsibility in an Indian reservation is as to non-Indians, to maintain law and order in matters between non-Indians. The federal government and the tribe have responsibility of maintaining law and order in matters that affect Indians.

And neither one of them should have to look at the plat book to do it. It's a question of whether the person is Indian or non-Indian. That's a difficult enough problem, without having to figure out whether a policeman can go on this piece of ground or that piece of ground.

QUESTION: Does a non-Indian ever get in conflict with an Indian?

MR. SACHSE: Yes, and when that happens, that's federal jurisdiction, under 18 U.S.C. 1151. And it makes a good deal of sense for the federal—

QUESTION: Is that generally or is—that's true [20] if it's on a reservation.

MR. SACHSE: If it's on a reservation, that's right.

QUESTION: But not otherwise.

MR. SACHSE: If it's off the reservation, it would —it would not, that's right; it would be State jurisdiction.

QUESTION: In a civil dispute—

MR. SACHSE: No. Excuse me, that's inaccurate. If it's not on Indian country, it would be State jurisdiction. There could be Indian country off a reservation.

QUESTION: Well, yes. Patented land is Indian country by statutory definition; correct?

MR. SACHSE: That's right.

QUESTION: In a civil dispute, under *Williams v. Lee*, isn't a federal question, it's a question for the tribal court, if it's on a reservation.

MR. SACHSE: That's correct. That within an Indian reservation, in a matter affecting Indians, the jurisdiction —the original jurisdiction, the root of the jurisdiction was tribal jurisdiction. But the federal government, through

numerous statutes, has preempted great parts of that jurisdiction. And for all major crimes, for instance, there's federal jurisdiction. But in a civil dispute between an Indian and a non-Indian on an Indian reservation, it's tribal jurisdiction.

That's *Williams vs. Lee*.

[21] QUESTION: Laying aside the major crimes question, and you had a very simple statement that I understood thoroughly for a moment or two there—when you said it desn't depend on geography or plats, it depends on the racial origin.

Now, were you confining that to reservations, as you suggested first, or to Indian country?

MR. SACHSE: I'm—that is true in Indian country. But if you—Indian country is any land inside a reservation. If this Court were to hold this reservation had been abolished by the 1891 Act, which I think would be a very restrictive and artificial interpretation of what the Court's done in *Mattz* and in *Seymour vs. Superintendent*, and I think it would also undercut 18 U.S.C. 1151 seriously. At least for this reservation.

QUESTION: Yes, but go ahead. If the Court should hold—

MR. SACHSE: If the Court should hold that, then each one of these red spots is a little island of federal and tribal jurisdiction, and we're not in a time now when these—

QUESTION: That's the way it's been, isn't it, as my brother White suggested?

MR. SACHSE: The way it's been is that everyone has ignored both the Indian and federal rights there, and this—[22] I don't want to testify, but I don't think the Court should assume that the situation has been good, and that you can assume that because we haven't faced this issue before that it's perfectly all right to leave it another fifty years.

QUESTION: On the other hand, if the Court should decide that the statute, the cession statute didn't amount to a conveyance,—

MR. SACHSE: Yeah.

QUESTION: —then the result would be that the State would no longer have any power to enforce its laws in any of these several counties, if any Indian was involved.

MR. SACHSE: That's correct. It would be a federal question, as in any other Indian reservation,—

QUESTION: Wherever it occurred.

MR. SACHSE: —wherever it occurred, and this is something that Congress has decided is a proper way for the federal government to exercise its—

QUESTION: Well, if this is an Indian reservation.

MR. SACHSE: Yes. And whether this one is or not, it would be the same situation you're describing in other reservations of the State, that clearly are reservations.

We're speaking of the proposition that this, what we call a reservation, where a major tribe lives and where there's a major number of Indians, should be treated like the other Indian reservations in the State.

[23] QUESTION: Well, I suppose the vast proportion —this is something like, what, 27,000 non-Indians and a few, 3,000-plus Indians?

MR. SACHSE: That's right.

QUESTION: In this Lake Traverse area.

MR. SACHSE: That's correct.

But we're not trying to subject the non-Indians to federal or Indian jurisdiction except to the extent needed to fulfill the trust responsibilities—

QUESTION: Which means that whenever they're involved with an Indian—

MR. SACHSE: That's right.

QUESTION: —the State does not have any jurisdiction—

MR. SACHSE: That's correct.

QUESTION: —with respect to its civil, criminal or family or status law.

QUESTION: It was suggested that the tribe had recently passed an ordinance that asserted rather expansive jurisdiction within this area. Is that true or not?

Or do you know?

MR. SACHSE: I haven't seen it. I've heard that that's so. I suspect that it goes beyond the authority that the tribe has.

QUESTION: Because it reaches non-Indians?

[24] MR. SACHSE: Yes.

QUESTION: Well, how do we know that the tribe doesn't have authority to reach non-Indians?

MR. SACHSE: Well, the *McBratney* case and the *Draper* case in criminal matters.

QUESTION: Well, all *McBratney* says is that the State has the right to try a white man for a crime that took place on an Indian reservation. It doesn't say the tribe couldn't try him.

MR. SACHSE: Well, I suppose I just have to answer that this has been the—at least tacit holding of this Court, or assumption of the Court in a number of cases. And I refer to *Cake v. Egan*, where Justice Frankfurter tried to lay out the limits on tribal jurisdiction. And it's never been faced directly in the last ten years, perhaps, by this Court, but it has been faced before.

QUESTION: Well,—

MR. SACHSE: My time is up, and I'm feeling bad about taking all the time of my partner.

MR. CHIEF JUSTICE BURGER: We'll take care of that; you're on our time for a minute or two here.

Mr. Justice White, did you have a further question?

QUESTION: No, I didn't.

MR. CHIEF JUSTICE BURGER: We'll hear from your friend, then.

Transcript of Oral Argument at 18-30, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562).

* * * *

[18] ORAL ARGUMENT OF H. BARTOW FARR, ESQ. ON BEHALF OF U. S. AS *AMICUS CURIAE*

QUESTION: Mr. Farr, before you commence, will you help me understand the facts situation?

The main issue, as I understand it, is the boundary of the Reservation.

MR. FARR: That is right.

QUESTION: The location of the boundary. Who occupies the land within the disputed area? Do Indians still occupy part of it?

MR. FARR: There are Indians within the disputed area but I think the area is largely occupied by whites who purchased or successors of the people who purchased the open lands.

QUESTION: Right. And the principal interest of the Indian Tribe, as I understand it, is whether the Tribe or the state exercises jurisdiction within the disputed area.

MR. FARR: The Tribe and the Federal Government or [19] the state, yes.

QUESTION: Right. Well, who, in fact, has exercised jurisdiction legally? What laws have prevailed within the disputed area in recent years? How far back?

MR. FARR: Well, this is a question which I think the record is unclear on, Mr. Justice Powell. Essentially, the United States, as the United States understands the position—of course, not having been the party to the suit throughout, there has been some exercise of jurisdiction by the state, they having taken the position that this is land outside of an Indian Reservation to which their jurisdiction applies.

QUESTION: Have state criminal laws been imposed or enforced within the disputed area?

MR. FARR: I believe that the state has, you know, gone ahead and imposed state criminal law as well as,

though, I think the Federal Government and the U.S. Attorneys have also imposed some federal law but there has basically been a kind of working relationship in this area.

I am not sure how much of this is reflected by the record but I think as a practical matter that is generally what has been happening.

QUESTION: All right. Just one other question. We are not concerned with the individual title of any particular parcel of land, are we?

[20] MR. FARR: We are not.

QUESTION: Just the boundary of the reservation.

MR. FARR: That is right.

QUESTION: Right.

MR. FARR: Mr. Chief Justice and may it please the Court:

The United States is appearing this afternoon as *amicus curiae* is support of the position of the Rosebud Sioux Tribe that the decision of the Court of Appeals for the Eighth Circuit should be reversed.

We think that under the principles set forth by this Court in previous cases, particularly in *Seymour, Mattz* and *DeCoteau*, that it is clear that the acts of 1904, 1907 and 1910 did not disestablish the boundaries of the Rosebud Sioux Reservation in the areas to which they applied.

I would like to note briefly at the outset one important general point. In suggesting that Congress did not disestablish the boundaries of the Reservation in the early 1900's, we do not mean to imply that Congress expected that those boundaries and the boundaries of comparable reservations were going to continue indefinitely.

We agree that in the early 1900's, Congress contemplated at some period of time that the Reservation system would, in fact, come to an end but we believe that time was when the trust period on Indian allotments expired and the [21] assimilation of Indians and white settlers on the lands had been accomplished.

QUESTION: And in your view, it would have taken an Act of Congress later, then, to—

MR. FARR: That is corect. Congress at some point would have found that the assimilation had occurred and would have passed an Act abolishing the Reservation.

At that point, all of these lands and all of the people on it—except if the Federal Government wished to retain jurisdiction over the Indians—would have gone within state jurisdiction.

In 1934, however, as the Court is aware, Congress reversed that policy when it passed the Indian Reorganization Act and definitely extended the trust period on the Indian allotment.

I will discuss that more briefly in connection with the General Allotment Act of 1887.

Because this case involves an issue of statutory interpretation, the United States does not urge or perhaps even believe it is possible for this Court to lay down a binding fixed rule that would govern construction of acts in all similar cases.

However, we do believe it is appropriate for this Court to reaffirm the principle that except for the language of an act or the compelling legislative history, shows a clear [22] intention by Congress to contract Reservation boundaries and limit federal jurisdiction over certain areas of Indian reservations, that whenever Congress without a binding agreement opens lands to white settlers, it does not pay for them and does not guarantee any payment but only agrees to act as trustee for future uncertain sales and leaves the property interest in the Indians—as they did in this case—that act does not remove the lands from the boundaries of the Reservation.

As this Court said in *Seymour*, discussing an act with very, very similar terms, the purpose of the 1905 Act is neither to destroy the existence of the Reservation nor to lessen federal responsibility or jurisdiction over the Indians having tribal rights on that Reservation.

Now, this principle that Congress did not intend to disestablish the Reservations is not one that the government

has made up out of whole cloth. It is supported both by history and by the previous decisions of this Court.

To begin with, it is well-recognized that the Tribes are entitled to rely on certain rules of statutory construction. In particular, doubtful expressions are to be resolved for the benefit of the Indian.

More particularly, in cases of these types—of this type, the intent to disestablish Reservation boundaries must be made clear, either from the Act or the legislative [23] history and as this Court said in *Rice versus Olson*, the policy of leaving Indians free from state jurisdiction and control is deeply rooted in the nation's history. All of these rules of construction apply to the case at hand.

Equally important—

QUESTION: Mr. Farr, may I interrupt you?

MR. FARR: Certainly.

QUESTION: As I understand the geography, we really are not talking about very many Indians because all of the unsold land has been restored to the Indians and all the land which was sold was sold to whites. Isn't that right?

MR. FARR: Well, those facts are true, yes. But in terms of the area in which we are talking about, we are talking about a considerable area of land in which Indians will either be able to move within federal jurisdiction or will be moving within the state jurisdiction and of course, Indians do have allotments within those open areas.

QUESTION: Within the open areas.

MR. FARR: Yes. They do.

QUESTION: But could you clarify one thing? What percentage of the—what portion of this total land was restored in 1934? How much of the original reservation is in dispute?

MR. FARR: I would love to answer that question but I have no idea.

[24] QUESTION: The record does not tell us, I take it.

MR. FARR: No.

QUESTION: But these would be probably noncontiguous parcels, wouldn't they? The would be little islands.

MR. FARR: They are likely to be, right. I mean, depending on the settlement practices and who defaulted and who did not, the lands that would be left available would be likely to be individual tracts. That is correct.

QUESTION: One more last question. Does the record tell us how many Indians live on the lands in dispute?

MR. FARR: I believe that there is a figure stated in one of the opinions below that—I think that the Reservation covers about 7,000. I think that the areas that we are talking about, the counties that we are talking about, the number of Indians is somewhere around 1,600 or 1,700. I think that is reflected in the record.

QUESTION: I see. And those would be Indians that reacquired lands or now occupy lands which were originally—

MR. FARR: Well, not necessarily. Again, they may be Indians who were allotted lands at the time that these areas were opened. When the areas were opened, Indians were first given an opportunity to select allotments within those areas.

QUESTION: Well, wouldn't, by virtue of those allotments, wouldn't that land be Indian country?

MR. FARR: That land is Indian country.

[25] QUESTION: There is no dispute about that.

MR. FARR: No, I don't believe so.

QUESTION: How many Indians occupy land over which there is a dispute? Do we know that?

MR. FARR: I do not know.

QUESTION: And there would be very few, would there not?

MR. FARR: Well, I don't know how many there would be, but I think—I might just say that the principle, I think, extends further than that because jurisdiction, if it only applies on allotments, the Indians, any time they

step off their particular allotments onto territory that is owned by a white settler may at that point be subject to state jurisdiction and that is something that clearly the Indians do not want and which is an interest we feel that we ought to protect in this case.

Turning to the General Allotment Act of 1887 briefly—

QUESTION: In other words, the nonreservation land can be and is Indian country if it is owned by the individual Indians.

MR. FARR: That is correct. That applies in—

QUESTION: And by the same token, or the other side of the same coin, within a Reservation there can be fee simple and non-Indians.

MR. FARR: Well, there can be fee simple and [26] non-Indians in terms of land ownership.

QUESTION: That is what I mean.

MR. FARR: No question. However, for purposes of jurisdiction—

QUESTION: Well, we are talking now about the geographic boundaries of the Reservation.

MR. FARR: That is correct. Now, the definition of Indian country, just to make sure that I have answered your question properly, the definition of Indian country in 1151 includes all areas including patented lands within a Reservation within Indian country and also, Indian allotments outside the boundaries of a Reservation within Indian country.

QUESTION: So within a Reservation, land owned in fee simple by non-Indians is still Indian country.

MR. FARR: That is correct.

QUESTION: Do you know what the relative proportion of whites and Indians is in the area that is disputed?

MR. FARR: If my memory serves me correctly, Mr. Justice White, I think there are somewhere around 16,000 whites and 1,600 Indians.

QUESTION: 16,000 whites and 1,600 Indians.

MR. FARR: I believe that is correct.

We also believe, in addition to the presumptions that I discussed a minute ago, that the General Allotment Act of 1887 has—that the policies and objectives of that are [27] consistent with the principle that an act such as this does not disestablish Reservation boundaries.

Although Respondents in their brief have continually turned the General Allotment Act on its head saying that it embodies the intent of Congress to disestablish Reservations, this Court has considered that precise question in several recent cases and found the opposite intent and we believe the Court correctly identified the intent of the General Allotment Act only last term in *Moe versus Confederated Salish and Kootenai Tribes,* in which you quoted from *Mattz* with approval the following language:

"Its policy, that of the General Allotment Act of 1887, was to continue the Reservation system and the trust status of Indian lands but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted and the trust expired, the Reservation could be abolished." And that is the Act of Congress that I said in answer to your question, Mr. Justice Rehnquist.

Unalloted lands were made available to non-Indians with a purpose in part of promoting interaction between the races and of encouraging Indians to adopt white ways.

QUESTION: When was that Act?

MR. FARR: That is 1887.

QUESTION: '87.

MR. FARR: Right.

[28] And in fact, Respondents have said that this Sioux Act, in fact, followed along from that general plan.

We think that that indicates that the Court has recognized an intent to retain jurisdiction and control over those lands during the trust period with the consideration of whether to end the Reservation to be made at a later time when the assimilation had occurred and we think the Court has noted that even more specifically in the cases in

which we very heavily rely on in our brief. *Seymour* and *Mattz* and also in *DeCouteau,* which distinguishes both cases in a case where sale was made for a sum certain and an agreement was made, as counsel for the Tribe has discussed.

In addition to these guiding principles, we also feel that the legislative history and the administrative treatment that we have set forth in our brief supports the position of the Tribe.

The remaining question then is, what is there sufficient to override this in the materials that the Court has before it?

Most importantly we call the Court's attention to the fact that there is nothing in the Act that says specifically that jurisdiction over these areas was to be given to the state.

In fact, I think, as a reading of the legislative history shows, Congress was really not concerned with the [29] jurisdiction at this point. The pressure on Congress was to open up lands for white settlers for two reasons, one, the settlers wanted the lands and two, the counties wanted a greater tax base.

Both of those objectives could be met perfectly comfortably by Congress by opening lands within the Reservation boundaries without sacrificing the principles of the General Allotment Act of 1887 which was to continue the Reservation during the period of assimilation.

QUESTION: Well, could the counties tax white-owned lands within the Reservation?

MR. FARR: Yes.

I don't believe that there is any dispute about that, but that was considered at that time and I believe, even now, would be considered land that is within the power of the state to tax.

In *DeCoteau,* in fact, discussing the—this particular conflict of policy the Court said, in 1887, the General Allotment Act was enacted in an attempt to reconcile the government's responsibility for the Indians' welfare with the

desire of non-Indians to settle upon Reservation land and we submit in this case that the best way to reconcile those and the way that Congress did reconcile them throughout this period was to continue the Reservation system but open white lands so that they would have a taxable base for the county and [30] the whites would have the additional lands.

For those reasons, as my time is getting short, I will close and simply suggest that the decision of the Court of Appeals should be reversed.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well. Thank you, Mr. Farr.

* * * *

Transcript of Oral Argument at 18-27, *Hagen v. Utah*, 510 U.S. 399 (1994) (No. 96-6281).

* * * *

[18]

ORAL ARGUMENT OF RONALD J. MANN
ON BEHALF OF THE UNITED STATES AS
AMICUS CURIAE SUPPORTING THE PETITIONER

MR. MANN: Thank you, Mr. Chief Justice, and may it please the Court:

The question before the Court is whether the provisions of the 1902 and 1905 acts that opened portions of the Uintah Indian Reservation to settlement by non-Indians operated to exclude from the reservation the lands that were opened to settlement.

QUESTION: Mr. Mann, let me ask you the same question that I asked Mr. Seneca. If all we have before us is the language of the 1902 act, speaking of restoration to the public domain, if land had been restored, would the reservation boundary be excluded, in your view? Was that language clear enough under the Seymour case, and DeCoteau, and some of the others?

MR. MANN: We think it's quite clear that the language would not have been sufficient to alter the boundaries of the reservation. The Court's decision—

QUESTION: How do you explain away Seymour and the other cases indicating that that language is [19] sufficient?

MR. MANN: I don't think that those cases do indicate that the language is sufficient. If I could sort of take you through the cases where this Court has referred to public domain language in statutes affecting reservations, the statute at issue in Seymour actually had also been considered by the Court in an earlier case, United States v. Pelican in 1914, but in both cases the key thing to realize is that the statute does not simply say that the land is being restored to the public domain. It states that the reservation is being vacated and restored to the public domain. Now, the word vacate in our mind carries much

more of a connotation of surrender, or cession of the type that has been required in this Court's later decisions, so that doesn't really seem to us to speak to this issue directly.

QUESTION: I would think that that phrase hurts your case rather than helps it. It shows that restored to the public domain means being taken away from the reservation.

MR. MANN: Well, no, actually—

QUESTION: Being vacated and restored to the public domain. It doesn't mean merely that white settlers are going to be allowed to come in. It means it's off the reservation from now on.

[20] MR. MANN: Well, it suggests that the reservation is being vacated, and there are a number of things that can happen when the reservation is vacated. In this particular instance, the land is being restored to the public domain.

I think that the clearest description—

QUESTION: What does that mean, though, and restored to the public domain? What do you think it means in that context?

MR. MANN: Well, the clearest explanation the Court has given in this context is in footnote 17 of the opinion in Solem, where the Court indicated that the phrase could well have referred to the fact that the lands were being made available for sale to non-Indians.

The reference to public lands in Federal statutes has traditionally referred to lands that are available for sale as opposed to lands owned by the United States that had been set aside for some other use, and that's what the Court in the Solem case referred to. The—stated that a reference to public domain in this context was perfectly consistent with a continuing reservation status.

There's no reason why lands could not be within an Indian reservation and be available for sale to non-Indians. That's the exact thing that happened in each of [21] this Court's cases involving surplus land acts in which the Court held a reservation was not diminished.

QUESTION: And you say that that's the meaning of restored to the public domain, land on reservation which is available for purchase to non-Indians is referred to as public domain.

MR. MANN: It doesn't matter whether it's on a reservation or not, but the phrase, public domain, could be understood to refer to lands that are owned by the United States that are available for sale.

QUESTION: Do you have any instance where—you say it could be. Do you have any instances where it has been, other than this statute?

MR. MANN: The statute at issue in Solem, that's what the Court indicated the most likely understanding of the—

QUESTION: That wasn't the operative language there. That was just—

MR. MANN: No, but the Court did hold that the land was on the reservation. That was the holding of the Court, and the statute stated the land was in the public domain, so the legal effect of the Solem decision is that land which Congress had described specifically as being in the public domain, albeit offhandedly, but in an act that Congress enacted and the President signed, stated that [22] that land was in the public domain, and this Court held that it remained on the reservation.

QUESTION: Well, how about the Rosebud case, where the statute said restored to the public domain resulted—

MR. MANN: Now, in that case also, you'll—if you —when you look at the Rosebud opinion, the statute to which you're referring is not the statute that was at issue before the Court, and the reference occurs in a footnote in the facts statement that described how the Rosebud Sioux Reservation came to the size that was at issue before the 1904, 1907, and 1910 acts, and if you actually look at the statute in that case it becomes fairly clear why the

parties before the Court conceded that the statute altered the boundaries of the reservation.

The title of the statute states that its purpose is to divide a portion of the reservation of the Sioux Nation into separate reservations and to secure the relinquishment of the Indian title to the remainder.

QUESTION: Well, was that mentioned in the opinion?

MR. MANN: I'm not sure whether it was or not.

QUESTION: If it wasn't mentioned in the opinion, it doesn't add anything to your argument, it [23] seems to me, to say there were even additional reasons than those mentioned in the opinion for reaching the result.

MR. MANN: Well, the opinion did not necessarily reach the result. The parties conceded that the reservation —that the land in question there has been removed from the reservation, and the Court was simply summarizing the fact that that—that the land in question was no longer part of the reservation because the Great Sioux Reservation no longer existed, and what remained was the Rosebud Sioux Reservation at issue in the case.

And then the Court went on to consider whether the Rosebud Sioux Reservation had been diminished by the statutes at issue there, so we think that was adequately explained by the fact that the parties would have had no possible basis for suggesting the reservation continued in existence in light of the clear purpose of the statute at hand.

QUESTION: Mr. Mann, in deciding whether the public domain language could mean what you claim it does mean, I suppose we look to intent, and there was a reference to congressional intent a moment ago. The conclusion that was stated was that there was no sort of specific indication, specific to the statutes involved [24] here, of congressional intent.

Isn't it fair to say, however, that if we look further into the state of the congressional enactments at the time

of the 1902, 3, 4, 5 acts, that there was very clearly a policy of the United States, an indication of the policy of the United States in effect to end the reservation system, and shouldn't we read the language in light of that broader policy?

MR. MANN: Well, this Court has had a number of cases that have considered surplus land acts from this period of time, and I think it's fair to say that—

QUESTION: And we declined to do that—

MR. MANN: —in all—in all—

QUESTION: —but were we right, or were we wrong?

MR. MANN: No, I think you were right, because the—what's going on here is, the question of whether reservation boundaries were going to be altered at the time had little practical significance, because the question of criminal jurisdiction turned on the definition of Indian country, which at the time turned solely on who owned the land, so when Congress opened the land to settlement by non-Indians, by that very action it was removing at the time the land from jurisdiction. It didn't have to consider whether it was going to alter the [25] reservation boundaries.

Now, what the Court has done is, it's assumed that if Congress intended to alter reservation boundaries, typically Congress would have stated so specifically, and it's looked very closly to the language of the statutes, and it has had a number of statutes where Congress has quite clearly stated that it intended to alter the boundaries of reservation, and those statutes appear in DeCoteau and Rosebud, and if you look at them, they quite clearly state more or less that the land is being ceded, surrendered, and conveyed, and the Indians are—

QUESTION: Well, certainly, saying more or less is really something of an understatement, because I don't recall in either of those cases that the language said, we intend to alter the boundary of the reservation.

MR. MANN: Well, the language in DeCoteau said that the Indians cede, sell, relinquish and convey to the

United States all their claim, right, title, and interest in the land in question, and the statute in Rosebud stated that the Indians cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all the land in question.

It would be rather difficult, I think, to construe that language as language that allowed the Indians to retain sovereignty over the land.

[26] QUESTION: I think you're probably right, but to —I wouldn't say that to—it is paraphrasing the language you just quoted to say, Congress says we intend to diminish the reservation.

MR. MANN: I think it is paraphrasing the language to say that that is unambiguous language of cession of the reservation from the Indian tribe to the United States.

QUESTION: Well, it was cession, but this was not cession. I mean, Congress can proceed in one of two ways, either by getting the tribe to cede it, or, if the tribe does not wish to cede it under Lone Wolf, simply declaring the reservation ended. You would not expect to have the language of cession when there's been no cession, and that's what it is asserted occurred here.

MR. MANN: Of course, the statute in Rosebud was enacted long after Lone Wolf as well, and the Indians are not consenting Congress used the language of cession. That seems to be—that phrase seems to be the phrase Congress used when it intended to alter the boundaries of a reservation.

QUESTION: Well, when it intended to alter the boundaries of the reservation by cession. That much is clear. But still, isn't it the case that in deciding what to make of the less explicit language, the reference to [27] returns to public domain, that we should construe that in light of the overriding congressional policy, which at the time, as I understand it, was to end the reservation system?

MR. MANN: Well, but the policy was that the reservation system would be ended sometime, because Congress anticipated that it would end the reservation system in the future. The concept was not to end the reservation system directly by these particular statutes. The Court has repeatedly said that some of the statutes ended them, and some of them didn't.

QUESTION: Thank you, Mr. Mann.

* * * *

Supreme Court, U.S.
FILED
SEP 24 1997
CLERK

(21)

No. 96-1581

In the Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF SOUTH DAKOTA, PETITIONER

v.

YANKTON SIOUX TRIBE AND DARRELL E. DRAPEAU

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

SETH P. WAXMAN
Acting Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
BARBARA MCDOWELL
Assistant to the Solicitor General
EDWARD J. SHAWAKER
JUDY RABINOWITZ
TSEMING YANG
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

37 pp

QUESTION PRESENTED

Whether the boundaries of the Yankton Sioux Indian Reservation, as set forth in the 1858 Treaty between the Tribe and the United States, were diminished by the 1894 Act of Congress that ratified the Tribe's agreement to sell surplus reservation lands to the United States while expressly preserving the "full force and effect" of the 1858 Treaty.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
Summary of argument	6
Argument:	
The Yankton Sioux Indian Reservation has not been diminished	8
A. The savings provision of the 1892 Agreement and the 1894 Act precludes any determination that Congress clearly intended to diminish the Reservation	10
B. Other provisions of the 1894 Act do not evince a congressional intent to diminish the Reservation	15
1. The "agency, schools, and other purposes" provision	15
2. The "school sections" provision	16
3. The liquor prohibition	17
C. Events surrounding the 1894 Act do not evince a congressional intent to diminish the Reservation	20
1. The 1892 negotiations	20
2. The congressional debates	22
3. The Presidential proclamation	23
D. Subsequent events do not establish that the Reservation was diminished	24
E. Demographic patterns do not establish diminishment	29
Conclusion	31

TABLE OF AUTHORITIES

Cases: Page

Cihak v. *United States*, 232 F. 551 (8th Cir. 1916) .. 28
Cournoyer v. *Montana*, 512 N.W.2d 479 (S.D. 1994) 28
DeCoteau v. *District County Court*, 420 U.S. 425 (1975) 2, 11, 14, 17, 21, 30
Donnelly v. *United States*, 228 U.S. 243 (1913) 18
Federal Power Comm'n v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949) 13
Forman v. *United States*, 256 F.2d 766 (8th Cir. 1958) 28
Hagen v. *Utah*, 510 U.S. 399 (1994) 9, 10, 14, 21, 23, 24, 25, 27, 28, 30
Mattz v. *Arnett*, 412 U.S. 481 (1973) 3, 9, 10, 20
McClanahan v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973) 8
Montana v. *United States*, 450 U.S. 544 (1981) 15
Oregon Dep't of Fish & Wildlife v. *Klamath Indian Tribe*, 473 U.S. 753 (1985) 12
Perrin v. *United States*, 232 U.S. 478 (1914) .. 24, 27, 28
Rosebud Sioux Tribe v. *Kneip*, 430 U.S. 584 (1977) 8, 9, 10, 12, 14, 16, 17, 19, 21
Solem v. *Bartlett*, 465 U.S. 463 (1984) ..... *passim*
State v. *Thompson*, 355 N.W.2d 349 (S.D. 1984) 28
State v. *Williamson*, 211 N.W.2d 182 (S.D. 1973) 28
State v. *Winckler*, 260 N.W.2d 356 (S.D. 1977) 28
Strate v. *A-1 Contractors*, 117 S. Ct. 1404 (1997) 8
United States v. *Alaska*, 117 S. Ct. 1888 (1997) 13
United States v. *Dion*, 752 F.2d 1261 (8th Cir. (1985) 27
United States v. *McBratney*, 104 U.S. 621 (1881) ... 8
United States v. *Menasche*, 358 U.S. 528 (1955) 13
United States v. *Wheeler*, 435 U.S. 313 (1978) 11
United States Nat'l Bank of Oregon v. *Independent Ins. Agents of America, Inc.*, 508 U.S. 439 (1993) .. 13

Cases—Continued: Page

Walters v. *Metropolian Educ. Enters., Inc.*, 117 S. Ct. 660 (1997) 13
Weddell v. *Meierhenry*, 636 F.2d 211 (8th Cir. 1980), cert. denied, 451 U.S. 941 (1981) 28
Wood v. *Jameson*, 130 N.W.2d 95 (S.D. 1964) 28
Worcester v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832) 8
Yankton Sioux Tribe v. *United States*, 623 F.2d 159 (Ct. Cl. 1980) 28

Treaty and statutes:

Treaty of Apr. 19, 1858, 11 Stat. 743 1
Art. 1, 11 Stat. 744 ..... 1, 2, 7, 11
Art. 4, 11 Stat. 744 ..... 2, 11
Art. 10, 11 Stat. 747 ..... 2, 14
Art. 11, 11 Stat. 747 11
Act of Apr. 11, 1882, ch. 74, § 1, 22 Stat. 43 15
Act of Feb. 8, 1887 (Dawes Act), ch. 119, 24 Stat. 388 2
Act of Feb. 22, 1889, ch. 180, § 10, 25 Stat. 679 16
Act of Mar. 3, 1891, ch. 543, § 31, 26 Stat. 1042 15
Act of July 13, 1892, ch. 164, § 1, 27 Stat. 137 3
Act of Aug. 15, 1894, ch. 290, 28 Stat. 286:
§ 12, 28 Stat. 314:
Art. I, 28 Stat. 314 ..... 3, 6, 11, 12, 13, 14
Art. II, 28 Stat. 315 ..... 3, 6, 11, 12, 13, 14
Art. VIII, 28 Stat. 316 ..... 4, 15
Art. XVII, 28 Stat. 318 ..... 4, 17, 24, 28
Art. XVIII, 28 Stat. 318 .... 4, 6, 7, 11, 12, 13, 14, 15, 23
§ 12, 28 Stat. 319 5
§§ 14-15, 28 Stat. 322-326 12
§ 16, 28 Stat. 331 12
§ 17, 28 Stat. 332-336 12
Act of Feb. 26, 1896, ch. 31, § 1, 29 Stat. 16 26
Act of June 10, 1896, ch. 398, § 1, 29 Stat. 343 26
Act of Apr. 23, 1904, ch. 1484, § 1, Art. V, 33 Stat. 255 12
Act of Mar. 3, 1905, ch. 1479, § 1, 33 Stat. 1068 26
Act of June 21, 1906, ch. 3504, 34 Stat. 371 26

Statutes—Continued: Page

Act of May 29, 1908, ch. 218, § 9, 35 Stat. 464 15
Act of May 30, 1910, ch. 260, § 10, 36 Stat. 451 19
Act of Feb. 13, 1929, ch. 183, 45 Stat. 1167..... 26
Act of July 6, 1954, ch. 463, 68 Stat. 452 26
Bald Eagle Protection Act, 16 U.S.C. 668 *et seq.* 27
Indian Intercourse Act of 1834, ch. 161, § 1, 4 Stat. 729 18
Indian Major Crimes Act, 18 U.S.C. 1153 1
18 U.S.C. 1151 ..... 8, 18
18 U.S.C. 1151 note 18

Miscellaneous:

Felix Cohen, *Handbook of Federal Indian Law* (1942) 25, 26
59 Fed. Reg. (1994):
p. 16,647 27
p. 16,649 27
1 U.S. Dep't of Interior, *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs* (1979) 25

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1581

STATE OF SOUTH DAKOTA, PETITIONER

v.

YANKTON SIOUX TRIBE AND DARRELL E. DRAPEAU

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case concerns the boundaries of the Yankton Sioux Indian Reservation. Those boundaries affect the United States' law enforcement authority under the Indian Major Crimes Act, 18 U.S.C. 1153, and other federal statutes that apply only in Indian country. In addition, the United States, because of its special relationship with the Indian Tribes, has a strong interest in protecting the integrity of reservation boundaries and in promoting tribal self-government within those boundaries.

STATEMENT

1. a. In the Treaty of April 19, 1858, 11 Stat. 743 (the 1858 Treaty), the Yankton Sioux Tribe ceded to the United States its aboriginal lands, about 11 million acres, except for a 430,000-acre Reservation in Charles Mix County in southeastern South Dakota. Art. 1 (Pet. App. 100). The Treaty specifically delineated the boundaries of the Res-

ervation, which was said to consist of "four hundred thousand acres." *Ibid.*[1] In return, the United States agreed, among other things, "[t]o protect the * * * Yanctons in the quiet and peaceable possession of the said tract * * * so reserved for their future home." Art. 4 (Pet. App. 102). The Treaty further provided that "[n]o white person," with some exceptions, "shall be permitted to reside or make any settlement upon any part of the tract herein reserved for said Indians." Art. 10 (Pet. App. 108).

b. Toward the end of the 19th century, Congress began to question the policy, reflected in the 1858 Treaty, of setting aside large tracts of land as permanent homes for Indian Tribes. See *Solem* v. *Bartlett*, 465 U.S. 463, 466 (1984); *DeCoteau* v. *District County Court*, 420 U.S. 425, 431 (1975). Congress was faced at that time with a "continuing demand for new lands for the waves of homesteaders moving west," *Solem*, 465 U.S. at 466, but was constrained by treaty provisions that, like Article 10 of the 1858 Treaty, prohibited white settlement on Indian reservations. In addition, Congress believed that the Indians would benefit from "assimilation into American society," which would be accelerated by their "abandon[ing] their nomadic lives on the communal reservations and settl[ing] into an agrarian economy on privately owned parcels of land." *Ibid.*

In response to those concerns, Congress passed the General Allotment Act, commonly known as the Dawes Act, in 1887. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388. The Dawes Act "empowered the President to allot portions of reservation land to tribal members and, with tribal consent, to sell the surplus lands to white settlers, with the proceeds of these sales being dedicated to the Indians' benefit." *DeCoteau*, 420 U.S. at 432. As this Court has

[1] A subsequent survey determined that the Reservation actually encompassed some 430,000 acres. See Pet. App. 69.

recognized, while the elimination of Indian reservations may have been Congress's ultimate goal, the actual consequence of allotment was often "to continue the reservation system," at least for the time being. *Mattz* v. *Arnett*, 412 U.S. 481, 496 (1973).

c. By 1892, much of the Yankton Sioux Reservation had been allotted to individual members of the Tribe pursuant to the Dawes Act. Pet. App. 71. In that year, Congress appropriated funds for the Secretary of the Interior "to negotiate with any Indians for the surrender of portions of their respective reservations, any agreement thus negotiated being subject to subsequent ratification by Congress." Act of July 13, 1892, ch. 164, § 1, 27 Stat. 137. The Secretary appointed three commissioners to conduct such negotiations with the Yankton Sioux. Pet. App. 71.

The Commissioner of Indian Affairs in the Department of the Interior instructed the commissioners to attempt to acquire all, or at least some portion, of the Tribe's surplus lands on terms that "should be just and equitable to the Indians as well as the United States." J.A. 99. The commissioners were provided with a form of agreement as "an indication of the views" of the Office of Indian Affairs, but were "not required to adhere to [it] absolutely." J.A. 101 (emphasis omitted).

In an agreement dated December 31, 1892 (the 1892 Agreement), the Tribe ceded to the United States, for $600,000, all of its surplus lands. Arts. I & II (Pet. App. 112-113). As the commissioners noted in their report to the Secretary of the Interior, those lands were "not in one body, but scattered over the reservation and mixed up with the allotted lands of the Indians." J.A. 137.[2] The Agree-

[2] The form agreement, which we have lodged with the Clerk of the Court, did not propose to pay the Tribe a sum certain for its lands. Instead, the lands were to be appraised and offered for sale in 160-acre parcels at no less than a specified price per acre. The provision paying

ment reserved from sale to settlers those surplus lands "as may now be occupied by the United States for agency, schools, and other purposes * * * until they are no longer required for such purposes." Art. VIII (Pet. App. 116).

The Agreement, unlike the Office of Indian Affairs form, contained a savings provision, which expressly preserved the Tribe's rights under the 1858 Treaty that created the Reservation:

> Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement, and its ratification by Congress, all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858.

Art. XVIII (Pet. App. 120).[3]

---

the Tribe a flat $600,000 for the lands appears to have been adopted for administrative convenience. The commissioners explained that the appraisal option "would accomplish only about one-third of the work which the Government and the Indians desired to accomplish by this transaction," because only the most desirable land would have sold at or above the minimum price then agreeable to the Tribe. J.A. 136. It then "would have been necessary to enter into a new agreement with [the Tribe], reducing the minimum price" when the land failed to sell. *Ibid*.

[3] In addition, the Agreement contained a provision, insisted upon by the Tribe, prohibiting the selling or giving away of "intoxicating liquors" upon "any of the lands by this agreement ceded and sold to the United States" or "any other lands within or comprising the reservations of the Yankton Sioux * * * as described in the [1858] treaty." Art. XVII (Pet. App. 120).

d. Congress "accepted, ratified, and confirmed" the Agreement without change and incorporated it, together with several other surplus land agreements, into an omnibus Indian appropriations act (the 1894 Act). Act of Aug. 15, 1894, ch. 290, § 12, 28 Stat. 319 (Pet. App. 122). The congressional ratification debates raised various concerns about the Agreement, including whether the purchase price was too high and whether the Indians should be paid only when, or if, the lands were sold to settlers. J.A. 381-382, 403-427, 437-444. But there was no discussion of whether the Agreement, if ratified, would alter the boundaries of the Reservation.[4]

e. On May 16, 1895, President Cleveland issued a proclamation declaring that "all of the lands acquired from the Yankton tribe" by the 1892 Agreement, aside from those reserved for agency, school, and other purposes, were "open to settlement, under the terms of and subject to all the conditions, limitations, reservations, and restrictions contained in said agreement" and all applicable laws. J.A. 456. The proclamation incorporated a "Schedule of Lands within the Yankton Reservation, to be opened to settlement by Proclamation of the President." *Ibid.*

2. In 1993, the Southern Missouri Recycling and Waste Management District (the Waste District) purchased, from a non-Indian, a parcel of land within the original boundaries of the Yankton Sioux Reservation. Pet. App. 91. The Waste District sought to develop the land as a regional solid waste landfill. *Ibid.* After a hearing before the South Dakota Board of Minerals and Environment, at

---

[4] The Act also included various implementing provisions. See Pet. App. 122-124. Those included a requirement that the sixteenth and thirty-sixth sections of each township on the opened lands be "reserved for common-school purposes" and be "subject to the laws of the State of South Dakota." *Id.* at 123.

which the Tribe opposed the landfill, the Waste District obtained a permit for the project. *Id.* at 91-92.

The Tribe then commenced this suit to enjoin construction of the landfill. Petitioner State of South Dakota was joined as a third-party defendant. Pet. App. 93. After trial, the district court concluded that "Congress did not disestablish or diminish the boundaries of the Yankton Sioux Reservation when it ratified the 1892 Agreement with the Yankton Sioux Tribe." *Id.* at 96.[5]

The court of appeals affirmed. Pet. App. 1-65. The majority acknowledged that the provisions in Articles I and II of the Agreement providing for cession of surplus lands in return for a fixed payment might, in other circumstances, indicate congressional intent to diminish a reservation. *Id.* at 14-15. However, the totality of the 1894 Act's text and legislative history—and, in particular, the savings provision of Article XVIII—did not, in the majority's view, establish that Congress intended to diminish the Reservation. *Id.* at 21, 27, 43-44. The dissent argued that the "cession" and "sum certain" language of Articles I and II alone provided sufficient evidence of diminishment. *Id.* at 44.

SUMMARY OF ARGUMENT

Under the Court's surplus land act jurisprudence, only Congress can diminish an Indian reservation. Its intent to do so must appear in the text of the statute itself or be clear from the surrounding circumstances. A congressional intent to diminish is not found lightly, and any ambiguities must be resolved in favor of the Indians.

The text of the 1894 Act, read in light of those principles, does not evince a clear congressional intent to diminish the Yankton Sioux Reservation. To be sure, the Act and the Agreement that it ratified contain language of cession and lump sum payment that, without more, has been held sufficient to establish such intent in other cases. But there *is* more in this case. The savings provision contained in Article XVIII of the Agreement, and incorporated by Congress into the Act, declares that "all provisions" of the 1858 Treaty are to remain "in full force and effect." Article XVIII thus preserves the first Article of the Treaty, which sets forth the boundaries of the Reservation. At a minimum, the savings provision manifests sufficient ambiguity as to Congress's intent regarding the reservation boundaries that the matter must be resolved in favor of the Tribe. That conclusion is reinforced by the provisions of the Agreement and the Act that reserve from sale to settlers those surplus lands occupied by the United States for agency, school, and other purposes; that reserve (but do not grant to the State) township sections for school purposes; and that prohibit the introduction of liquor onto the ceded lands or "any other lands within or comprising" the Reservation as delineated in the 1858 Treaty.

Nor do the course of negotiations with the Tribe, the debates on the 1894 Act, and other surrounding events provide the "unequivocal[]" evidence necessary to demonstrate "a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Solem* v. *Bartlett*, 465 U.S. 463, 471 (1984). Petitioner concedes as much. Pet. Br. 28-29. And tribal members have remained, to this day, a substantial portion of the population within the original reservation boundaries.

Finally, the subsequent treatment of the reservation lands has been "rife with contradictions and inconsistencies." *Solem*, 465 U.S. at 478. However, on two occasions, in 1913 and 1941, when the federal government considered

---

[5] At the same time, the district court found that the Tribe had not demonstrated that it had regulatory authority over the landfill project. Pet. App. 96. The Tribe did not appeal that ruling. *Id.* at 6 n.5.

the issue, it concluded that the Reservation was not diminished. The Court should reach the same conclusion here.

ARGUMENT

THE YANKTON SIOUX INDIAN RESERVATION HAS NOT BEEN DIMINISHED

This Court has recognized that each case involving whether a surplus land act has altered Indian reservation boundaries is unique, because "[t]he effect of any given surplus land Act depends on the language of the Act and the circumstances underlying its passage." *Solem* v. *Bartlett*, 465 U.S. 463, 469 (1984). "[I]t is settled law that some surplus land Acts diminished reservations and other surplus land Acts did not," but instead "simply offered non-Indians the opportunity to purchase land within established reservation boundaries." *Id.* at 469, 470 (citations omitted); see *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 586-587 (1977) ("The mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation status.").[6]

In a series of modern decisions concerning the effects of turn-of-the-century surplus land acts, the Court has followed several "well-established legal principles" in assessing whether such an act has diminished a reservation. *Rosebud Sioux*, 430 U.S. at 586-587; see, *e.g.*, *Hagen* v. *Utah*, 510 U.S. 399, 410-411 (1994); *Solem*, 465 U.S. at 470-472; *Mattz* v. *Arnett*, 412 U.S. 481, 504-505 (1973). The "first and governing principle" is that, "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem*, 465 U.S. at 470. The dispositive question, then, is whether "Congress [has] clearly evince[d] an intent to change boundaries." *Ibid.* (internal quotation marks and ellipses omitted). Its intent to do so "must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz*, 412 U.S. at 505. The "most probative evidence" of such intent is, of course, the actual language of the surplus land act. *Hagen*, 510 U.S. at 411; *Solem*, 465 U.S. at 470.

Second, while events surrounding the passage of a surplus land act are relevant, they rarely are sufficient, in themselves, to establish that Congress intended to alter reservation boundaries if the act itself is silent or ambiguous. *Solem*, 465 U.S. at 471. It is only when such events "unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation" that they can sustain an inference that "Congress shared the understanding that its action would diminish the reservation." *Ibid.*[7]

---

[6] An Indian reservation does not imply total Indian or federal ownership or control of all of the lands within its boundaries. The term instead refers to the geographical area within which the Tribe's authority over its territory and its members is primary. *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832); *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973). It also describes an area in which the federal government exercises criminal jurisdiction in matters affecting Indians, see 18 U.S.C. 1151, and in which the services of the Bureau of Indian Affairs are focused. Reservation status does not eliminate all jurisdiction of the State with regard to non-Indians, especially in their relations with other non-Indians. See, *e.g.*, *Strate* v. *A-1 Contractors*, 117 S. Ct. 1404 (1997); *United States* v. *McBratney*, 104 U.S. 621 (1881).

[7] Moreover, the Court has been "careful to distinguish between evidence of the contemporaneous understanding of the particular Act and matters occurring subsequent to the Act's passage." *Hagen*, 510 U.S. at 411. The latter shed far less light on the intent of the Congress that adopted the act.

Third, the diminishment of an Indian reservation "will not be lightly inferred." *Solem*, 465 U.S. at 470; accord *Hagen*, 510 U.S. at 411. Any ambiguities in the surplus land act, its legislative history, or the surrounding context are to be resolved "in favor of the Indians." *Ibid.*; *Rosebud Sioux*, 430 U.S. at 586 ("[D]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith."). Accordingly, absent "substantial and compelling evidence of a congressional intention to diminish Indian lands," the Court has considered itself "bound by [its] traditional solicitude for the Indian tribes to rule that diminishment did not take place." *Solem*, 465 U.S. at 472.

No such "substantial and compelling evidence" exists here. The text of the 1894 Act, the circumstances surrounding its enactment, and subsequent events do not demonstrate with the requisite clarity that Congress intended to diminish the Yankton Sioux Reservation.

A. The Savings Provision Of The 1892 Agreement And The 1894 Act Precludes Any Determination That Congress Clearly Intended To Diminish The Reservation

Nowhere in the 1894 Act, the underlying 1892 Agreement, or the records of the negotiations and congressional debates is there any express statement that the Reservation was to be "abolished," "discontinued," "vacated," or otherwise disestablished or diminished. Congress used such language in a number of contemporaneous statutes involving Indian reservations. See *Mattz*, 412 U.S. at 504 n.22 (citing such statutes). It chose not to do so here.

In the absence of such language, provisions in a surplus land act that accept a Tribe's "cession" of reservation lands in return for a sum certain, where unqualified by other provisions, have been held sufficient to create a

strong presumption that Congress intended to diminish a reservation. See *Solem*, 465 U.S. at 470-471; *DeCoteau* v. *District County Court*, 420 U.S. 425, 445 (1975). But no such inference is warranted in a case such as this one, in which the ceded lands were scattered over the reservation (see J.A. 137) and Congress, in the same surplus land act, imposed conditions on the transaction that reasonably may be read as preserving the existing reservation boundaries.

The savings provision in Article XVIII of the 1892 Agreement, which Congress incorporated verbatim into the 1894 Act, contains such conditions with respect to the Yankton Sioux Reservation. Article XVIII begins by expansively providing that "[n]othing in this agreement" —necessarily including the cession and lump sum payment provisions of Articles I and II—"shall be construed to abrogate the [1858] treaty." Pet. App. 120. It then further declares that, "after the signing of this agreement, and its ratification by Congress, all provisions of the [1858] treaty * * * shall be in full force and effect, the same as though this agreement had not been made." *Ibid.* No exception is made for the first Article of the 1858 Treaty, which created the Reservation and delineated its boundaries. *Id.* at 100; see also Treaty, Art. 4 (Pet. App. 103) (recognizing that the Reservation was to be the Tribe's "permanent" home). Nor is any exception made for the other provisions in the Treaty that contemplate tribal self-government within the reservation boundaries.[8]

---

[8] For example, Article 11 of the Treaty recognizes the federal government's authority over "matters of dispute and difficulty between [the Tribe] and other Indians," and thus, by implication, the Tribe's authority over internal matters. Pet. App. 108-109. That same article contains the Tribe's agreement to assist in enforcing federal "treaties, laws, or regulations * * * within the limits of [the] reservation." *Id.* at 109. See *United States* v. *Wheeler*, 435 U.S. 313, 322 (1978) (law enforcement authority over tribal members is an inherent aspect of tribal self-government).

Article XVIII is considerably broader than the savings provisions contained in most other Indian agreements. See Pet. App. 16-18 & n.12, 81 (contrasting language of other agreements). It differs significantly from the more common savings provisions that simply preserve "benefits" or rights created under earlier treaties or agreements "*not inconsistent* with the provisions of this agreement." *Rosebud Sioux*, 430 U.S. at 623 (Marshall, J., dissenting) (quoting Rosebud Sioux agreement, Act of Apr. 23, 1904, ch. 1484, § 1, Art. V, 33 Stat. 255) (emphasis added); see *Oregon Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, 473 U.S. 753, 760-761 (1985) (quoting similar savings provision).[9]

Petitioner offers three reasons why Article XVIII should not be read to rebut any presumption created by the cession and lump sum payment language of Articles I and II. Pet. Br. 20-28. None of those arguments has merit.

First, petitioner contends (Br. 21-22) that Article XVIII should be construed solely "to preserve the annuities due the Tribe under the Treaty of 1858." But Article XVIII concludes with a separate clause specifically providing that "the said Yankton Indians shall continue to receive their annuities under the [1858] treaty." Pet. App. 120. Petitioner's proposed construction would render superfluous all of the preceding language of Article XVIII, in contravention of the canon that "[s]tatutes must be inter-

[9] None of the other surplus land agreements ratified along with the 1892 Agreement contains a similar savings provision. The agreements with the Cour d'Alene, Alsea, and Yuma Indians contain no savings provision at all. See Act of Aug. 15, 1894, ch. 290, §§ 14-15, 17, 28 Stat. 322-326, 332-336. The agreement with the Nez Perce Indians contains a provision that preserves those portions of earlier treaties "not inconsistent with the provisions of this agreement." § 16, 28 Stat. 331. A brief amicus curiae has been filed by Lewis County, Idaho, arguing that the Nez Perce agreement diminished that Tribe's Reservation. That issue is not before the Court or, indeed, before any court at this time.

preted, if possible, to give each word some operative effect." *Walters* v. *Metropolitan Educ. Enters., Inc.*, 117 S. Ct. 660, 664 (1997); see *United States* v. *Alaska*, 117 S. Ct. 1888, 1918 (1997) ("The Court will avoid an interpretation of a statute that renders some words altogether redundant.") (internal quotation marks omitted).[10]

Second, petitioner contends (Br. 23-24) that Article XVIII, aside from its annuity clause, should be disregarded because it is "ambiguous" or "inconsistent." Principally, petitioner argues that Article XVIII's preservation of "all provisions" of the 1858 Treaty is inconsistent with Articles I and II, because the 1858 Treaty gave the Tribe "possession" of all reservation lands whereas Articles I and II transfer possession of some of those lands to the United States. But the appropriate judicial response to tension between different provisions of the same statute is not to read one of those provisions out of the statute. This Court has stressed that "[s]tatutory construction is a holistic endeavor," which, "at a minimum, must account for a statute's full text." *United States Nat'l Bank of Oregon* v. *Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 455 (1993) (internal quotation marks omitted); see *Federal Power Comm'n* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 514 (1949) ("If possible, all sections of the Act must be reconciled so as to produce a symmetrical whole."). It is thus essential "to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section," *United States* v. *Menasche*, 358 U.S. 528, 538-539 (1955)

[10] Moreover, while the historical materials cited by petitioner (Br. 21-23) demonstrate that some members of the Tribe were concerned at the time of the 1892 negotiations with the preservation of their annuities, they do not suggest that Article XVIII was drafted solely to address those concerns.

(internal quotation marks omitted), as petitioner would do here.

The 1894 Act may readily be construed to give effect to Article XVIII as well as Articles I and II. As the court of appeals recognized, all three provisions may be reconciled by construing the Act as conveying certain real property within the Reservation to the United States, for subsequent sale to non-Indian settlers, while preserving "as much of [the 1858] treaty as possible." Pet. App. 20-21. In other words, the Agreement and the Act may reasonably be read as simply opening the surplus lands for settlement "within established reservation boundaries," *Solem*, 465 U.S. at 470, while preserving those boundaries and the Tribe's right of self-government within them. The Agreement thus modifies only that portion of Article 10 of the 1858 Treaty that excluded white settlers from the Reservation.

We submit that ours is the most plausible "holistic" construction of the Act. But even if petitioner's strained construction, which essentially reads Article XVIII out of the Act, were deemed equally plausible, our construction must prevail. At a minimum, Article XVIII renders the Act sufficiently ambiguous that the diminishment question must be resolved in favor of the Tribe. See *Hagen*, 510 U.S. at 411; *Rosebud Sioux*, 430 U.S. at 586.

Finally, petitioner notes (Br. 26-28) that the Court did not accord significance to savings provisions in holding against diminishment in *Solem* or in favor of diminishment in *DeCoteau*. But the Court's silence is hardly surprising, given that neither the parties to those cases nor the United States as amicus curiae based their arguments on any savings provision. Nor did they have reason to do so. The surplus land act at issue in *DeCoteau* did not even contain a savings provision. See 420 U.S. at 455-460 (reprinting agreement as ratified). And the savings provision in *Solem*'s surplus land act was weaker than the one here. See Act of May 29, 1908, ch. 218, § 9, 35 Stat. 464 ("nothing in this Act shall be construed to deprive the said Indians * * * of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this Act").[11] In any event, because each surplus land act case is *sui generis*, turning on the particular "language of the Act and the circumstances underlying its passage," *Solem*, 465 U.S. at 469, no conclusion could properly be drawn from the Court's failure to address a different savings provision in a different surplus land act passed under different circumstances.

B. Other Provisions Of The 1894 Act Do Not Evince A Congressional Intent To Diminish The Reservation

Other provisions of the 1892 Agreement and the 1894 Act reinforce the conclusion, drawn from the savings provision of Article XVIII, that Congress did not clearly manifest an intent to diminish or disestablish the Reservation.

1. *The "agency, schools, and other purposes" provision.* Article VIII of the Agreement reserved from sale to settlers those surplus lands "as may now be occupied by the United States for agency, schools, and other purposes * * * until they are no longer required for such purposes." Pet. App. 116. The Court viewed a virtually identical provision in *Solem* as "strongly suggest[ing]" that Congress did not intend to diminish the reservation,

---

[11] Petitioner also notes (Br. 26-27) that the Court observed in *Montana* v. *United States*, 450 U.S. 544, 548 (1981), that a series of surplus land acts had "reduced" the Crow Reservation. Although not mentioned by the Court, two of those acts contained savings provisions. Act of Mar. 3, 1891, ch. 543, § 31, 26 Stat. 1042; Act of Apr. 11, 1882, ch. 74, § 1, 22 Stat. 43. However, given that the construction of the surplus land acts was not at issue in *Montana*, the Court's statement has no relevance here.

because "[i]t is difficult to imagine why Congress would have reserved lands for such purposes if it did not anticipate that the opened areas would remain part of the reservation." 465 U.S. at 474. The same is true here.

2. *The "school sections" provision.* The 1894 Act contains a provision (not contained in the underlying 1892 Agreement) excepting from sale to settlers "the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common-school purposes and be subject to the laws of the State of South Dakota." Pet. App. 123. Petitioner notes that a provision in the surplus land act in *Rosebud Sioux*, which "grant[ed]" the sixteenth and thirty-sixth sections to South Dakota for common schools, was held to indicate diminishment. See 430 U.S. at 600-602. But the Court's rationale in *Rosebud Sioux* is inapplicable here.

As the Court noted in *Rosebud Sioux*, the enabling act admitting South Dakota to the Union provided that the sixteenth and thirty-sixth sections of each township "are hereby granted to [the] State[] for the support of common schools." 430 U.S. at 599 (quoting Act of Feb. 22, 1889, ch. 180, § 10, 25 Stat. 679). That act further provided, however, that when those sections were "embraced in permanent [Indian] reservations," they "shall not, at any time, be subject to the grants * * * until the reservation shall have been extinguished." *Id.* at 599-600 (quoting § 10, 25 Stat. 679). The Court relied primarily on the legislative history of the *Rosebud Sioux* surplus land act to conclude that its school sections provision was intended to implement the school sections provision of the enabling act, and thus that the surplus land act extinguished the reservation status of the land so as to trigger the grant in the enabling act. See *id.* at 600-601 (quoting statement in congressional reports that school sections provision "is in conformity with the guarantee given to the State of South

Dakota by Congress in the enabling act"). No such legislative history exists here.

Nor does the 1894 Act contain the express "grant" language of the *Rosebud Sioux* surplus land act that was held to have implemented the South Dakota enabling act. To the contrary, the 1894 Act simply "reserve[s]" the sixteenth and thirty-sixth sections from settlement without taking the further step of granting them to the State, as contemplated by the enabling act when an Indian reservation is extinguished. Indeed, if the school sections were granted to the State and the Reservation extinguished, there would have been no need for Congress to provide, as it did in the same clause of the 1894 Act, that those sections "shall * * * be subject to the laws of the State of South Dakota." Pet. App. 123. Accordingly, the most natural reading of the school sections provision is that it simply authorizes the State to operate common schools for Indian and non-Indian students on specified lands within the reservation boundaries. At the very least, petitioner errs in contending that the school sections provision affirmatively supports a finding of diminishment. See *DeCoteau*, 420 U.S. at 445-446 n.33 (discussing similar provision).

3. *The liquor prohibition.* The Agreement and the Act also contain a provision that "[n]o intoxicating liquors * * * shall ever be sold or given away upon any of the lands by this agreement ceded and sold to the United States, nor upon any other lands within or comprising the reservations of the Yankton Sioux * * * as described in the [1858] treaty." Art. XVII (Pet. App. 120). Petitioner notes that the Court held that a liquor prohibition in the *Rosebud Sioux* surplus land act indicated diminishment of the reservation. See 430 U.S. at 613-614. The Court reasoned that Congress must have assumed that the opened lands would no longer be Indian country, and thereby

subject to the existing statute prohibiting liquor in Indian country, because otherwise the provision would have been mere surplusage.

There is, however, an equally plausible explanation for why Congress would have included such a provision in the 1894 Act without intending to diminish the Reservation. The term "Indian country," which was not statutorily defined in 1894, was understood to exclude all lands held by non-Indians, even if located within reservation boundaries. See *Solem*, 465 U.S. at 468.[12] It was thus uncertain whether such lands would continue to be covered by the general statute banning liquor in Indian country. Special provisions like that contained in the 1894 Act eliminated any such uncertainty.

It is noteworthy as well that the liquor prohibition in the 1894 Act applies not to the opened lands alone, but to *all* lands within the original reservation boundaries, including lands held by the Tribe that indisputably would

[12] The term "Indian country," currently defined in 18 U.S.C. 1151, can be traced back to early statutes regulating Indian affairs. In the Indian Intercourse Act of 1834, Congress designated as Indian country all land west of the Mississippi River, not including Missouri, Louisiana, and the Arkansas Territory, and all land east of the Mississippi that was not part of any State, "to which the Indian title has not been extinguished." Ch. 161, § 1, 4 Stat. 729. Changing historical circumstances rendered that definition obsolete. In 1874, the compilers of the Revised Statutes omitted any statutory definition of Indian country, while leaving intact the numerous statutory provisions that used that term. From 1874 to 1948, the task of defining Indian country was left to the judiciary. In the early part of this century, the Court issued a series of decisions that form the basis for Section 1151. See 18 U.S.C. 1151 note. Thus, Section 1151 was, in part, an outgrowth of *Donnelly* v. *United States*, 228 U.S. 243 (1913), which eliminated the requirement that Indian country "be confined to land formerly held by the Indians, and to which their title remains unextinguished." *Id.* at 269. "Only in 1948," with the enactment of Section 1151, "did Congress uncouple reservation status from Indian ownership." *Solem*, 465 U.S. at 468.

remain subject to the general statute banning liquor in Indian country. Congress thus appears to have been concerned simply with adopting a clear, specific, and *permanent* ban on the selling or giving away of liquor anywhere within the Reservation.[13]

Significantly, moreover, because the Act prohibits liquor on "the lands by this agreement ceded and sold to the United States" as well as "any *other* lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the [1858] treaty" (Pet. App. 120) (emphasis added), the Act appears to contemplate that the ceded lands would remain "within" the Reservation. The liquor provision in *Rosebud Sioux* contained no such description of the surplus lands as being within the reservation.

Petitioner apparently reads the liquor prohibition's reference to the 1858 Treaty as simply an identification of which lands were subject to the prohibition, not as an indication that all such lands would retain their reservation status. But that is not the most natural reading. It is further undermined by the background of the liquor prohibition, which was included in the 1892 Agreement only because the Tribe had "demand[ed]" it. J.A. 154-155.[14] The commissioners explained that the Tribe had made it an "imperative condition" of the sale of its surplus lands "that whisky should be excluded," because the Tribe "fear[ed] that upon the opening of the Yankton Reserva-

[13] The 25-year liquor prohibition in *Rosebud Sioux* similarly applied to "lands allotted" and "those retained or reserved," as well as to "the surplus land sold, set aside for town-site purposes, granted to the State of South Dakota, or otherwise disposed of." Act of May 30, 1910, ch. 260, § 10, 36 Stat. 451.

[14] That was not the case with the liquor prohibition included 16 years later in the *Rosebud Sioux* surplus land act. See 430 U.S. at 611 (provision recommended by Secretary of Interior).

tion to settlement by white people, drinking saloons would be established in their midst." J.A. 154. That account conveys a clear sense that the Tribe believed that the Reservation would retain its identity and Indian character. The commissioners endorsed the Tribe's condition in terms that reinforce that understanding: they expressed the "hope that Congress will fix a penalty for the violation of this provision which will make it most effective in preventing the introduction of intoxicants *within the limits of the reservation*." J.A. 154-155 (emphasis added).[15]

Thus, far from supporting a finding of congressional intent to diminish the Reservation, as petitioner asserts, the liquor prohibition, like the school sections provision, affirmatively supports a contrary finding. But even if the school sections and liquor provisions were the same as those in *Rosebud Sioux*, the Court has since made clear that such provisions are "suspect" as "independent evidence of a congressional intention to diminish." *Solem*, 465 U.S. at 475 n.18.

C. Events Surrounding The 1894 Act Do Not Evince A Congressional Intent To Diminish The Reservation

The events surrounding the negotiation of the 1892 Agreement and the adoption of the 1894 Act do not demonstrate the requisite clear intent to diminish the Yankton Sioux Reservation. *Mattz*, 412 U.S. at 505. Indeed, petitioner essentially concedes (Br. 28) that such intent could not be established based on contemporaneous events alone.

1. *The 1892 negotiations.* The record of the negotiations with the Yankton Sioux contains none of the sorts of

[15] Congress responded by including penalties for the introduction of liquor "upon any of the lands by said agreement ceded, or upon any of the lands included in the Yankton Sioux Indian Reservation as created by the [1858] treaty." Pet. App. 124.

statements by federal negotiators or tribal members that, in other cases, have been found to reflect a widely held understanding that a reservation was to be diminished. In *Rosebud Sioux*, for example, the Court noted the federal negotiator's statement to the Tribe that its cession of certain lands "will leave your reservation a compact, and almost square tract, and would leave your reservation about the size and area of Pine Ridge Reservation." 430 U.S. at 591-592. Similarly, the Court noted in *Hagen* that the federal negotiator had informed the Tribe that "after next year there will be no outside boundary line to this reservation." 510 U.S. at 417. And in *DeCoteau*, the Court noted a tribal spokesman's acknowledgment that the reservation "was given us as a permanent home, but now we have decided to sell." 420 U.S. at 436-437 n.16.

No similar understanding that the Yankton Sioux Reservation was to be diminished can be discerned from the statements cited by petitioner. See Pet. Br. 29-30. Commissioner Cole's assertions that "[t]he reservation alone proclaims the old time and the old conditions," and that "[t]he tide of civilization * * * requires the sale of these surplus lands and the opening of this reservation to white settlement," are fully consistent with an intent to open surplus lands to non-Indian settlement within existing reservation boundaries. Commissioner Brown's statement that "[t]he time is past when you could stay in your present condition" likewise does not suggest any immediate extinguishment of the Reservation. He may simply have been expressing the view that the Tribe must have greater contact with non-Indian society in order to achieve the goal of self-sufficiency contemplated by the 1858 Treaty. Nor does the recognition by the commissioners and tribal members that the Agreement would effect a "sale" of surplus lands (see Pet. Br. 29) suggest any

understanding that the reservation boundaries would thereby be altered.

Other contemporaneous statements suggest, if anything, that the commissioners and the Tribe did *not* understand that the Reservation would be diminished. In their final report to the Secretary of the Interior, for example, the commissioners observed that the Agreement would bring about "[t]he settlement *of the reservation* by white people." J.A. 150 (emphasis added). And in a letter to one of the commissioners shortly after the Agreement was signed, Reverend Williamson, a missionary who was well-regarded among the Yankton Sioux, found "no cause of apprehension that this agreement will *in any way* interfere with the treaty of 1858." J.A. 317-318 (emphasis added).

2. *The congressional debates.* The congressional debates on the 1894 Act fail to demonstrate any intent to diminish the Reservation. The discussions focused primarily on the fiscal consequences of the government's agreeing to pay a sum certain for the surplus land at the outset rather than to pay only when, or if, the land was sold to settlers. See J.A. 406-427, 437-444. As Representative Pickler of South Dakota, a member of the Indian Affairs Committee and a supporter of the Agreement, stated during the House debates:

> The only question is whether we will settle up with the Indians now or keep books with them and pay them hereafter as the lands are sold, supposing they would so agree.

J.A. 427; see J.A. 432 (Rep. Maddox, an opponent of ratification, agrees that "[t]he question is whether we are willing to advance the money"). Nothing in the record indicates that Congress believed that the answer to that question would affect the future boundaries of the Reservation. See Pet. App. 15-16 ("the House debate" and

other contemporaneous statements "all show that a sum certain price was included for reasons other than issues of jurisdiction and sovereignty").

Petitioner identifies no statement during the congressional debates that expressly addresses the status of the reservation boundaries. Instead, petitioner relies (Br. 31-32) on statements by two Representatives that the opened lands would become part of the "public domain." See J.A. 380, 386 (Reps. McRae and Hermann). However, isolated floor statements referring to the "public domain," especially when no such references appear in the text of the Act itself, shed little light on the diminishment question. See *Solem*, 465 U.S. at 475 & n.17; see also *Hagen*, 510 U.S. at 413.[16]

3. *The Presidential proclamation.* The post-enactment proclamation of the President opening the surplus lands for settlement also indicates that those lands were to remain within the Reservation. The proclamation refers to, and incorporates by reference, a "Schedule of Lands *within the Yankton Reservation*, South Dakota, to be opened to settlement by Proclamation of the President." J.A. 456 (emphasis added). The proclamation further states that the lands were being opened "under the terms of and subject to all the conditions, limitations, reservations, and restrictions contained in [the 1892] agreement." *Ibid.* Those "restrictions" and "reservations" necessarily included the Article XVIII savings provision preserving the "full force and effect" of the 1858 Treaty establishing the Reservation.

---

[16] Moreover, another member of Congress expressed the view that the opened lands would "[n]ot necessarily" become a part of the "public domain" upon their purchase by the United States. J.A. 382-383 (statement of Rep. Lynch).

D. Subsequent Events Do Not Establish That The Reservation Was Diminished

The Court has recognized that evidence of the government's subsequent treatment of the lands opened by a surplus land act is of only limited value in assessing whether Congress intended to diminish a reservation. *Solem*, 465 U.S. at 471. It has never been found sufficient, in itself, to establish such an intent. Moreover, where the treatment of the opened lands has been "rife with contradictions and inconsistencies," such evidence is "of no help." *Id.* at 478; see also *Hagen*, 510 U.S. at 420.

The federal government's conduct with respect to the Yankton Sioux Reservation, while not entirely consistent, suggests that no diminishment was intended. Most significantly, on two occasions when the federal government squarely considered the question, it concluded that the Reservation was not diminished.

First, as early as 1913, in its brief in *Perrin* v. *United States*, 232 U.S. 478 (1914), the United States took the position that the Reservation had not been diminished. In arguing the validity of the liquor prohibition contained in Article XVII of the 1892 Agreement, the United States stated:

> And the "Reservation" referred to in Article I [of the Agreement] (as enduring then and after the passage of the act) was necessarily that embraced in the original boundaries of the 400,000 acres [under the 1858 Treaty].

U.S. Br. at 7-8, *Perrin* v. *United States*, No. 707 (O.T. 1913). In other words, the Reservation not only "endur[ed]" after the 1894 Act, but continued to encompass all of the lands within the 1858 Treaty boundaries. See also *id.* at 19-20 (describing ceded lands as within "actual physical boundaries of the reservation"). The petitioner

took the same position. See *Perrin* Transcript of Record at 28.

Second, in 1941, Felix Cohen, then-acting Solicitor of the Department of the Interior and author of the authoritative *Handbook of Federal Indian Law* (1942), issued a carefully considered opinion letter concluding that the boundaries of the Yankton Sioux Reservation had not been changed by the 1894 Act. See 1 U.S. Dep't of Interior, *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs* 1063 (1979). His conclusion rested primarily on the fact that the 1894 Act, in contrast to other surplus land acts, provided for the allotment to tribal members of lands "scattered over all the reservation," rather than "ced[ing] a definite part of the reservation and treat[ing] the remaining area as a diminished reservation." *Id.* at 1064. Solicitor Cohen noted (*ibid.*) that events since the passage of the Act had not undermined his conclusion that the Reservation had not been diminished:

> Since the 1892 agreement there has been no redefinition by Congress of the Yankton Reservation nor determination that the reservation no longer exists. On the contrary, the reservation was referred to as a still existing unit in the acts of April 29, 1920 (41 Stat. 1468), and June 11, 1932 (47 Stat. 300).[17]

---

[17] Petitioner argues (Br. 42-44) that Acting Solicitor Cohen's opinion is inconsistent with opinions issued by other members of the same office. Those opinions, however, either assume diminishment without analysis (see J.A. 492) or were issued by a subordinate officer, an associate solicitor (see J.A. 518). See *Hagen*, 510 U.S. at 420 (rejecting reliance on "merely passing references" to diminishment). The Cohen opinion has never been retracted or superseded. The official position of the Department of Interior remains that the Reservation was not diminished.

We do not dispute that Congress, the Executive, and the federal courts may not always have been consistent in their statements with respect to the status of the Yankton Sioux Reservation. Congress, for example, has occasionally used the term "former" in its post-1894 references to the Reservation. See Pet. Br. 44. More often, however, it has not.[18] While federal officials have sometimes made statements indicating that the Reservation was diminished (see Pet. Br. 41-44), those statements appear to be "merely passing references," and "not deliberate expres-

---

Nor is there any inconsistency, as petitioner suggests (Br. 43), between Felix Cohen's 1941 opinion and his 1942 citation of *Perrin* for the proposition that Congress has the authority to impose "liquor restrictions on lands ceded to [the United States] by the Indians when these lands adjoined Indian country." *Handbook of Federal Indian Law* 353 & n.26. As explained on the next page of that treatise, Cohen was relying on a definition of "Indian country" as "all lands and reservations, Indian title to which has not been extinguished." *Id.* at 354 n.32. Under such a definition, tribal lands purchased by the United States or non-Indian settlers would no longer be Indian country, whether or not within an existing reservation.

[18] See, *e.g.*, Act of Feb. 26, 1896, ch. 31, § 1, 29 Stat. 16 (one-year leave of absence for "settlers who made settlement under the homestead laws upon lands in the Yankton Indian Reservation"); Act of June 10, 1896, ch. 398, § 1, 29 Stat. 343 (appropriation for "artesian well or wells at or near Lake Andes, on the Yankton Indian Reservation"); Act of Mar. 3, 1905, ch. 1479, § 1, 33 Stat. 1068 (authorizing use of "land reserved for agency purposes on the Yankton Indian Reservation" as tribal park); Act of June 21, 1906, ch. 3504, 34 Stat. 371 (appropriation for "artesian well or wells at or near Lake Andes, on the Yankton Indian Reservation"); Act of Feb. 13, 1929, ch. 183, 45 Stat. 1167 (restoration to Tribe of "lands on the Yankton Sioux Indian Reservation * * * now reserved for agency, schools, and other purposes"); Act of July 6, 1954, ch. 463, 68 Stat. 452 (preamble) (authorizing funds for removal and resettlement of "the Indians of the Yankton Indian Reservation" residing on lands taken for water project).

sions of * * * conclusions about congressional intent in [1894]." *Hagen*, 510 U.S. at 420.[19]

Similarly, the federal cases on which petitioner relies (Br. 33-34) neither turned on the diminishment question nor presented any extended analysis of that question. For example, while petitioner asserts (Br. 33) that the diminishment analysis in this case is "controlled" by *Perrin*, the Court had no occasion in that case to decide whether the reservation boundaries had been diminished. The case concerned whether Congress had exceeded its authority in prohibiting liquor sales on lands opened by the 1894 Act. 232 U.S. at 483. The Court concluded that it had not. *Id.* at 485. Accordingly, since the Court did not hold that Congress's authority to prohibit liquor was limited to

---

[19] For example, petitioner notes (Br. 38, 44) the United States' statement 12 years ago in a footnote in a brief that, based on decisions of state courts in South Dakota, the Reservation had been diminished by the 1894 Act. See U.S. Br. at 17 n.10, *United States* v. *Dion*, 752 F.2d 1261 (8th Cir. 1985) (en banc). The boundaries of the Reservation were, however, immaterial to the issue in that case, which instead concerned whether the Bald Eagle Protection Act, 16 U.S.C. 668 *et seq.*, abrogated the Tribe's rights to hunt bald or golden eagles. The court of appeals did not make any determinations regarding reservation boundaries, since the violations had occurred on trust lands, and left unresolved whether the conduct at issue had "occurred on the Yankton Sioux Reservation." 752 F.2d at 1270. Indeed, the defendant tribal members in *Dion* maintained that their conduct had occurred on the "Yankton Sioux Reservation," thereby asserting its continued existence. *Id.* at 1263.

Petitioner also points (Br. 44) to a Federal Register notice in which the Environmental Protection Agency expressed its "belie[f]" that "the State of South Dakota has sufficiently demonstrated that the Yankton Sioux Reservation was disestablished by the Act of 1894." Yet, the very title of that notice—"Notice of *tentative* determination"— indicates that it should not be accorded significant weight. 59 Fed. Reg. 16,647, 16,649 (1994) (emphasis added). In any event, as petitioner acknowledges (Br. 44), EPA has since rejected that tentative belief.

Indian reservations, the Court did not have to decide whether the ceded lands were, in fact, within the Reservation. The Court's description of the ceded lands as "formerly included in the Yankton Sioux Indian Reservation" (*id.* at 480) is merely a "passing reference" that does not indicate any analysis of the diminishment issue. See *Hagen*, 510 U.S. at 420.[20]

To be sure, the State has asserted jurisdiction over the opened lands on the Reservation. See Pet. App. 33, 38. As this Court has recognized, however, such an assertion of jurisdiction, while of "some evidentiary value," is not dispositive of Congress's intent. *Solem*, 465 U.S. at 471. That is particularly so where, as here, there is countervailing evidence from Congress and the Executive Branch.[21]

---

[20] The subsequent federal cases cited by petitioner (Br. 34, 38) merely assumed diminishment, without any independent assessment, and did not turn on the resolution of that question. See, *e.g.*, *Cihak* v. *United States*, 232 F. 551 (8th Cir. 1916) (dicta) (application of Article XVII); *Forman* v. *United States*, 256 F.2d 766 (8th Cir. 1958) (dicta) (allotment claim); *Yankton Sioux Tribe* v. *United States*, 623 F.2d 159, 165 (Ct. Cl. 1980) (dicta) (land and trust fund claims related to 1894 Act); *Weddell* v. *Meierhenry*, 636 F.2d 211, 213 n.2 (8th Cir. 1980) (dicta) (dependent Indian community), cert. denied, 451 U.S. 941 (1981).

[21] Petitioner also cites (Br. 35-36) several opinions of the South Dakota Supreme Court that state that the Reservation was diminished. Some predate this Court's recent decisions clarifying the criteria for assessing diminishment. The rest simply rely, without further analysis, on the earlier opinions. See *State* v. *Williamson*, 211 N.W.2d 182, 183 (S.D. 1973) (analogizing 1892 Agreement to ordinary conveyance); *Wood* v. *Jameson*, 130 N.W.2d 95, 99 (S.D. 1964) (summarily holding that Reservation was diminished); *State* v. *Winckler*, 260 N.W.2d 356, 360 (S.D. 1977) (citing *Williamson*); *State* v. *Thompson*, 355 N.W.2d 349, 350-351 (S.D. 1984) (citing *Williamson*); but see *Cournoyer* v. *Montana*, 512 N.W.2d 479, 479 (S.D. 1994) (referring to "physical confines of the Yankton Sioux Tribe reservation").

In sum, as the court of appeals observed, government entities' treatment of the Reservation has been "mixed." Pet. App. 35. At a minimum, then, one must conclude, as in *Solem*, that the evidence is too "rife with contradictions and inconsistencies" to establish that Congress intended to diminish the Reservation. 465 U.S. at 478.

E. Demographic Patterns Do Not Establish Diminishment

Petitioner relies (Br. 48-49) on demographic patterns as additional evidence of intent to diminish the Reservation. But "[t]here are * * * limits to how far [the Court] will go to decipher Congress' intention in any particular surplus land Act." *Solem*, 465 U.S. at 472. The Court has never held a reservation to have been diminished based on demographic factors alone.

To the extent that demographic evidence can shed any light on the intent of the Congress that adopted a surplus land act, the most probative evidence is from the years immediately after the adoption of the act. Here, such evidence is, as the court of appeals charitably put it, "somewhat incomplete." Pet. App. 41. The 1900 census did not separately identify the population within the boundaries of the Reservation as defined by the 1858 Treaty. It identified only the population of Charles Mix County, less than half of which falls within those boundaries. Those figures show that the County had 1,483 Indian residents and 7,015 non-Indian residents five years after the opening of the Reservation. Even assuming, as did the court of appeals, that the mix of Indians and non-Indians was the same throughout the County, Indians would still have constituted about 40 percent of the population within the original Reservation boundaries. *Ibid.*[22] This is not the

---

[22] It is reasonable to assume that most Indians lived on the Reservation in 1900, rather than elsewhere in the County. Indeed, at the

sort of situation described in *Hagen* and *Solem*—"an area [that] is predominately populated by non-Indians with only a few surviving pockets of Indian allotments"—that would be probative of congressional intent to diminish a reservation. *Hagen*, 510 U.S. at 420-421; *Solem*, 465 U.S. at 471-472.

Even today, "between 32 and 44 percent of the people within the 1858 boundaries are Indians," depending on whether one uses 1990 census figures or the Tribe's own figures. Pet. App. 42. That is a significantly higher percentage than on the Lake Traverse Reservation, which the Court held to have been disestablished in *DeCoteau*, where Indians constituted only 9 percent of the population. See 420 U.S. at 428. And it is more than twice the percentage of Indians within the original reservation boundaries in *Hagen*. See 510 U.S. at 421. In short, the territory within the boundaries of the Yankton Sioux Reservation has not lost its "Indian character."

---

time of the 1990 census, only eight of the 1,994 Indians in the County lived outside the Reservation. Pet. App. 42-43.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

SETH P. WAXMAN
Acting Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
BARBARA MC DOWELL
Assistant to the Solicitor General
EDWARD J. SHAWAKER
JUDY RABINOWITZ
TSEMING YANG
Attorneys

SEPTEMBER 1997

Supreme Court, U.S.
FILED
AUG 7 1997
CLERK

No. 96-1581

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STATE OF SOUTH DAKOTA,
Petitioner,
v.

YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,
Respondents,
and

SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF CITIES DANTE, GEDDES, LAKE ANDES, PICKSTOWN, PLATTE, RAVINIA AND WAGNER, *AMICI CURIAE*, IN SUPPORT OF PETITIONER, STATE OF SOUTH DAKOTA

TIMOTHY R. WHALEN
WHALEN LAW OFFICE, P.C.
P.O. Box 127
Lake Andes, SD 57356
Telephone: (605) 487-7645
Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

49 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI* CITIES	1
A. Early History	2
B. City History	3
C. Demographics and the Surrounding Area	7
D. Conflicts and Confusion	8
SUMMARY OF ARGUMENT	12
ARGUMENT	13
I. THE AGREEMENT IN THE *YANKTON* CASE NOW BEFORE THIS COURT IS THE "FUNCTIONAL TWIN" OF THE AGREEMENT AT ISSUE IN *DeCOTEAU v. DISTRICT COUNTY COURT*, AND THEREFORE THIS COURT SHOULD REVERSE ON THE BASIS OF *DeCOTEAU*	13
II. FACTORS DEMONSTRATING THE YANKTON AND SISSETON AGREEMENTS ARE FUNCTIONAL TWINS	15
III. ADDITIONAL PROVISIONS IN THE YANKTON AGREEMENT AND FACTORS IN THE SUBSEQUENT HISTORY OF THE YANKTON SIOUX TRIBAL GOVERNMENT MAKE THE YANKTON ARGUMENT FOR DISESTABLISHMENT EVEN STRONGER	20
IV. HISTORICAL DOCUMENTATION CONFIRMS THAT THE NEGOTIATORS AND THE YANKTON INDIANS EQUATED THE SISSETON-WAHPETON AGREEMENT WITH THE YANKTON AGREEMENT	23
V. SECONDARY SOURCES SHOULD ALWAYS BE CAREFULLY SCRUTINIZED	24

TABLE OF CONTENTS—Continued

	Page
VI. THE NEW POST-*HAGEN* POSITION OF THE UNITED STATES PROMISES NIGHTMARISH CONSEQUENCES AND IS COMPLETELY UNTENABLE	25
VII. THE ARTICLE XVIII ARGUMENT MAKES AN ENORMOUS ASSUMPTION AND LACKS SUBSTANTIVE SUPPORT IN THE YANKTON DOCUMENTS	27
VIII. THIS COURT SHOULD ACCORD THE LANGUAGE IN THE 1894 ACT ITS ORDINARY MEANING	29
CONCLUSION	30
APPENDIX	
Letter of Instruction from the Commissioner of Indian Affairs to the Sisseton Commission of August 13, 1889 (APPENDIX A)	1a
Excerpts from H.R. Rep. No. 7613, 59th Cong., 2d Sess. (1907) (APPENDIX B)	4a
Proclamation of April 11, 1892 opening the Sisseton-Wahpeton Reservation, 27 Stat. 1017 (APPENDIX C)	7a

TABLE OF AUTHORITIES

CASES:	Page
Andrus v. Glover Construction Co., 446 U.S. 608 (1980)	30
Bates v. Clark, 95 U.S. 204 (1877)	28
Burlington Northern R.R. v. Red Wolf, 106 F.3d 868 (8th Cir. 1997)	11
Colautti v. Franklin, 439 U.S. 379 (1979)	30
DeCoteau v. District County Court, 420 U.S. 425 (1975)	*passim*
Hagen v. Utah, 510 U.S. 399 (1994)	*passim*
Mattz v. Arnett, 412 U.S. 481 (1973)	26
Montclair v. Ramsdell, 107 U.S. 147	30
Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237 (1985)	30
Oregon Fish and Wildlife Dept. v. Klamath Tribe, 473 U.S. 753 (1985)	12, 14, 29
Perrin v. United States, 232 U.S. 478 (1914)	20
Primeaux v. Lee, Memorandum Opinion and Order, Civ. 94-9022 (D.S.D. 1995), *aff'd per curiam*, *Primeaux v. Lee*, 74 F.3d 1243 (8th Cir. 1996)	4
Rice v. Rehner, 463 U.S. 713 (1983)	30
Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977)	*passim*
Seymour v. Superintendent, 368 U.S. 351 (1952)	26
Solem v. Bartlett, 465 U.S. 463 (1984)	13, 26
South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498 (1986)	29
Spalding v. Chandler, 160 U.S. 394 (1896)	28
State v. Greger, 559 N.W.2d 854 (S.D. 1997)	13
State v. Williamson, 211 N.W.2d 182 (S.D. 1973)	5
State v. Winckler, 260 N.W.2d 356 (S.D. 1977)	4
United States v. Forty-three Gallons of Whiskey, 93 U.S. 188 (1876)	21
United States v. Menasche, 348 U.S. 528 (1955)	30
Ute Indian Tribe v. Utah, 935 F.Supp. 1473 (D. Utah 1996)	26
Ute Indian Tribe v. Utah, 114 F.3d 1513 (10th Cir. 1997)	26
Washington v. Washington Commercial Passenger Fishing Vessel Assn., 443 U.S. 658 (1979)	30

TABLE OF AUTHORITIES—Continued

	Page
Weddell v. Meierhenry, 636 F.2d 211 (8th Cir. 1980)	5
Wood v. Jameson, 130 N.W.2d 95 (1964)	5
Yankton Sioux Tribe v. Southern Missouri Waste Management Dist., 890 F.Supp. 878 (D.S.D. 1995)	12
Yankton Sioux Tribe v. Southern Missouri Waste Management Dist., 99 F.3d 1439 (8th Cir. 1996)	2, 22
STATUTES:	
Treaty of April 19, 1858, 11 Stat. 743	27, 28
Act of March 3, 1891, 26 Stat. 1036	17
Act of April 11, 1892, 27 Stat. 1017	18
Act of August 15, 1894, ch. 290, 28 Stat. 286	15, 20, 27
Act of May 16, 1895, 29 Stat. 865	18
18 U.S.C. § 1151(a)	4
18 U.S.C. § 1151(b)	4, 5
CONGRESSIONAL MATERIALS:	
26 Cong. Rec. 6425 (1894)	18
Jurisdiction on Indian Reservations—Part 2: Hearing Before the Senate Select Committee on Indian Affairs, 96th Cong., 2d Sess. (Aug. 11, 1980)	9
Jurisdiction—Part 3, Investigations and Prosecution of Federal Crimes on Indian Reservations: Oversight Hearings Before the Committee on Interior and Insular Affairs, 100th Cong., 2d Sess. (1988)	10
Investigation and Prosecution of Federal Crimes on Indian Reservations: Hearings Before the Committee on Interior and Insular Affairs, House of Representatives, 101st Cong., 1st Sess. (1989)	10
H.R. Rep. No. 101-60, 101st Cong., 1st Sess. (1989)	10
Hearing before the Committee on Indian Affairs, S. Hrg. 104-694, 104th Cong., 2d Sess. (1994)	11

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES:	Page
Sup. Ct. R. 37(4)	2
Brief for the United States as *Amicus Curiae*, *Mattz v. Arnett*, 412 U.S. 481 (1973) (No. 71-1182)	25
Brief for Respondent, *DeCoteau v. District County Court*, 420 U.S. 425 (1975) (No. 73-1148)	7
Brief for the United States as *Amicus Curiae*, *DeCoteau v. District County Court*, 420 U.S. 425 (1975) (No. 73-1148)	25
Memorandum for the United States as *Amicus Curiae*, *DeCoteau v. District County Court*, 420 U.S. 425 (1975) (No. 73-1148)	25
Memorandum for the United States as *Amicus Curiae*, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562)	25
Motion for Leave to File Brief and Brief *Amici Curiae* of the National Congress of American Indians, et al., *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562)	25
Transcript of Oral Argument, *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 890 F.Supp. 878 (D.S.D. 1995) (94-CV-4217)	9, 11
Brief for the United States as *Amicus Curiae* in Support of Plaintiffs-Appellees, *Yankton Sioux Tribe v. Southern Missouri Waste Dist.*, 99 F.3d 1439 (8th Cir. 1996) (No. 95-2647)	26
Brief of Respondent, Southern Missouri Waste Management District in Support of Petitioner, State of South Dakota, *South Dakota v. Yankton Sioux Tribe*, No. 96-1581 (April 28, 1997)	14, 15
Brief of Respondent, Southern Missouri Waste Management District in Support of Petitioner, State of South Dakota, *South Dakota v. Yankton Sioux Tribe*, No. 96-1581 (August 7, 1997)	24
Brief of Charles Mix County, South Dakota, *Amicus Curiae* in Support of Petitioner, State of South Dakota, *South Dakota v. Yankton Sioux Tribe*, No. 96-1581 (August 7, 1997)	19

TABLE OF AUTHORITIES—Continued

	Page
Brief for Duchesne County, Utah and Uintah County, Utah, *Amici Curiae* in Support of Petitioner, State of South Dakota, *South Dakota v. Yankton Sioux Tribe*, No. 96-1581 (August 7, 1997)	26
E. Peterson and L. Peterson, *1906 Atlas of Charles Mix County, South Dakota* (1906)	2, 3
A. Gnirk, *Epic of the Realm of Ree* (1984)	3, 6, 8
A. Gnirk, *Epic of the Great Exodus* (1985)	8
A. Gnirk, *Epic of Papineau's Domain* (1986)	3, 5, 6
1990 United States Census	4, 5, 6, 7
F. Prucha, *The Challenge of Indian History*, Journal of the West, Jan. 1995	13
Conference of Western Attorneys General, *American Indian Law Deskbook* (1993)	24
Constitution of the Yankton Sioux Tribe (1962)	22
Opinions of the Solicitor, Dep't of the Interior, M-27671 (March 1, 1934)	29

The cities of Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner, respectfully submit this brief as *amici curiae*, in support of Petitioner pursuant to Supreme Court Rule 37(4).

INTEREST OF *AMICI* CITIES

> The majority's assertion that 'Article XVIII of the 1894 statute indicated that as much of [the 1858] treaty as possible was to be preserved,' Maj. Op. at 1448, is based neither on the text—which referred only to annuities—nor the legislative history of the 1894 Act, and has at its source only, as best as I can discern, *a single-minded desire to avoid diminishment at all costs.*
>
> *Yankton Sioux Tribe v. Southern Missouri Waste Dist.*, 99 F.3d 1439, 1462 (8th Cir. 1996) (J. Magill dissenting). Pet. App. at 56 (emphasis added).

Five of the *amici* cities, Wagner, Lake Andes, Ravinia, Dante and Pickstown are located within the 1858 boundaries of the reservation recently declared to exist by the court of appeals for the Eighth Circuit; two of the *amici* towns, Geddes and Platte, lie close to the purported boundaries. Each of the cities within the newly recognized boundaries of the Yankton Sioux Reservation has operated, since its founding a few years after the 1894 Surplus Land Act in question, as if no reservation boundaries exist. Each of the cities respectfully expresses its profound shock to this Court over the decision of the court of appeals. Importantly, we understand that this is only the second time that any federal court of appeals has ever held that a congressional act of this nature did not disestablish the reservation area affected; the first and only other case with a similar holding was promptly reversed in *DeCoteau v. District County Court*, 420 U.S. 425 (1975). We respectfully request this Court to reverse the decision of the court of appeals, a decision which conflicts with both the prior and subsequent decisions of the South Dakota Supreme Court, and resolve the conflict and confusion created by the federal decision.

A. Early History.

Prior to the organization of Charles Mix County, South Dakota, this area was visited and occupied by various Indian tribes. E. Peterson and L. Peterson, *1906 Atlas of Charles Mix County, South Dakota,* 48 (1906). The Ree or Aricara Indians are among the earliest residents, dating back more than three hundred years. *Id.* at 48. The Ree were eventually driven out by the Oglala Sioux branch of the Tetons, who, in turn, were partially displaced by the Yankton Sioux in the early 1800's. *Id.* at 48. "Few of the Indians, however, had made this part of the state their principal place of abode as other localities seemed to them more desirable. This part of the state was therefore used only as a hunting ground." *Id.* at 48. By the mid-1800's, the Charles Mix County area was rarely hunted by the Indians, "for large game had sought better pastures farther west and north, and the Indians had gone with the game." *Id.* at 50. The Yankton Sioux eventually settled the area pursuant to the treaty of 1858. *Id.* at 48.

In the late 18th century and throughout the entire 19th century a continual non-Indian presence was felt in the area in the form of resident French trappers, explorers, river traders, wood cutters and the U.S. Army, whose influence culminated in 1857 with the completion of Ft. Randall. *Id.* at 48.

> In speaking of the history of Charles Mix county we shall see that it is in no sense a "new" county. It had a community life along the river before Dakota Territory was organized and had been visited by more white men before that time than any of the "old" counties not having a Missouri river front.

Id. at 48.

The 1858 treaty with the Yankton Sioux established the Yankton Sioux Reservation which consisted of approximately 430,000 acres in the eastern portion of what is now Charles Mix County. The Yankton Sioux settled the reservation on July 10, 1859, a date commonly associated with the restoration of all of Charles Mix County, except the Yankton reserve, to the public domain. *Id.* at 49. Charles Mix County was created at the first territorial legislature of Dakota by its act of May 8, 1862. *Id.* at 49. The Yankton Indian reservation was later incorporated into the county boundaries in 1873, although the reservation continued to have "little or nothing to do with county affairs and took no part in our community life until after the treaty of 189[4]." *Id.* at 48.

In 1892, the government negotiated with the Yanktons for the sale of their surplus lands, resulting in a treaty signed by a majority of the Tribe and ratified by Congress on August 15, 1894. *Id.* at 49. These lands were opened to homesteading by the president's proclamation of May 16, 1895 and were quickly populated. *Id.* at 49. By early 1900, virtually all of the surplus lands had been homesteaded. A. Gnirk, *Epic of the Realm of Ree,* 8 (1984). The population of Charles Mix County by 1900 was 8,498. 1906 *Atlas of Charles Mix County, South Dakota, supra,* at 46.

B. City History.

Several of the cities which are *amici* here were created along the Milwaukee Railroad through the "former Indian lands from Napa to Platte," South Dakota. A. Gnirk, *Epic of Papineau's Domain,* 143 (1986). In fact, the area of Charles Mix County which contains a majority of the country's towns was once part of the "Yankton Sioux Reservation until 1895 when the land of eastern Charles Mix County was thrown open to homesteaders." *Id.* at 143.

1. City of Wagner, South Dakota.

Wagner was created by the Milwaukee land company in 1900, just six years after the 1894 Act which opened the Yankton Reservation. *Epic of the Realm of Ree, supra,* at 62. According to the 1990 Census, Wagner's population was 1462, of whom 281 are Indian.

1990 Census of Population and Housing, Summary Population and Housing Characteristics, South Dakota, at 33, 57. City and county records indicate that there are approximately 1510 properties within the city limits of Wagner; approximately 1450 are owned by non-Indian persons or entities, four are owned by the Yankton Sioux Tribe, six are held in trust by the United States for an Indian person, and fifty are owned in fee by individual Indians.

The decision of the court of appeals would convert the entirety of Wagner to "Indian country" pursuant to 18 U.S.C. § 1151(a) by designating it as a reservation. Paradoxically, even as this case was being litigated, an Indian person failed in a claim that a housing development in Wagner qualified as "Indian country" presumably as a dependent Indian community under 18 U.S.C. § 1151(b). *See Primeaux v. Lee,* Memorandum Opinion and Order, Civ. 94-9022 (D.S.D. 1995), *aff'd per curiam, Primeaux v. Lee*, 74 F.3d 1243 (8th Cir. 1996). The Defendant in that case failed *even to make the claim* that the entirety of Wagner should be declared Indian country as a "reservation;" the failure of the district court and court of appeals to find the housing area to be Indian country simply reaffirmed the long-held understanding of all the residents of the area that Wagner was not "Indian country" as a reservation pursuant to 18 U.S.C. § 1151(a) or partly "Indian country" pursuant to 18 U.S.C. § 1151(b).

The residents of Wagner can also point to *State v. Winckler,* 260 N.W.2d 356 (S.D. 1977), another case which arose within Wagner and in which the South Dakota Supreme Court stated that it had "ruled that the Yankton Indian reservation was disestablished. . . ." *Winckler,* 260 N.W.2d at 360.

In addition, as recently as 1980, a unanimous court of appeals was of the same opinion:

> In our opinion, the district court correctly determined that the crimes of grand larceny and burglary did not occur in "Indian Country" as defined in 18 U.S.C. § 1151(b), so as to preclude state court jurisdiction.[2] [2] The Supreme Court of South Dakota has twice determined that the original Yankton Indian Reservation had been diminished by an Act of Congress. *Wood v. Jameson,* 81 S.D. 12, 130 N.W.2d 95, 99 (1964); *State v. Williamson,* 211 N.W.2d 182, 184 (S.D. 1973). Appellant does not challenge these holdings in this appeal.

Weddell v. Meierhenry, 636 F.2d 211, 213 (8th Cir. 1980).

2. *City of Lake Andes, South Dakota.*

Lake Andes was established as a railroad siding stop in 1900 and became a full-fledged town in 1904. *Epic of Papineau's Domain, supra,* at 143. Lake Andes was named the Charles Mix County seat in 1916 and remains the county seat to date. *Id.* at 143. Lake Andes submits the unlikelihood of the residents of Charles Mix County selecting a town within a "reservation" to be a county seat, when only half the county is within the purported boundaries. In any event, according to the 1990 Census, the population of Lake Andes was 846 persons, of whom 246 were Indians. *1990 United States Census, supra,* at 33. City and county records indicate that there are approximately 1060 properties within the city limits of which approximately 998 are owned by non-Indians or non-Indian entities, two of which are owned by the Tribe, eight are held in trust by the United States for an individual Indian, two are owned by the Native American Women's Resource Center and fifty are owned in fee by individual Indian persons.

Most of the county offices or headquarters are located in Lake Andes, as are various state offices. The Charles Mix County Law Enforcement Center is located in Lake Andes and provides services to the entire county and surrounding area. The city provides drinking water to all the Yankton Sioux tribal housing units within Lake Andes

and to the approximately 70 housing units in the Yankton Sioux Tribe housing units southeast of Lake Andes. The city itself maintains twenty-four separate housing units, through its city housing authority; many or most of these units are occupied by Indian persons. Like Wagner, Lake Andes can point to specific judicial authority which assured it, had there been any doubt, that the reservation had long been disestablished. In *Wood v. Jameson*, 130 N.W.2d 95 (S.D. 1964), the South Dakota Supreme Court held that it was the purpose of the 1892 agreement and 1894 Act of Congress "to disestablish the reservation. . . ." *Id.* at 99.

3. *Town of Ravinia, South Dakota.*

The town of Ravinia was also created as a railroad stop in 1909. *Epic of the Realm of Ree, supra,* at 157. The 1990 Census sets the population of Ravinia at 79, 34 of whom are Indian. Of the 185 properties within its boundaries, approximately 182 are held by non-Indians and non-Indian entities and three are held in trust by the United States for an Indian person.

4. *Town of Dante, South Dakota.*

Dante was likewise founded as a railroad stop. According to the 1990 Census, its population is 98, of whom 12 are Indian. City and county records indicate that approximately 185 properties exist within its boundaries; no properties are owned by the Tribe, individual Indians, or by the United States in trust.

5. *Town of Pickstown, South Dakota.*

Pickstown, like each of the towns identified above, now finds itself within the purported boundaries of the Yankton Sioux reservation. Pickstown was created in 1947 by the United States Army Corps of Engineers to accommodate construction workers and their families while working on the Fort Randall Dam. *Epic of Papineau's Domain, supra,* at 527. Pickstown was released from its

federal domination in 1986 and the properties were sold, ceded or relinquished to its residents. According to the 1990 Census, its population was 95, of whom 6 were Indian. The official records of the city indicate there are approximately 190 properties within the city limits; 186 are owned by non-Indians or non-Indian entities and four are owned by Indians. There are no properties owned by the Yankton Sioux Tribe or held in trust by the United States government.

C. Demographics and the Surrounding Area.

Generally speaking, the demography of the situation in the entire area parallels the area under consideration in *DeCoteau v. District County Court*, 420 U.S. 425 (1975). Keeping in mind that in this litigation the contested area, as in *DeCoteau*, involves essentially the non-Indian fee lands, only one other point need be specially noted. In *DeCoteau*, approximately 90% of the tribal members were said to actually reside on trust lands (in HUD community housing projects and other individual homes). Brief for Respondent at 196, *DeCoteau v. District County Court*, 420 U.S. 425 (1975) (No. 73-1148). In this 1858 Yankton reservation area, that percentage is apparently somewhat less, though a clear majority of the Yankton tribal members are similarly situated. And while the trust allotments of the members do constitute approximately 10% of the total land base, only a small fraction of that area is actually resided upon or farmed by members of the Yankton Sioux Tribe. Again, this fact situation parallels that presented in *DeCoteau*. *Id.*

The five cities above, all of which find themselves within the 1858 boundaries of the Yankton reservation, are joined in this *amici* brief by two sister cities, Geddes and Platte. Geddes is located approximately fifteen miles northwest of Lake Andes, or one mile west of the eastern 1858 boundary. Platte was established in 1900 as the last city on the railroad line running west in Charles Mix

County. A. Gnirk, *Epic of the Great Exodus*, 92 (1985). Both cities are demographically similar to those noted above.[1]

D. Conflicts and Confusion.

Each of the *amici* cities within the 1858 boundaries has experienced immediate dramatic adverse impacts as a result of the decisions of the district court and court of appeals, despite the subsequent decision of the South Dakota Supreme Court. Problems involving law enforcement, zoning, landlord-tenant, provision of utilities, and foreclosures, all difficult in the best of situations, have become permeated with uncertainty. Local officials cannot reliably and finally say that state, or federal law actually applies to a diverse variety of situations which occur on the non-Indian lands within the 1858 boundaries and within their cities. The uncertainty provides an additional means by which those who wish to evade the law can do so and provides a similar haven to those who commit civil wrongs against their neighbors.

The jurisdictional uncertainty referred to above has been exacerbated by the failure of the federal authorities

[1] Although not included as *amici*, two additional towns in Charles Mix County which were not created or established due to the railroad were Marty and Greenwood. Marty was founded in 1913 and is located 10 miles south of Ravinia and 13 miles southwest of Wagner and was named for the Rt. Rev. Martin Marty, a pioneer Catholic bishop in South Dakota. *Epic of the Realm of Ree*, *supra*, at 12,186. The town of Marty is, perhaps, best known for the mission and Indian school located there. *Id.* at 196. According to official county records, all of the land within the boundaries of Marty is held in trust by the United States government for the benefit of an Indian person or is owned by an individual Indian person. According to the 1990 census, the population of Marty was 436 persons, 412 of which were Indian persons.

The town of Greenwood is located approximately 5 miles southeast of Marty and was first established as an Indian agency. All of the property located within the boundaries of Greenwood is held in trust by the United States government for individual Indian persons.

to provide adequate resources to meet the responsibilities they now claim as a result of the federal decision. Prior to the decision of the courts below, all law enforcement activities on non-Indian lands were provided locally through a centrally located county law enforcement center; a full-time sheriff, with three full-time deputies and two part-time deputies; and supplemented by local police departments with six full-time officers and two part-time officers. The State circuit court is located in the Charles Mix County courthouse in Lake Andes, South Dakota.

After the decisions, the United States claims that it has jurisdiction of felony investigations involving Native American suspects or Native American victims, but it has provided only one FBI agent based over one hundred miles outside the county in Sioux Falls, South Dakota. The federal court is also located there. Further, the FBI agent's duties are not limited to investigations within the 1858 boundaries; rather, the additional investigations were simply added to the agent's already heavy urban case load. The United States Attorney's Office has not provided additional staff to handle the cases it now claims.[2] Further, despite its new assertion of jurisdiction, the federal authorities have no plans at present to base any FBI locally, to the cities' knowledge. The result is clearly a decline in effective law enforcement.[3] The crimi-

[2] The tribal chairman indicated at trial that he intended that the United States would greatly expand its criminal law jurisdiction if the Tribe were successful in this litigation. Tr. at 330-331. *Yankton Sioux v. Southern Missouri*, 890 F.Supp. 878 (D.S.D. 1995) (94-CV-4217). He admitted, however, that he had not discussed the increased jurisdiction with the U.S. Attorney nor did he know the position of the U.S. Attorney on the matter. *Id.* at 331. (The cities suggest that the United States was just as shocked by the decisions below finding the 1858 boundaries intact as were the *amici* cities.)

[3] The present situation is not surprising, for even when reservation status is not apparently at issue, reservation law enforcement is generally regarded as ineffective, especially with regard to the "most common crimes." *See, e.g., Jurisdiction on Indian Reserva-*

nal law problem, however, presents more than the difficulties attendant to a decline in effective law enforcement. The most critical problem is that, without intervention by this Court, there is no solution to the controversy over which entity actually has jurisdiction of the crimes now being committed. Numerous habeas corpus petitions are already ongoing and will continue to challenge the jurisdiction of courts which have in the past or might in the future take jurisdiction of a now disputed criminal case. Uncertainty thus permeates the criminal law, as well as the civil law sphere, within the *amici* cities.

---

tions—Part 2: Hearing Before the Senate Select Committee on Indian Affairs, 96th Cong., 2d Sess. at 24 (Aug. 11, 1980) (hereinafter *Jurisdiction—Part 2*): "The most common crimes, such as assaults or small burglaries, simply are not prosecuted in the vast majority of instances." (comment of Caleb Shields, Ft. Peck Tribal Executive Board); *Id.* at 56 (comment of Senator Melcher revealing complaints of state judges that federal authorities do not prosecute even major crimes); *Id.* at 32 (comment of local chief of police that only one of ten "felony-type" theft, burglary or assault cases are prosecuted on the reservation); *Id.* at 26 (United States Magistrate's comment on infrequency of prosecution of reservation assaults). Similar testimony was received approximately a decade later. *See, e.g., Investigation and Prosecution of Federal Crimes on Indian Reservations: Hearings Before the Committee on Interior and Insular Affairs*, House of Representatives, 101st Cong., 1st Sess. at 187 (1983): "[O]nly the most aggregious [sic] and clear-cut cases can properly be pursued." (comment of Tribal Chairman Ketachezan); *Id.* at 281: "[W]e see an awful lot of people who probably should be prosecuted for different things just simply slip through because no one is quite sure who is in charge." (comment of Representative Campbell); *See also* H.R. Rep. No. 101-60, 101st Cong., 1st Sess. at 7 (1989). In addition, legislators in both the 1980 and 1989 hearings drew attention to the fact that reservation law enforcement let cases "fall through the cracks." *See Jurisdiction—Part 2, supra*, at 21 (comment of Senator Melcher); *Investigations and Prosecution of Federal Crimes on Indian Reservations: Oversight Hearings Before the Committee on Interior and Insular Affairs*, 100th Cong., 2d Sess. 249 (1988); *Prosecution of Federal Crimes, supra*, at 249: "Case-by-case determination can lead to a cumbersome, inefficient process which ultimately leads to cases falling through the cracks." (comment of Representative Tim Johnson.)

We note further, that, at trial, the tribal chairman was equivocal as to whether the Tribe *intended* to exercise jurisdiction over non-Indians on non-Indian lands, assuming that it was successful in the litigation. *See, e.g.*, Tr. at 322-334, *Yankton Sioux v. Southern Missouri*, 890 F.Supp. 878 (D.S.D. 1995) (94-CV-4217). Nonetheless, since the Tribe has been successful in the federal litigation, it has made it very clear to local city officials, in conferences and otherwise, that the Tribe *will* attempt to regulate non-Indian hunting and fishing on non-Indian lands, *will* establish licensing procedures with regard to non-Indians, and *will* attempt to regulate access to state and federal facilities and lands by non-Indians, particularly those on the Missouri River. The Tribe has not exercised such jurisdiction at least since *amici* towns were founded in the early 1900's, and the Tribe thus promises to radically alter the status quo.

The residents of Charles Mix County are, by and large, highly informed as to cases being litigated in other parts of the nation regarding tribal issues. Aberrant tribal court outcomes such as that appealed in *Burlington Northern R.R. v. Red Wolf*, 106 F.3d 868 (9th Cir. 1997) are tremendously unsettling to the non-Indian residents. Further, the inevitability of extensive and burdensome litigation over tribal regulation and control of non-Indian interests, as detailed above, has caused land owners to suspect that a further and significant decrease in property values is likely in the event the court of appeals decision is not reversed.[4]

---

[4] One recent witness at a Senate Indian Affairs Committee hearing, a rancher on South Dakota's Cheyenne River Sioux Reservation, testified that it was his opinion that the prices of property on that reservation "are regularly discounted about 25 percent. These facts make it difficult for non-Indians to either stay or leave." Tribal Sovereign Immunity: Hearing before the Committee on Indian Affairs, S. Hrg. 104-694, 104th Cong., 2d Sess. at 45. The recent experience of *amici* towns has led them to surmise that the loss in property value identified in the Senate Hearing will most

SUMMARY OF ARGUMENT

The court of appeals failed to apply the precedent of *DeCoteau* in this case. A cursory review of the *DeCoteau* decision and the 1891 Sisseton-Wahpeton agreement demonstrates that the 1891 agreement is, in fact, the functional twin of the 1894 Yankton agreement. The provisions and formats in both agreements are virtually identical. In addition, the congressional representatives and other participants in the process specifically made the comparisons and relied upon the earlier Sisseton-Wahpeton agreement as precedent. The demographics and the subsequent jurisdictional histories of the two areas are also remarkably similar. In two respects, the Yankton documentation presents even stronger factors for disestablishment.

This Court's precedent in *Rosebud Sioux Tribe v. Kniep*, 430 U.S. 584 (1977) indicates that this type of analysis should have at least been considered by the court of appeals. *See also Oregon Fish and Wildlife Dept. v. Klamath Tribe*, 473 U.S. 753 (1985). It was not. The decision of the court of appeals should be reversed by this Court.

---

probably be replicated within the 1858 boundaries, should the decision of the court of appeals remain unreversed.

ARGUMENT

> FATHER PRUCHA: "THE GAP IS WIDENING, I FEAR, BETWEEN SOLID HISTORICAL ACCOUNTS AND THE PSEUDO-HISTORICAL OR MYTHICAL ACCOUNTS ADOPTED AND PROCLAIMED BY MANY INDIANS AND THEIR WHITE ADVOCATES."
>
> Francis Paul Prucha, *The Challenge of Indian History*, Journal of the West, Jan. 1995, at 3.

I.

THE AGREEMENT IN THE *YANKTON* CASE NOW BEFORE THIS COURT IS THE "FUNCTIONAL TWIN" OF THE AGREEMENT AT ISSUE IN *DECOTEAU v. DISTRICT COUNTY COURT*, AND THEREFORE THIS COURT SHOULD REVERSE ON THE BASIS OF *DECOTEAU*.

> Construing Article XVIII in the sweeping manner defendant advocates ignores the remainder of the Act. Such a result would be an *extravagant misuse of the canons of statutory construction* to salve modern sensibilities, especially given that the language in Articles I and II is so "precisely suited" to diminishment. Courts should not presume Congress intended an "absurd result." . . . To give Article XVIII pointed emphasis allows it to negate the preceding seventeen articles, and that is a result contrary to the plain meaning of the rest of the Agreement.
>
> *State v. Greger*, 559 N.W.2d 854, 865 (S.D. 1997) (citation omitted) (emphasis added).

Not only did the court of appeals spurn the bright-line "presumption" articulated in *Solem v. Bartlett*, 465 U.S. 463 (1984) and *Hagen v. Utah*, 510 U.S. 399 (1994), the court also failed to apply the precedent of *DeCoteau v. District County Court*, 420 U.S. 425 (1975). In *DeCoteau*, this Court considered an agreement of the United States with the Sisseton-Wahpeton Sioux Tribe

which resulted in disestablishment. The Yankton Agreement of three years later is the "functional twin" of the Sisseton Agreement and *DeCoteau* therefore strongly suggests a finding of disestablishment in the *Yankton* case.

The term "functional twin" was employed by the Court in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 609 (1977), and denoted the identity, except for the "operative language" of the Agreements, of a 1907 Agreement and an earlier 1904 Agreement. Because the Agreements constituted "functional twins," except for the critical "operative" language, the Court found the later Agreement (which *lacked* cession language) accomplished disestablishment, just as the earlier agreement had accomplished disestablishment. *Id.* As we demonstrate below, the origin, content, and outcome of the Sisseton and Yankton agreements make them even better "functional twins" than the agreements at issue in *Rosebud*. *See also Oregon*, 473 U.S. 753.

This argument takes on special importance for the residents of the *amici* cities because of the proximity of the former Sisseton reservation at issue in *DeCoteau* (roughly 150 miles northeast of the *amici* cities) and because the agreements and local histories of the two areas were known to be so similar. *Amici* cities and their residents could and legitimately did, we respectfully submit, continue to assume that no reservation existed at Yankton based on *DeCoteau* and the legal and factual similarities between the two situations.

Summarily, in every respect even arguably significant, the Yankton documents mirror and reflect the same terminology, discussions, considerations, policies, and generalities presented in *DeCoteau*. The Yankton Commissioners even repeatedly referred specifically to the terms of the Sisseton Agreement. Br. of Resp't District in Supp. of Pet'r at 18-19. *See also*, South Dakota Representative Pickler's remarks in the congressional record ("same kind of a treaty we have always made" . . . "procure these

lands in the same way" . . . "we make no departure from our past policy" . . . "just as all other cessions of land" . . .). *Id.* at 36-37. As a result, in both instances the Commissioner of Indian Affairs and the Secretary of the Interior also acknowledged that both reservations were "restored to the public domain." *Id.* at 9. *See generally Hagen*, 510 U.S. at 412-414 (public domain).

In this light, we submit that the "functional twin" characteristics of the two situations do, in fact, demonstrate that this Court's decision in *DeCoteau* should dispose of this case.

II.

FACTORS DEMONSTRATING THE YANKTON AND SISSETON AGREEMENTS ARE FUNCTIONAL TWINS.

SISSETON DISESTABLISHMENT	YANKTON DISESTABLISHMENT
Time period equivalent	***Time period equivalent***
Agreement approved 1891. *DeCoteau*, 420 U.S. at 427.	Agreement approved 1894. 28 Stat. 286 (1894).
Allotment of substantial territory under General Allotment Act.	***Allotment of substantial territory under General Allotment Act.***
DeCoteau, 420 U.S. at 455.	Exhibit 605, at 5.
Interior Instructions to Commissioners	*Interior Instructions to Commissioners*
"The treaty makes no provision regarding the cession or relinquishment of the reservation or any portion thereof."	"The treaty makes no provision regarding the cession or relinquishment of the reservation or any portion thereof."
"The terms and conditions agreed upon in Council, with the description of the lands to be relinquished, should be reduced to writing and incorporated in the accompanying form of agreement, which should be signed by at least a majority of the male adults of the bands." Cities App. at 2a.	"The terms and conditions agreed upon in council should be reduced to writing and incorporated in the accompanying form of agreement which should be signed by at least a majority of the male adults of the members of the tribe." Br. Resp. in Support of Pet. at 50a.

Preambles equivalent.	*Preambles equivalent.*
The Sisseton Indians "are desirous of disposing of a portion of the land set aside and reserved to them. . . ." *DeCoteau*, 420 U.S. at 455.	"The Yankton Tribe . . . is willing to dispose of a portion of land set aside and reserved to said Tribe. . . ." Pet. App. at 112.
Cession language used.	*Cession language used.*
"The Sisseton and Wahpeton Bands of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title and interest. . . ." Art. 1, cited at *DeCoteau*, 420 U.S. 456.	"The Yankton Tribe of Dakota or Sioux Indians hereby cede sell, relinquish, and convey to the United States all their claim, right, title, and interest. . . ." Art. I, Pet. App. at 112-113.
All unallotted lands ceded.	*All unallotted lands ceded.*
Cession pertains to "all the unallotted lands within the limits of the reservation set apart to said bands of Indians as aforesaid remaining after the allotments and additional allotments provided for in article four of this agreement. . . ." Art. 1, *DeCoteau*, 420 U.S. at 456.	Cession pertains to "all the unallotted lands within the limits of the reservation set apart to said Indians as aforesaid." Art. I, Pet. App. at 112-113.
Sum Certain Language Used.	*Sum Certain Language Used.*
Sesseton Agreement provides "[i]n consideration for the lands ceded, sold, relinquished and conveyed . . . the United States stipulates and agrees to pay . . . the sum of two dollars and fifty cents per acre for each and every acre thereof. . . ." Art. 2, *DeCoteau*, 420 U.S. at 456.	Yankton agreement provides "[i]n consideration for the lands ceded, sold, relinquished, and conveyed to the United States . . . the United States stipulates and agrees to pay . . . the sum of six hundred thousand dollars. . . ." Art. II, Pet. App. at 113.
Entry subject to homestead and townsite laws.	*Entry subject to homestead and townsite laws.*
"That the lands by said agreement ceded, sold, relinquished, and conveyed to the United States shall . . . be subject only to entry and settlement under the homestead and town-site laws of the United States. . ." Act of Mar. 3, 1891, 26 Stat. 1036.	"That the lands by said agreement ceded, to the United States shall, upon proclamation by the President, be opened to settlement, and shall be subject to disposal only under the homestead and town-site laws of the United States. . ." Pet. App. at 123.
Missionaries allowed to purchase lands.	*Missionaries allowed to purchase lands.*
Art. 2, *DeCoteau*, 420 U.S. at 457.	Art. X, Pet. App. at 117.
School lands granted to State with public domain premise.	*School lands granted to State with public domain premise.*
("excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State"). *DeCoteau*, 420 U.S. at 442. For public domain premise, see Cities App. at 4a-6a.	("excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be common-school purposes and be subject to the laws of the State of South Dakota"). Pet. App. at 123. For public domain premise, see Cities App. at 4a-6a.
United States retained an agency and schools.	*United States retained an agency and schools.*
DeCoteau, 420 U.S. at 435 n.16; *id.* at 438 n.19.	Pet. App. at 116.
Lands retained were scattered about the former reservation.	*Lands retained were scattered about the former reservation.*
DeCoteau, 420 U.S. at 428.	Pet. App. at 159.
The proclamation opening the reservation referred to a conveyance of "all their title and interest" and quoted the cession language of the Act.	*The proclamation opening the reservation referred to a conveyance of "all their claim, title and interest" and repeated the cession language of the Act.*
"[A]greement made with said Indians residing on said reservation, dated December 12, 1889, they conveyed, as set forth in article one thereof, to the United States, all their title and interest in and to all the unallotted lands within the limits of the reservation set apart as aforesaid remaining after the allotments shall have been made . . . it is provided in the act of Congress approved March 3, 1891 (26	"[S]aid Yankton tribe of Sioux or Dacotah Indians for the consideration therein mentioned, ceded, sold, relinquished, and conveyed to the United States, all their claim, right, title and interest in and to all the unallotted lands within the limits of the reservation set apart to said tribe. . . Whereas, it is provided in the act of Congress accepting, ratifying and confirming the said agreement approved

U.S. Statutes, pp. 1036-1038, Sec. 30), accepting and ratifying the agreement with said Indians: 'That the lands by said agreement ceded, sold, relinquished, and conveyed to the United States shall immediately, upon the payment to the parties entitled thereto of their share of the funds made immediately available by this act, and upon the completion of the allotments as provided for in said agreement, be subject only to entry and settlement under the homestead and townsite laws of the United States' ". . . . Cities App. at 7a-8a.	August 15, 1894, section 12 (Pamphlet Statutes 53d Congress, 2d session, pages 314 to 319), 'That the lands by said agreement ceded, to the United States shall, upon proclamation by the President, be opened to settlement, and shall be subject to disposal only under the homestead and town-site laws of the United States' ". . . . JA at 453.
The proclamation opening the reservation referred to a "schedule of lands within the . . . reservation . . . ."	*The proclamation opening the reservation referred to a "schedule of lands within the . . . reservation . . . ."*
27 Stat. 1017, 1018 (April 11, 1892).	29 Stat. 865, 866 (May 16, 1895).
Congress clearly intended to return the land to the public domain.	*Congress clearly intended to return the land to the public domain.*
DeCoteau, 420 U.S. at 440-441.	26 Cong. Rec. 6425 (1894); *id.* at 6426.
State assumed virtually unquestioned jurisdiction.	*State assumed virtually unquestioned jurisdiction.*
DeCoteau, 420 U.S. at 442.	Pet. App. at 38; Dissent, Pet. App. at 62; *Greger*, Pet. App. at 154-155.
Sisseton and Yankton generally treated in parallel fashion on maps.	*Sisseton and Yankton generally treated in parallel fashion on maps.*
Exhibit 33 (1889) (showing both reservations; Exhibit 620 (1901) (eliminates both Yankton and Sisseton reservations); Exhibit 621 (1910) (eliminates both reservations); Exhibit 44 (1909) (BIA both Sisseton and Yankton as blank).	Exhibit 33 (1889) (showing both reservations; Exhibit 620 (1901) (eliminates both Yankton and Sisseton reservations); Exhibit 621 (1910) (eliminates both reservations); Exhibit 44 (1909) (BIA both Sisseton and Yankton as blank).

As noted above, in *Rosebud*, the Court found a 1907 Act to diminish the Rosebud reservation the same as the 1904 Act even though the 1904 Act *had* contained language of cession and the 1907 Act had *not* contained language of cession. This Court found that "as the legislative comments make clear . . . the change in § 1 language was not intended to modify or change the purposes or operation of the 1904 Act." *Rosebud*, 430 U.S. at 609. *Rosebud* thus strongly indicated that when identical language is used, identical results are intended. This was so, in the case of *Rosebud*, even when the operative language was different and when the "cession language" was eliminated, because the legislative comments made clear that no change from the earlier Act was intended.

In this instance, as Charles Mix County has noted, even the United States has described the Sisseton Agreement as "a similar and contemporaneous cession agreement" containing "the same language." Brief of Charles Mix County, South Dakota, *Amicus Curiae* in Support of Petitioner, State of South Dakota at 25-26 (citing BUS, Co. Pet. App. at 166a).

There are a few differences between the agreements. *Both* agreements, however, contain the critical cession and sum certain language as "operative language." *See Hagen*, 510 U.S. at 412-416. Several of the changes from the Sisseton to the Yankton agreement, moreover, make the Yankton agreement even a stronger argument for disestablishment than the Sisseton agreement.

III.

ADDITIONAL PROVISIONS IN THE YANKTON AGREEMENT AND FACTORS IN THE SUBSEQUENT HISTORY OF THE YANKTON SIOUX TRIBAL GOVERNMENT MAKE THE YANKTON ARGUMENT FOR DISESTABLISHMENT EVEN STRONGER.

The liquor provision and its history are of special importance, for the Yankton Act contained this provision while the Sisseton Act did not. Article XVII of the 1894 Yankton Act provided that intoxicating liquor could not be sold upon reservation lands after they were ceded and opened to settlement:

> No intoxicating liquors nor other intoxicants shall ever be sold or given away upon any of the lands by this agreement ceded and sold to the United States, nor upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the treaty between the said Indians and the United States, dated April 19th, 1858, and as afterwards surveyed and set off to the said Indians. The penalty for the violation of this provision shall be such as Congress may prescribe in the act ratifying this agreement.

Act of August 15, 1894, ch. 290, 28 Stat. 286, 318; Pet. App. at 120.

Thus, federal liquor laws applied on lands, "as described in the treaty between the said Indians and the United States, dated April 19th, 1858. . . ." *Id.* This provision would be surplusage if the reservation were *not* diminished by the Act of 1894, as intoxicants were *already* forbidden in "Indian country" by federal law. *Perrin v. United States*, 232 U.S. 478, 484 (1914). Furthermore, this Court has said, of a provision in the 1910 Act concerning the Rosebud Sioux Reservation, that:

> the most reasonable inference from the inclusion of this [liquor prohibition] provision is that Congress was aware that the opened, unallotted areas would henceforth not be "Indian country" because not in the Reservation.

Rosebud, 430 U.S. at 613. *See also id.* at n.47.

The legislative history of Article XVII in the Yankton Act also supports this proposition. According to the 1893 Commissioner of Indian Affairs Report to Congress on the Yankton Agreement:

> Article XVII, prohibiting the sale or disposition of intoxicants upon any of the lands now within the Yankton reservation, seems to be a desirable provision, and from the decision of the Supreme Court in *United States v. 43 Gallons of Whiskey* (93 U.S. 188), the stipulation would appear to be valid if ratified by the United States.

Exh. 605, Pet. App. at 15. The passage implies diminishment in that it referred in 1893 to lands "*now* within the Yankton Reservation. . . ." Thus, before the Yankton agreement was ratified by Congress in 1894, the Commissioner looked to a time when the lands would *not* be "within the Yankton Reservation."

Further significance is found in the citation of *United States v. Forty-three Gallons of Whiskey*, 93 U.S. 188 (1876). In that case, the Court held that Congress may prohibit liquor not only within "Indian country," but also within a "territory in proximity to that where the Indians live." *Id.* at 195. The citation of this case by the Commissioner of Indian Affairs indicates that he believed that the ceded lands would no longer be part of a reservation but that this Court's decision in *Forty-Three Gallons of Whiskey* would nonetheless permit the liquor prohibition of Article XVII.

A further salient distinction, demonstrating that a case for disestablishment of Yankton is even stronger than at Sisseton, is found in the tribal constitutions. In 1946, the tribal constitution at Sisseton claimed jurisdiction only as to:

> *Indian owned lands* lying within the territory within the original confines of the Sisseton-Wahpeton Lake Traverse Sioux Reservation.

DeCoteau, 420 U.S. at 443 (quoting Article 1 of the October 16, 1946, Constitution) (emphasis added). In 1966, three years after the court of appeals had found the 1891 Act terminated the Sisseton Reservation, the Commissioner of Indian Affairs approved a new constitution which provided that the jurisdiction of the Tribe shall "extend to lands lying in the territory within the original confines of the Lake Traverse Reservation. . . ." *Id.* (quoting the 1966 Constitution). Thus, by 1966, the Sisseton Tribe claimed reservation boundaries in its constitution.

The constitutions at Yankton, however, have *never* claimed such boundaries. According to the 1962 Constitution of the Yankton Sioux Tribe, a Constitution which remains in effect *to this day*:

> The territory under which this Constitution shall exist shall extend to all original tribal lands *now owned by the Tribe* under the treaty of 1858.

J.A. at 493 (emphasis added). The Yankton Constitution has never been amended to claim tribal boundaries.

Thus, in coming before this Court, the Yankton Sioux Tribe cannot assert a tribal constitutional claim to reservation boundaries. It would, moreover, be highly anomalous to allow a tribe to succeed on a claim of boundaries in this Court when it had not even made that claim in its own constitution. In this respect also, the Yankton situation presents a stronger and more persuasive case for disestablishment than did the Sisseton case.

The Tribe's attempt to distinguish the two agreements is derived mainly from the Section XVIII savings section. As the Dissent below pointed out, however, there is *nothing in the record which supports the contention that the savings section was meant to preserve the boundaries of the reservation. Yankton Sioux v. Southern Missouri*, 99

F.3d 1439 (8th Cir. 1996); Pet. App. at 54-56. Furthermore, the savings section is itself internally ambiguous in providing both for the preservation of *all* provisions of the 1858 agreement and the *annuity* provisions of the 1858 agreement. *Id.*

In *Rosebud*, the 1907 Agreement was the "functional twin" of a 1904 Agreement even though the 1907 Agreement lacked the "operative language" of "cession." Here, the Yankton agreement and the Sisseton agreement both contain the critical "cession and sum certain" language, and numerous other indicia that they should be treated equivalently. Furthermore, the Yankton agreement is in certain respects stronger than the Sisseton agreement with regard to disestablishment. Given this situation, the *Rosebud* "functional twin" analysis strongly suggests a finding that the Yankton reservation, like the Sisseton reservation, has been disestablished.

IV.

HISTORICAL DOCUMENTATION CONFIRMS THAT THE NEGOTIATORS AND THE YANKTON INDIANS EQUATED THE SISSETON-WAHPETON AGREEMENT WITH THE YANKTON AGREEMENT.

With this background, it is not surprising that the negotiators and Indians at Yankton both equated the Sisseton agreement signed in 1889 with the Yankton agreement signed in 1892. For example, Commissioner Cole said during the Yankton negotiations:

> The Commissioners are now ready to make you an offer for your surplus lands . . . . It is more than the Government paid for the Sisseton reservation and it is the highest price we have ever known the Government to offer.

Exhibit 605, at 80. Tribal member John Cole also said that "[t]he Sisseton Reservation was purchased by the government at $2.50 per acre." *Id.* at 77. Henry Selwyn

linked the 1892 Yankton agreement with both the Treaty of 1858 by which the Yankton reservation had been diminished *and* the transaction by which the Sisseton Indians had sold their lands. He stated:

> I will now refer to the treaty of 1858. This is the second time we sold land to the Government. I think they should be very grateful to us for selling our land. . . . If the Sissetons and Titowan had sold their land at the same prices at which we sold ours in 1858 per acre they would have given the Government their lands for nothing.

Id. at 63. The identity of the two agreements makes it logical that the Yankton Indians should perceive the Sisseton agreement as equivalent to theirs. It confirms that the two agreements are, in fact, "functional twins."

V.

SECONDARY SOURCES SHOULD ALWAYS BE CAREFULLY SCRUTINIZED.

The Cities are aware of the fact that Felix Cohen's Handbook of Federal Indian Law generally and directly supports the Yankton disestablishment argument, as do the subsequent revisions of that text. The Brief for Southern Missouri makes that point. Brief for Southern Missouri at 44. In this instance, this fact is all the more remarkable in light of another consideration. Namely, it has been generally observed that the original Cohen text (and the subsequent revisions) have been viewed by some as tribal advocacy works. *See* Conference of Western Attorneys General, American Indian Law Deskbook at xiii-xv (1993).

Nevertheless, in *DeCoteau, Rosebud,* and *Hagen,* the analysis of this Court was not based upon secondary sources of this nature. In fact, some of the authors, editors and contributing writers involved in the revised edition of the Handbook of Federal Indian Law have individually submitted arguments in categorical opposition to

diminishment/disestablishment positions. *See, e.g.,* Brief for the United States as Amicus Curiae, *Mattz v. Arnett,* 412 U.S. 481 (1973) (No. 71-1182); Brief for the United States as Amicus Curiae, and Memorandum for the United States as Amicus Curiae, *DeCoteau,* 420 U.S. 425 (1975) (No. 73-1148); and Memorandum for the United States as Amicus Curiae and Motion for Leave to File Brief, and Brief Amici Curiae of the National Congress of American Indians, et al., *Rosebud Sioux Tribe,* 430 U.S. 584 (1977) (No. 75-562), submitted in cases where such views have been rejected by this Court. In the final analysis, the support for the Yankton disestablishment argument in this type of text, only demonstrates the strength of the Yankton documents.

VI.

THE NEW POST-HAGEN POSITION OF THE UNITED STATES PROMISES NIGHTMARISH CONSEQUENCES AND IS COMPLETELY UNTENABLE.

As Charles Mix County has noted, another generic argument that the United States has endorsed and submitted in litigation of this kind promises even more unsettling consequences than the simple reversal of the position of the United States in regard to the 1894 Yankton cession statute. The new argument of the United States, submitted subsequent to *Hagen* in the Tenth Circuit and now in the Eighth Circuit Court of Appeals, summarily undermines the effect of all disestablishment precedent on reservation boundaries and would leave local jurisdictions in almost impossible situations.

According to this new post-*Hagen* argument, even if an act was intended to diminish or disestablish a reservation or a portion thereof, it would remove from Indian country status only those lands ceded, restored to the public domain, or otherwise directly affected, leaving reservation boundaries *intact* so as to encompass all other fee lands in the same area. As a result, even if we

prevail in this Court, and even though this argument flies in the face of the submissions in *Seymour v. Superintendent*, 368 U.S. 351 (1962); *Mattz v. Arnett*, 412 U.S. 481 (1973); *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *Solem v. Bartlett*, 465 U.S. 463 (1984) and *Hagen v. Utah*, 510 U.S. 399 (1994), persistence by the United States on this point could create the same chaos in South Dakota (and in all states previously affected by these and related decisions) as it has for the Counties of Duchesne and Uintah in the State of Utah. *See Ute Indian Tribe v. Utah*, 935 F. Supp. 1473 (D. Utah 1996) and *Ute Indian Tribe v. Utah*, 114 F.3d 1513 (10th Cir. 1997), where this argument recently received favorable consideration, after *40 months* of needless post-*Hagen* litigation, which is not over yet, as Charles Mix County and the Utah amici Counties have noted.

This post-*Hagen* argument is based only on isolated sentences in the *Hagen opinion*, taken out of context and used in conjunction with "diminished" terminology to support a reservation concept that would have been unthinkable a century ago. Although this argument is pure sophistry, it is beyond the scope of the arguments in this brief to address it in detail and others have assumed that responsibility. See Brief for Duchesne County, Utah, and Uintah County, Utah, *Amicus Curiae*. For this reason, the cities have simply reproduced in its entirety note 6 at 17, of the Brief of the United States submitted in the instant case in the court of appeals, as Cities App. at 1a, *infra*. Brief for the United States as *Amicus Curiae* in Support of Plaintiffs-Appellees at 17 n.6, *Yankton Sioux Tribe v. Southern Missouri Waste Dist.*, 99 F.3d 1439 (8th Cir. 1996) (No. 95-2647). This note outlines the thrust of the new post-*Hagen* argument of the United States. The Court should make clear in its opinion that this novel post-Hagen argument was also considered and rejected in this case, consistent with the question presented and the established precedent of this Court.

VII.

THE ARTICLE XVIII ARGUMENT MAKES AN ENORMOUS ASSUMPTION AND LACKS SUBSTANTIVE SUPPORT IN THE YANKTON DOCUMENTS.

1858 TREATY PROVISIONS

ARTICLE I . . . [C]ede and relinquish to the United States all the lands now owned, possessed, or claimed by them, wherever situated, except four hundred thousand acres thereof, situated and described as follows [metes and bounds description] . . . so as to include the said quantity of four hundred thousand acres.

ARTICLE IV. In consideration of the foregoing cession, relinquishment, and agreements, the United States do hereby agree and stipulate as follows, to wit:

> 1st. To protect the said Yanctons in the quiet and peaceable possession of the said tract of four hundred thousand acres of land so reserved for their future home, and also their persons and property thereon during good behavior on their part.

Treaty of April 19, 1858, 11 Stat. 743, 744.

1894 SAVINGS CLAUSE

> ARTICLE XVIII. Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement, and its ratification by Congress, all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858.

Act of August 15, 1894, 28 Stat. 286, 318; Pet. App. at 120.

The Tribe relies on this Article XVIII savings clause in the 1894 Act to support the argument that the metes and bounds boundaries of the 1858 "tract of four hundred thousand acres of land" should still be recognized.

In the first place, the United States and the Tribe *agreed* by the terms of the 1894 cession agreement to dispose of a substantial portion of this 1858 tract of land set apart for their "future home" or reservation. As a result, a change in the limits or boundaries of this tract to reflect this 1894 cession *agreement* would not abrogate the 1858 treaty. Instead, such a change, voluntarily and knowingly agreed to by both parties, was a modification of the 1858 treaty, supported by a consideration paid by the United States of $600,000. It was not an abrogation of the 1858 treaty. Of course, other unrelated 1858 treaty "provisions" did remain in full force and effect, like the annuity provisions.

Secondly, this savings clause argument erroneously assumes that one of the 1858 treaty benefits spelled out in the 1858 treaty was that the United States promised to maintain the 1858 boundaries intact, irrespective of a subsequent change in tribal ownership status within those boundaries (or at least such a result was intended by Congress to be included therein in 1858). Generally speaking, in 1858 (and for decades thereafter), this premise would have been *contrary* to all established principles of federal Indian law. At that time, extinguishment of Indian title also necessarily extinguished the Indian character of the land. *Bates v. Clark*, 95 U.S. 204 (1877). Moreover, as Solicitor Margold noted:

> The Yankton Sioux Indian Reservation was established by the treaty of April 19, 1858 (11 Stat. 744). *The right of the Indians to the reservation thereby created was that of use and occupancy, the United States having the title in fee. Spalding v. Chandler* (160 U.S. 394). By an agreement entered into December 31, 1892, and ratified by the act of August 15, 1894 (28 Stat. 286, 314), the Yankton Sioux Indians *ceded and sold to the United States for a consideration of $600,000 a part of the reservation. . .*

Opinions of the Solicitor, Dep't of the Interior, M-27671 (March 1, 1934) (emphasis added).

The above opinion was approved by the Secretary of the Department of the Interior in 1934.

This fact, together with the undisputed point that *nothing* in the 1858 treaty *or* the accompanying history can be cited to establish any Congressional intent to create an obligation on the part of the United States to maintain the 1858 boundaries, wholly undermines the credibility of this position.

In addition, this argument ignores the sum and substance of the 1894 Yankton documentation. In every respect this documentation is plainly inconsistent with such a position.

VIII.

THIS COURT SHOULD ACCORD THE LANGUAGE IN THE 1894 ACT ITS ORDINARY MEANING.

In *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498 (1986), this Court had occasion to address a general issue of statutory construction in great detail in an Indian law case. At the end of the day, what the Court said there, bears repeating:

> The canon of construction regarding the resolution of ambiguities in favor of Indians, however, does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress[16] . . . [16] See *Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985) ("[E]ven though 'legal ambiguities are resolved to the benefit of the Indians,' *DeCoteau v. District County Court*, 420 U.S. 425, 447 (1975), courts cannot ignore plain language

> that, viewed in historical context and given a 'fair appraisal,' *Washington v. Washington Commercial Passenger Fishing Vessel Assn.*, 443 U.S. [658, 673 (1979)], clearly runs counter to a tribe's later claims"); *Rice v. Rehner*, 463 U.S. 713, 732 (1983) (canon of construction regarding certain Indian claims should not be applied "when application would be tantamount to a formalistic disregard of congressional intent"); *Andrus v. Glover Construction Co.*, 446 U.S. 608, 618-619 (1980); *DeCoteau v. District County Court*, 420 U.S., at 447 ("A canon of construction is not a license to disregard clear expressions of tribal and congressional intent"). . . . [22] It is an "elementary cannon of construction that a statute should be interpreted so as not to render one part inoperative." *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). See also *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute,' *Montclair v. Ramsdell*, 107 U.S. 147, 152, rather than to emasculate an entire section").

476 U.S. at 506, 510.

By according the statutory language in the *Yankton* case its "ordinary meaning," a "most incongruous" result will be laid to rest. *Id.* at 507.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

TIMOTHY R. WHALEN
WHALEN LAW OFFICE, P.C.
P.O. Box 127
Lake Andes, SD 57356
Telephone: (605) 487-7645
Counsel of Record

APPENDICES

APPENDIX TABLE OF CONTENTS

	Page
Letter of Instruction from the Commissioner of Indian Affairs to the Sisseton Commission of August 13, 1889 (APPENDIX A)	1a
Excerpt from H.R. Rep. No. 7613, 59th Cong., 2d Sess. (1907) (APPENDIX B)	4a
Proclamation of April 11, 1892 opening the Sisseton-Wahpeton Reservation, 27 Stat. 1017 (APPENDIX C)..	7a

APPENDIX A

LETTER OF COMMISSIONER OF INDIAN AFFAIRS, NATIONAL ARCHIVES LAND DIVISION LETTER BOOK 188.

DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS
WASHINGTON

August 13, 1889.

Gentlemen:

Upon receipt hereof, you will proceed to the Sisseton Agency, Dakota, for the purpose of negotiating with the Sisseton and Wahpeton Indians for the relinquishment of such portions of the Lake Traverse Reservation not allotted, as said Indians may consent to release.

Such negotiations are authorized by the 5th Section of the Act of February 7, 1887, which provides: "That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time consent to sell, on such terms and conditions as shall be considered just and equitable, between the United States and said tribe, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress".

The Lake Traverse Reservation was created by the 3rd Article of the treaty between the United States and the Sisseton and Wahpeton Bands of Dakota Sioux Indians, concluded February 19, 1867. (15 Stats. 505).

It contains 818,780 acres, of which some 127,887 acres have been allotted in severalty, and 1,417 acres reserved for church and other purposes, leaving a surplus of some 789,476 acres.

The allotments have virtually been completed although it is possible that some few individuals who were not on the reservation when the allotments were made in 1887 are entitled to allotments.

The treaty makes no provision regarding the cession or relinquishment of the reservation or any portion thereof.

It is understood that the Indians desire to sell a portion at least, of their surplus lands.

You will call a full council of the bands and submit the subject for their consideration. If a majority of such council determine to sell any portion of the reservation, you will then agree upon the quantity of land to be sold, and its location, which should be described by sections, or other legal subdivisions of townships.

It is not considered advisable that the cession at this time should embrace all these surplus lands. A sufficient quantity should be reserved for future contingencies.

The terms and conditions of the sale should then be agreed upon, which should be just and equitable to the Indians, as well as to the United States.

You will explain to the Indians that under the Act of February 8, 1887, the sums agreed to be paid as purchase money, will be paid in the Treasury of the United States for their sole use, the same with interest, thereon at 3 per cent per annum, to be at all times subject to appropriation by Congress for the education and civilization of said Indians.

The terms and conditions agreed upon in Council, with the description of the lands to be relinquished, should be reduced to writing and incorporated in the accompanying form of agreement, which should be signed by at least a majority of the male adults of the bands.

All such adults should be given an opportunity to sign.

When freely and properly signed, your certificates and the certificate of the Official Interpreter, should be attached to the instrument.

The proceeding of the Council should be reduced to writing and attested by your signatures and that of the Official Interpreter.

The Indians should be informed that the negotiations will not be valid or binding until ratified by Congress.

Very respectfully,

/s/ T. J. Morgan
Commissioner

APPENDIX B

59TH CONGRESS, *2d Session*

REPORT No. 7613

HOUSE OF REPRESENTATIVES

SALE AND DISPOSITION OF CERTAIN LANDS IN ROSEBUD INDIAN RESERVATION, S. DAK.

FEBRUARY 14, 1907.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

Mr. BURKE, of South Dakota, from the Committee on Indian Affairs, submitted the following

REPORT.

[To accompany H. R. 24987.]

* * * *

Section 6 of the bill reserves sections 16 and 36 in each township for the use of the common schools, and grants the same to the State of South Dakota, and section 7 make an appropriation to pay for the same at $2.50 per acre. This is following the precedents which have heretofore been established in the opening of other reservations in South Dakota, and is based upon section 10 of the act of Congress admitting South Dakota into the Union, approved February 22, 1889. Said section is as follows:

> SEC. 10. That upon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed States,

> and where such sections, or any part thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools, such indemnity lands to be selected within said States in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided*, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not at any time be subject to the grants nor to indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands restored to and become a part of the public domain.

The following are the precedents:

By section 30 of the act opening and dividing the Great Sioux Reservation, sections 16 and 36 were granted to the State, and an appropriation of $1.25 per acre was made to pay for same. Act approved March 2, 1889. (25 Stat. L. 898.)

By section 30, act approved March 3, 1891, opening the Sisseton and Wahpeton Reservation, the school sections were ceded to the State and an appropriation made, and the same were paid for at $2.50 per acre. (26 Stat. L., 1039.)

By act of August 15, 1894, opening the Yankton Reservation, the school sections were ceded to the State and paid for at $3.75 per acre. (28 Stat. L., 313.)

Act providing for sale of Rosebud Reservation, in Gregory County, school sections were ceded and paid for

at $2.50 per acre, and act authorizing sale of a portion of the Lower Brule Reseravtion, first session of this (Fifty-ninth) Congress, school sections were ceded to the State and paid for at $1.25 per acre.

For the purpose of showing that the bill has the approval of the Secretary of the Interior and the Commissioner of Indian Affairs, their letters are attached hereto, together with a copy of the agreement. . . .

APPENDIX C

BY THE PRESIDENT OF THE
UNITED STATES OF AMERICA

A PROCLAMATION.

Whereas, by the third article of the treaty between the United States of America and the Sisseton and Wahpeton bands of Dakota or Sioux Indians, concluded February 19, 1867, proclaimed May 2, 1867 (15 U.S. Statutes, p. 505), the United States set apart and reserved for certain of said Indians certain lands, particularly described, being situated partly in North Dakota and partly in South Dakota, and known as the Lake Traverse Reservation; and

Whereas, by agreement made with said Indians residing on said reservation, dated December 12, 1889, they conveyed, as set forth in article one thereof, to the United States, all their title and interest in and to all the unallotted lands within the limits of the reservation set apart as aforesaid remaining after the allotments shall have been made, which are provided for in article four of the agreement, as follows:

> That there shall be allotted to each individual member of the bands of Indians, parties hereto, a sufficient quantity, which, with the lands heretofore allotted, shall make in each case one hundred and sixty acres, and in case no allotment has been made to any individual member of said bands, then an allotment of one hundred and sixty acres shall be made of such individual;

and

Whereas, it is provided in article two of said agreement,

> That the cession, sale, relinquishment, and conveyance of the lands described in article one of this agreement shall not take effect and be in force until the sum of $342,778.37, together with the sum of

> $18,400, shall have been paid to said bands of Indians, as set forth and stipulated in article third of this agreement;

and

Whereas, it is provided in the act of Congress approved March 3, 1891 (26 U.S. Statutes, pp. 1036-1038, Sec. 30), accepting and ratifying the agreement with said Indians:

> That the lands by said agreement ceded, sold, relinquished, and conveyed to the United States shall immediately, upon the payment to the parties entitled thereto of their share of the funds made immediately available by this act, and upon the completion of the allotments as provided for in said agreement, be subject only to entry and settlement under the homestead and townsite laws of the United States, expecting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State wherein located: *Provided*, That patents shall not issue until the settler or entryman shall have paid to the United States the sum of two dollars and fifty cents per acre for the land taken up by such homesteader, and the title to the lands so entered shall remain in the United States until said money is duly paid by such entryman or his legal representatives, or his widow, who shall have the right to pay the money and complete the entry of her deceased husband in her own name, and shall receive a patent for the same.

and

Whereas, Payment as required by said act, has been made by the United States; and

Whereas, Allotments as provided for in said agreement, as now appears by the records of the Department of the Interior will have been made, approved, and completed,

and all other terms and considerations required will have been complied with on the day and hour hereinafter fixed for opening said lands to settlement.

Now, therefore, I, Benjamin Harrison, President of the United States, do hereby declare and make known that all of the lands embraced in said reservation, saving and excepting the lands reserved for and allotted to said Indians, and the lands reserved for other purposes in pursuance of the provisions of said agreement and the said act of Congress ratifying the same and other, the laws relating thereto will, at and after the hour of twelve o'clock noon (central standard time) on the fifteenth day of April, A. D. eighteen hundred and ninety-two, and not before, be opened to settlement under the terms of and subject to all the terms and conditions, limitations, reservations, and restrictions contained in said agreements, the statutes above specified, and the laws of the United States applicable thereto.

The lands to be opened for settlement are for greater convenience particularly described in the accompanying schedule, entitled "Schedule of lands within the Lake Traverse Reservation opened to settlement by proclamation of the President dated April 11, 1892," and which schedule is made a part hereof.

Warning, moreover, is hereby given that until said lands are opened to settlement as herein provided, all persons, save said Indians, are forbidden to enter upon and occupy the same or any part thereof.

And further notice is hereby given that it has been duly ordered that the lands mentioned and included in this Proclamation shall be, and the same are attached to the Fargo and Watertown land districts, in said States, as follows:

1. All that portion of the Lake Traverse Reservation, commencing at the northwest corner of said reservation;

thence south 12 degrees 2 minutes west, following the west boundary of the reservation to the new seventh standard parallel, or boundary line between the States of North and South Dakota; thence east, following the new seventh standard parallel to its intersection with the north boundary of said Indian reservation; thence northwesterly with said boundary to the place of beginning, is attached to the Fargo land district, the office of which is now located at Fargo, North Dakota.

2. All that portion of the Lake Traverse Reservation, commencing at a point where the new seventh standard parallel intersects the west boundary of said reservation; thence southerly along the west boundary of said reservation to its extreme southern limit; thence northerly along the east boundary of said reservation to Lake Traverse; thence north with said lake to the northeast corner of the Lake Traverse Indian Reservation; thence westerly with the north boundary of said reservation to its intersection with the new seventh standard parallel, or boundary line between the States of North and South Dakota; thence with the new seventh standard parallel to the place of beginning, is attached to the Watertown land district, the office of which is now located at Watertown, South Dakota.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this eleventh day of April, in the year of our Lord one thousand
[SEAL] eight hundred and ninety-two , and of the Independence of the United States the one hundred
pendence of the United States the one hundred
and sixteenth.

BENJ HARRISON

By the President:

JAMES G. BLAINE

Secretary of State.

Supreme Court, U.S.
FILED
AUG 7 1997
CLERK

(15)

No. 96-1581

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STATE OF SOUTH DAKOTA,
Petitioner,
v.
YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,
Respondents,
and
SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF CHARLES MIX COUNTY, SOUTH DAKOTA, *AMICUS CURIAE*, IN SUPPORT OF PETITIONER, STATE OF SOUTH DAKOTA

MATTHEW F. GAFFEY
Charles Mix County
State's Attorney
P.O. Box 370
Lake Andes, SD 57356
(605) 487-7441

TOM D. TOBIN
Counsel of Record
TOBIN LAW OFFICES, P.C.
422 Main Street
P.O. Box 730
Winner, SD 57580
(605) 842-2500

Attorneys for Amicus Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

40 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
A. A Review of the Arguments Previously Presented and Rejected in This Court Establishes Clear Principles That Undermine the Opinion of the Panel Majority	5
1. *Seymour v. Superintendent*, 368 U.S. 351 (1962)	5
2. *Mattz v. Arnett*, 412 U.S. 481 (1973)	8
3. *DeCoteau v. District County Court*, 420 U.S. 425 (1975)	10
4. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977)	14
5. *Solem v. Bartlett*, 465 U.S. 463 (1984)	18
6. *United States v. Dion*, 476 U.S. 734 (1986)	19
7. *Yankton Sioux Tribe v. South Dakota*, 796 F.2d 241 (8th Cir. 1986)	25
8. *Hagen v. Utah*, 510 U.S. 399 (1994)	26
9. *Yankton Sioux Tribe v. Southern Missouri Waste District*, 99 F.3d 1439 (8th Cir. 1996)	29
CONCLUSION	30
APPENDIX	
Excerpts of Brief for United States as *Amicus Curiae* in Support of Plaintiff's-Appellee's, *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 99 F.3d 1439 (8th Cir. 1997) (No. 95-2647)	1a

TABLE OF AUTHORITIES

CASES: Page

Antoine v. Washington, 420 U.S. 194 (1975) 6
DeCoteau v. District County Court, 420 U.S. 425 (1975) ..... *passim*
DeCoteau v. District County Court, 211 N.W. 843 (S.D. 1973) 2, 21
Dickerson v. New Banner Institute, Inc., 460 U.S. 103 (1983) 25
Hagen v. Utah, 510 U.S. 399 (1994) 1, 2, 13, 26
Johnson v. United States, 163 F. 30 (1st Cir. 1908) 15
Mattz v. Arnett, 412 U.S. 481 (1973) ..... *passim*
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 24, 25
Oregon Dept' of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985) 3, 25
Perrin v. U.S., 232 U.S. 478 (1914) 23, 24, 29
Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) ..... *passim*
Seymour v. Superintendent, 368 U.S. 351 (1962) .. *passim*
Solem v. Bartlett, 465 U.S. 463 (1984) 2, 18, 25
State v. Greger, 599 N.W.2d 854 (S.D. 1997) 2
State v. Williamson, 211 N.W.2d 182 (S.D. 1973) .. 20, 21, 22, 23
State v. Winckler, 260 N.W.2d 356 (S.D. 1977) 21
United States v. Dion, 752 F.2d 1261 (1985) 4
United States v. Dion, 476 U.S. 734 (1986) 4, 19, 23
United States v. Greger, 98 F.3d 1080 (8th Cir. 1996) 29
United States v. Pelican, 232 U.S. 442 (1914) 6, 23, 24
Ute Indian Tribe v. State of Utah, 935 F.Supp. 1473 (D. Utah 1996) 30
Ute Indian Tribe v. State of Utah, 114 F.3d 1513 (10th Cir. 1997) 30
Weddell v. Meierhenry, 636 F.2d 211 (8th Cir. 1980) 20, 21, 22, 23
Wood v. Jameson, 130 N.W.2d 95 (1964) 21, 22, 23, 24
Yankton Sioux Tribe v. South Dakota, 796 F.2d 241 (8th Cir. 1986) *cert. denied* 483 U.S. 1005 (1986) 25

TABLE OF AUTHORITIES—Continued

Page

Yankton Sioux Tribe v. Southern Missouri Waste Dist., 99 F.3d 1439 (8th Cir. 1996) 29

STATUTES:

General Allotment Act of February 8, 1887, 24 Stat. 388 ..... 5, 14
Act of June 17, 1892, 27 Stat. 52 8
Act of March 3, 1891, 26 Stat. 1036 27
Act of August 15, 1894, 28 Stat. 286 ..... 20, 21
Act of April 23, 1904, 33 Stat. 254 27

CONGRESSIONAL MATERIALS:

H.R. Rep. No. 791, 50th Cong., 1st Sess. (1988) 7
S. Rep. No. 664, 52d Cong., 1st Sess. (1892) 6

OTHER AUTHORITIES:

54 Interior Dec. 559 (1934) 17
Brief for Petitioner, *Seymour v. Superintendent*, 368 U.S. 351 (1962) (No. 62) 5
Memorandum for the United States, *Seymour v. Superintenednt*, 368 U.S. 351 (1962) (No. 62) .. 6
Joint Brief of Respondent State of South Dakota and United States as *Amicus Curiae*, *DeMarrias v. State*, 319 F.2d 845 (8th Cir. 1963) (No. 17200) 13
Brief for the United States, *Mattz v. Arnett*, 412 U.S. 481 (1973) (No. 71-1182) 7, 8, 9, 11
Transcript of Oral Argument, *Mattz v. Arnett*, 412 U.S. 481 (1973) (No. 71-1182) 8, 9
Transcript of Oral Argument, *Erickson v. U.S. ex rel. Feather*, U.S. Supreme Court No. 73-1500, *decided with DeCoteau v. District County Court*, 420 U.S. 425 (1975) 12
Brief for the United States as *Amicus Curiae*, *DeCoteau v. District County Court*, 420 U.S. 425 (1975) (No. 73-1148) 12, 13
Brief for the Tribe, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562) 17, 18

TABLE OF AUTHORITIES—Continued

Page

Brief for the United States as *Amicus Curiae*, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562) 14, 16, 17
Memorandum of the United States, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562) 16, 17
Transcript of Oral Argument, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562) 5, 14, 17, 18
Brief for the United States as *Amicus Curiae* Supporting Respondent, *Solem v. Bartlett*, 465 U.S. 463 (1984) (No. 82-1253) 18, 19
Opening Brief for the Federal Appellant, *United States v. Dion*, 752 F.2d 1261 (8th Cir. 1985) 19, 20, 24
Brief for the United States, *United States v. Dion*, 476 U.S. 734 (1986) (No. 85-246) 23, 25
Reply Brief of the United States, *United States v. Dion*, 476 U.S. 734 (1986) (No. 85-246) 25
Transcript of Oral Argument, *United States v. Dion*, 476 U.S. 734 (1986) (No. 85-246) 20, 23, 25
Brief for the United States in Opposition, *Yankton Sioux Tribe v. State of South Dakota*, 796 F.2d 241 (8th Cir. 1986) (No. 86-1436) 4, 26
Brief for the United States as *Amicus Curiae* Supporting Petitioner, *Hagen v. Utah*, 510 U.S. 399 (1994) (No. 92-6281) 28
Transcript of Oral Argument, *Hagen v. Utah*, 510 U.S. 399 (1994) (No. 92-6281) 19, 22, 29
Brief for the United States, *Yankton Sioux Tribe v. Southern Missouri Waste District*, 99 F.3d 1439 (8th Cir. 1996) (No. 95-2647) 13
Petition for Writ of Certiorari, *Yankton Sioux Tribe v. Southern Missouri Waste District*, (No. 96-1581) (April 7, 1997) 1, 2, 20
Brief of Respondent, Southern Missouri Waste Management District, in Support of Petitioner, State of South Dakota, *Yankton Sioux Tribe v. Southern Missouri Waste District*, (No. 96-1581) (April 28, 1997) 2, 18

TABLE OF AUTHORITIES—Continued

Page

Brief for the Cities as *Amici Curiae* in Support of Petitioner, *Yankton Sioux Tribe v. Southern Missouri Waste District*, (No. 96-1581) (May 7, 1997) 1, 2, 20
Brief for the Petitioner, *South Dakota v. Yankton Sioux Tribe*, (No. 96-1581) (August 7, 1997) 2, 18
Brief of Duchesne County, Utah, and Uintah County, Utah, *Amici Curiae* in Support of Petitioner, *South Dakota v. Yankton Sioux Tribe*, (No. 96-1581) (August 7, 1997) 30

INTEREST OF *AMICUS CURIAE*

The vital concern that prompts the filing of this *Amicus* Brief can be simply stated. Prior to this litigation, all the courts and parties had recognized that the 1858 Yankton reservation no longer existed. Now, a century later, more than half of the area of Charles Mix County, South Dakota, is at issue. Consequently, the approximately 6,000 people that reside there presently face the prospect of being suddenly thrust into the status of residents of an Indian reservation. If this takes place, their officials would have only limited jurisdiction and the non-members would have no elected voice in the governance of their affairs and property by the Yankton Sioux Tribe.

The demographics of Charles Mix County in this area are similar to other non-reservation rural counties found in the State of South Dakota and the United States. This is a county that has a significant rural farm population. In terms of agricultural productivity, the land consistently produces above average yields on a state-wide basis. Approximately ninety-eight percent (98%) of the acres in Charles Mix County are classified as farm land. This farm land has an above average valuation and an above average assessed dollars per acre worth. *Ninety* percent of the land is owned by non-members and over *two-thirds* of the residents are non-members who reside on these small farms and in small towns and cities like Dante, Lake Andes, Pickstown, Ravinia and Wagner. *See* Brief for the Cities as *Amici Curiae*. In all, there are forty-nine (49) political subdivisions within the county.

Although this Court has repeatedly recognized in this situation, that the justifiable expectations of the people should not be lightly regarded or simply swept aside, the panel majority ignored that prudential advice. *Hagen v. Utah*, 510 U.S. 399, 421 (1994); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-605 (1977). For these reasons, the issue here is of grave importance to the residents and governments of Charles Mix County, South Dakota.

By contrast, here, as in *Hagen*, it is also important to restate what is not at issue. *Hagen*, 510 U.S. at 421. The Indian trust lands and the seat of the Yankton Sioux tribal government situated on Indian trust lands ("tribal headquarters area at Marty") are not at issue. *State v. Greger*, 559 N.W.2d 854, 859 n.4 (S.D. 1997), Pet. App. at 135. *See also* Cities Pet. Brief at 7 n.1 (Marty).

The Supreme Court of the State of South Dakota subsequently considered the identical disestablishment question in *State v. Greger*, Pet. App. at 125. In a unanimous opinion, the State Supreme Court rejected the views of the panel majority and reaffirmed the longstanding position that the Yankton reservation was disestablished. The County would submit that the views of the State Supreme Court are more in line with the principles formulated by this Court, principles that should have been controlling here.

Importantly, this is only the second time that any federal court of appeals has ever held that a congressional act of this nature did not disestablish the reservation area affected; the first and only other case with a similar holding was promptly reversed in *DeCoteau v. District County Court*, 420 U.S. 425 (1975).

SUMMARY OF ARGUMENT

The County fully supports the arguments set forth in the Brief of the State of South Dakota. The County further agrees that the decision of the panel majority conflicts substantially with the relevant decisions of this Court. This brief will focus on that conflict and the role of the United States in the entire process.

A fair reading of *Seymour v. Superintendent*, 368 U.S. 351 (1962); *Mattz v. Arnett*, 412 U.S. 481 (1973); *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *Solem v. Bartlett*, 465 U.S. 463 (1984) and *Hagen v.*

Utah, 510 U.S. 399 (1994), clearly undermines the views set forth by the panel majority. The State highlights these important principles and, for that reason, they will not be repeated here.

In addition, however, a proper perspective regarding the history of disestablishment litigation before this Court is important in order to accurately assess the views of the panel majority and the dissent in conjunction with the principles set forth in these decisions. This brief is intended to serve that purpose and provide that perspective. The County starts with a brief review of the primary arguments presented and rejected in each case decided by this Court, as well as the historic perspective available or established at the time.[1] Such a review advances three overriding themes.

First, as one would expect, each time the Court was presented with this issue, more primary sources were available from which a proper historical perspective could be reconstructed and the intent of Congress more conclusively ascertained. The opinions reflect this documentation.

Second, the views of the United States are especially noteworthy. The United States rarely fails to advocate the resurrection of original reservation boundaries, presumably because of a perceived obligation to support the tribal position. The shifting, but very sophisticated, arguments of the United States (for the most part repeatedly rejected by this Court) have mainly served to perpetuate

---

[1] This brief does not address the decision of this Court in *Oregon Dept. of Fish and Wildlife v. Klamath Tribe*, 473 U.S. 753 (1985) in detail, only because it is not truly a disestablishment case. However, *Oregon* does involve a cession agreement and the *Oregon* opinion sheds considerable light on understanding the cession process. The Supreme Court of South Dakota in *Greger* cited and discussed *Oregon* in several instances. Pet. App. at 140 n.6, 149, 150. For all of these reasons, *Oregon* is important and merits consideration in this case.

the confusion and conflicts in this area of federal Indian law, fueling the prospect of additional litigation.

The central arguments of the United States are therefore closely examined for another reason. As will be seen, the United States repeatedly has made a number of important *concessions* in this Court, subsequent to *DeCoteau*, regarding the *effect of cession agreements*, like this one, on Indian reservations. These cession concessions, made in conjunction with submissions that urged the continued recognition of other original reservation boundaires, cannot be explained away. The views of the United States in this regard, submitted to this Court, merit continued consideration.

This brief also addresses, in chronological order, the specific concessions of the United States regarding the disestablishment of the 1858 Yankton Sioux reservation effected by the passage of the 1894 Yankton Sioux cession act. *Infra* at 5. In 1984, the United States formally submitted this Yankton disestablishment concession in the Eighth Circuit Court of Appeals. *United States v. Dion*, 752 F.2d 1261 (1985); *United States v. Dion*, 476 U.S. 734 (1986). The United States did so in order to maintain a cession distinction in *Solem* essential to its argument there supporting original reservation boundaries. Moreover, in other litigation also pending at the same time, and also involving the 1858 Yankton Sioux reservation and the 1894 Yankton Sioux cession act, the United States acknowledged that this Court's decision in *DeCoteau* considered "a similar and contemporaneous cession agreement" with "the same language" and "purpose." BUS, Co. Pet. App. at 166a. Significantly, Article XVIII of the 1858 treaty that the United States has now insisted is so important, was not mentioned in any of this.

ARGUMENT

A. A Review of the Arguments Previously Presented and Rejected in This Court Establishes Clear Principles That Undermine the Opinion of the Panel Majority.

> Now, this principle that Congress did not intend to disestablish the Reservations is not one that the government has made up out of *whole cloth*. It is supported both by history and by the previous decisions of this Court.

Office of Solicitor General, Tr. at 22, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562) (emphasis added).

1. *Seymour v. Superintendent*, 368 U.S. 351 (1962). A disestablishment issue was first presented to this Court in *Seymour*. Although we now know that the 1906 Colville Act at issue in that case was one in a series of surplus land statutes enacted pursuant to the General Allotment Act of 1887 (Dawes Act)—a routine matter for Congress by 1906—neither the General Allotment Act of 1887 nor the limited legislative history of the 1906 Act played any real role in the resolution of the question. Act of February 8, 1887, 24 Stat. 388. The *Seymour* opinion does not cite the General Allotment Act or the legislative history of the 1906 Colville Act. The briefs are similarly silent with respect to the General Allotment Act and the few citations to the 1906 legislative history are set forth almost as an afterthought.

In short, *Seymour* was decided *almost* without the benefit of any historical perspective. "Almost" is used because, although neither the General Allotment Act nor the legislative history of the specific act in question played any role in the decision, Petitioner Seymour did rely on the contrast between the 1906 Act and the earlier 1892 "public domain" legislation that concededly disestablished the North Half of the Colville Reservation. Pet. Br. at 10, *Seymour* (No. 62). At best, this was a limited perspective, but certainly one that benefited Petitioner by simple

contrast. More important matters were not briefed, i.e. the argument that the public domain format of the 1892 Act was the result of a refusal by Congress to ratify a previously negotiated 1891 cession agreement due to the questionable nature of the title to the Colville Executive Order Reservation and the argument that the language was added to deal with a congressional concern that undesirable precedent might be established. *Antoine v. Washington*, 420 U.S. 194, 216 (1975) (Rehnquist, J., dissenting); S. Rep. No. 664, 52d Cong., 1st Sess. (1892). *See also U.S. v. Pelican*, 232 U.S. 442 (1914). In any event, it is doubtful whether any of the above would have altered the views of the United States, which argued in support of the reservation boundaries of the South Half of the Colville Reservation ("Solicitor General has urged this construction upon the Court"). *Seymour*, 368 U.S. at 357.

The Solicitor General's three page argument was based predominantly on the 1948 statutory definition of Indian country which, of course, begs the question. It was also based upon *subsequent* congressional recognition, primarily in 1956, that the reservation continued to exist. BUS, Co. Pet. App. at 3a. Neither the General Allotment Act nor the historical perspective of the 1906 Act played any role in the brief for the United States. In this light, *Seymour* concluded, without further citation, that:

> The Act did no more than *open the way for non-Indian settlers* to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards.

Seymour, 368 U.S. at 356 (emphasis added).

The United States later seized on this statement from *Seymour* and tied it to the General Allotment Act of 1887 (which, as previously noted, was not even mentioned in *Seymour*). In effect, the United States attempted to attribute to both *Seymour* and the General Allotment Act,

a new congressional plan or purpose consistent with a new argument that no surplus land statute, passed pursuant to the General Allotment Act of 1887, was ever intended by Congress to disestablish portions of Indian Reservations—a "whole cloth" argument: the revisionist theory of the General Allotment Act.[2]

The United States focused on the General Allotment Act of 1887 for more than one reason. Prior to that time, Congress routinely utilized treaties, cession agreements and other similar arrangements, some of which contained allotment provisions, to disestablish reservations and open territories throughout the United States to settlement for decades:

> [t]he policy of the Government from its earliest days has been to restore Indian reservations or portions thereof to the public domain as the exigencies of advancing population required it. . . .

H.R. Rep. No. 791, 50th Cong., 1st Sess. at 3 (1888). No one had ever attempted to even formulate an argument that Congress never intended these actions to disestablish the limits or boundaries of Indian reservations. If similar cession agreements, passed subsequent to 1887, were not intended to have the same effect, the General Allotment Act of 1887 was the only point in history that Congress could have even arguably intended to have altered such a fundamental historical process. This is especially so in the absence of some affirmative evidence that Congress specifically intended to depart from that historical format, either generally or in a certain case. (The United States could not produce such evidence at the time—or, as a matter of fact, ever. And it will not do so in this case.) The first opportunity for the United States to advance the new revisionist theory of the General Allotment Act argument in this Court came in *Mattz v. Arnett, supra*. BUS, Co. Pet. App. at 14a-15a.

---

[2] *See* the "whole cloth" disclaimer noted *supra* at 5.

2. *Mattz v. Arnett*, 412 U.S. 481 (1973). Although the United States argued forcefully for the broad sweep of *Seymour* tied to the General Allotment Act, this argument met with only limited success in *Mattz*. BUS, Co. Pet. App. at 12a-14a. The history of the Klamath River Reservation at issue in *Mattz* was so tortious and fact specific, isolated and atypical, that the *Mattz* dicta regarding the General Allotment Act, while all that the United States could have hoped for, did not really seem pivotal to the decision.

Certainly, the United States repeatedly told the *Mattz* Court:

> The Act of 1892 can properly be understood only in light of the *General Allotment Act* which Congress had recently passed.
>
> In our view, the Act of June 17, 1892, can properly be understood only in light of two considerations: (1) what Congress had done five years earlier in the *General Allotment Act*. . . .
>
> *The policy of the Act* was to continue the reservation system and the trust status of Indian land. . . .
>
> This Court's more recent decision in *Seymour v. Superintendent*, 368 U.S. 351, is, in our view, controlling here. . . .

BUS, Co. Pet. App. at 10a, 14a, 24a (emphasis added). *See also, id.* at 11a, 15a n.8.

And at oral argument, the United States squarely placed this issue "into a little bit of historical perspective":

> This same policy is recognized more recently by this Court in *Seymour v. Superintendent*. . . .

Tr. at 19-20, *Mattz* (No. 71-1182). *See also, id.* at 13, 14, 15, 21.

At the same time, to shore up this new General Allotment Act argument and supplement this "little bit" of historical perspective for the Court, the United States also discussed certain statutes that concededly disestablished

Indian reservations. According to the United States, the Court could, by contrast, look to these examples in determining when congressional action was really intended to disestablish an Indian reservation—an instant historical perspective. BUS, Co. Pet. App. at 18a-19a. Following Petitioner's lead in *Seymour*, and especially in light of this aspect of the *Seymour* opinion, the controlling example cited by the United States of a congressional mandated disestablishment was the 1892 *Colville* statute, where the operative language restored the north half of the reservation to the public domain. As the United States told this Court in *Mattz*, among other things:

> This Court's more recent decision in *Seymour v. Superintendent*, 368 U.S. 351, is, in our view, *controlling* here. . . . In holding that the Act did not terminate the reservation there at issue, the Court emphasized the absence from the Act of language abolishing the reservations or "restoring that land to the public domain" (368 U.S. at 355).

BUS, Co. Pet. App. at 24a (emphasis added).

Other examples were also listed by the United States to support this "by contrast" argument, including a typical cession. *Id.* at 18a-19a (the *cession* example merits special attention *infra*).

At oral argument, the United States repeated the "by contrast" point:

> MR. SACHSE . . . In closing, since I assume I am out of time, I refer the Court to page 17 of our brief where we have samples of language that Congress used when it did want to discontinue a portion of a reservation.

Tr. at 20-21, *Mattz* (No. 71-1182).

(Except for the cession example, the text *infra* establishes that the others on the list were representative of atypical situations encountered by Congress only on rare occasions and decades apart.)

Without question, the *Mattz* opinion reflects both arguments made by the United States. First, with respect to the General Allotment Act:

> Its policy was to continue the reservation system and the trust status of Indian lands, ... See § 6 of the General Allotment Act, 24 Stat. 390; United States Department of the Interior, Federal Indian Law 115-117, 127-129, 776-777 (1958). . . .
>
> . . . This Court unanimously observed in an analogous setting in *Seymour, id.*, at 356, . . .

Mattz, 412 U.S. at 496, 497.

Secondly, with respect to the "by contrast" argument, the Court in *Mattz* noted:

> More significantly, throughout the period from 1871-1892 numerous bills were introduced which *expressly* provided for the termination of the reservation and did so in unequivocal terms. . . .
>
> Congress has used clear language of express termination when that result is desired. See, for example. . . .

Id. at 504, n.22 (emphasis added).

Two years later, this Court was actually presented with a typical surplus land statute specifically patterned and enacted pursuant to the terms of the General Allotment Act. With the supporting documentation of both the specific act as well as the General Allotment Act, the General Allotment Act *dicta* in *Mattz* did not dissuade the Court, including the author of the *Mattz* opinion, from correctly concluding that surplus land statutes passed pursuant to the General Allotment Act were also intended and routinely passed by Congress to disestablish Indian reservations. *DeCoteau v. District County Court*, 420 U.S. 425, 447-449 (1975). Predictably, the United States again argued forcefully for a different result in *DeCoteau*.

3. *DeCoteau v. District County Court*, 420 U.S. 425 (1975). In *DeCoteau*, the surplus land statute at issue was one of eight similar agreements in a cession format

jointly ratified in an 1891 Appropriation Act. Each of these agreements was specifically tailored to the provisions in the General Allotment Act, which had recently been passed after nearly a decade of focused debate. For these two reasons, fortuitous in retrospect, the historical record consisted of hundreds of pages directed to this aspect of the General Allotment Act (Section 5) and the effect the cession agreements were understood and intended to have.

Moreover, for the first time, all of this primary documentation was excerpted and presented to the *DeCoteau* Court in several hundred pages of briefs, setting forth a complete and proper historical perspective. That perspective established that although simple allotment per se (Section 6 of the General Allotment Act) was only intended to disestablish reservations at *some* point in the foreseeable future, a separate and distinct surplus land statute, in a cession format, opening the reservation or a portion thereof to settlement pursuant to Sec. 5 of the General Allotment Act, was intended to disestablish the affected reservation *pro tanto* (on the date of the opening set forth in the Presidential Proclamation). This was in precisely the same manner that pre-1887 cessions had disestablished reservations for decades, when Congress and/or the President authorized similar legislation.

The United States elected to ignore the force of this documentation, and instead urged the *DeCoteau* Court to recognize the continuing existence of the original reservation boundaries on the basis of *Seymour* and *Mattz* and the United States' revisionist theory of the General Allotment Act. While agreeing that the focal point of the issue had to be the General Allotment Act of 1887, the United States pressed the point that *Seymour* and *Mattz* were both openings pursuant to that act, and that no act pursuant to the General Allotment Act was ever intended to effect reservation disestablishment except at some future point in time. (Again, as in the Brief for the United States in *Mattz*, the United States blurred the distinction

between allotment per se (Section 6 of the General Allotment Act) which eventually resulted in some non-Indian ownership within the limits of Indian reservations, but was never intended to immediately disestablish the reservations, and surplus land statutes enacted pursuant to Sec. 5 of the General Allotment Act, which repeatedly accomplished this result). BUS, Co. Pet. App. at 37a, 38a, 39a, 40a.[3]

In addition, the United States submitted a series of very sophisticated arguments drawn from little scraps of language found in *Seymour* and *Mattz* to support this general proposition. No degree of sophistication, however, could overcome the problem the United States never addressed: namely, the fact that all of the contemporary historical evidence irrefutably pointed to the opposite conclusion. *DeCoteau*, 420 U.S. at 432, 434, 436, 438 and 441.

Further, the cession format utilized by Congress in previous decades—with the end result never questioned in terms of reservation boundaries—was only slightly modified at this point in time (1887 through the early 1900's). As a result, the United States could only argue that the cession format itself was probative of nothing because it was not within the list of self-serving "by contrast" examples the United States *now* said Congress utilized when Congress "clearly" intended to effectuate this result (the list noted previously was compiled by the United States and noted in *Mattz*, 412 U.S. at 497, n.19). In the original version of the list presented to the Court in *Mattz*, the United States had included representative cession language. BUS, Co. Pet. App. at 18a-19a. When that cession example did not appear in the *Mattz* opinion, the United States omitted any mention of this fact to the Court, simply adopted the *Mattz* list and argued throughout *DeCoteau* that the cession language was meaningless. *Id.* at 40a-41a.[4]

---

[3] *See also*, Tr. at 11, 13, 17, 21, *Erickson v. U.S. ex rel. Feather*, (No. 73-1500), *decided with DeCoteau.*

[4] At the time, the State of South Dakota evidently overlooked this aspect of the original list and the fact that the typical cession

Even without a specific historical point of reference, it is difficult to believe that the *DeCoteau* Court would have found this argument credible when actually presented with a real cession agreement. When all of the *DeCoteau* documents conclusively established that the *DeCoteau* cession format was still the rule at this point in time *i.e.*, *after* the General Allotment Act, rather than the exception, this argument was soundly rejected. Cession terminology was "precisely suited" to disestablishment and the remainder of the sophisticated arguments of the United States were noted and rejected for that reason. *DeCoteau*, 420 U.S. at 445.[5]

---

example submitted by the United States in the Brief for the United States in *Mattz* (as "direct and unambiguous language" of disestablishment) was actually ratified in the same statute as the cession agreement presented in *DeCoteau*. BUS Co. Pet. App. at 40a. To the extent that the United States was making the opposite argument in *DeCoteau*, this oversight was fortuitous for the United States in that this contradictory position was never brought to the Court's attention.

[5] As the Court in *DeCoteau* noted, as recently as 1963, the United States had joined with South Dakota in the argument that cessions disestablished reservations. Joint Brief of Respondent State of South Dakota and United States as *Amicus Curiae* at 7, *DeMarrias v. State*, 319 F.2d 845 (8th Cir. 1963) (No. 17200). *DeCoteau*, 420 U.S. at 443.

Not surprisingly, in every way that is arguably significant, the Yankton documents mirror and reflect the same terminology, discussions, considerations, policies, and generalities presented in *DeCoteau*. In fact, as Respondent Southern Missouri Waste Management District pointed out, the Yankton Commissioners repeatedly referred specifically to the terms of the Sisseton Agreement. Br. of Resp't District at 18-19. *See also* South Dakota Representative Pickler's remarks in the Congressional Record ("same kind of a treaty we have always made" . . . "procure these lands in the same way" . . . "we make no departure from our past policy" . . . "just as all other cessions of land" . . .). *Id.* at 36-37. As a result, in both instances the Commissioner of Indian Affairs and the Secretary of the Interior also acknowledged that both reservations were "restored to the public domain." *Id.* at 9. *See generally Hagen* 510 U.S. at 412-414 (public domain).

4. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977). The United States subsequently resisted the force of *DeCoteau*. In 1977, in *Rosebud*, this Court considered three Sec. 5 surplus land statutes considered by Congress a decade after the *DeCoteau* surplus land statutes were passed. The United States again argued that, after adopting the General Allotment Act, Congress never intended this type of statute to disestablish portions of Indian reservations. As in the past, reliance for this argument was placed almost entirely upon *Seymour* and *Mattz*. In its brief, the United States specially emphasized that *Mattz* noted:

> Placing the 1892 Act into the historic context of *the General Allotment Act of 1887*, 24 Stat. 388, the [*Mattz*] Court further observed that the Allotment Act "permitted the President to make allotments of reservation lands to resident Indians and, with tribal consent, to sell surplus lands. Its policy was to *continue the reservation system*. . .

BUS, Co. Pet. App. at 65a (emphasis in original text).

In its discussion of *DeCoteau*, the United States failed to mention the role played by Sec. 5 of the General Allotment Act and the cessions in the *DeCoteau* process. *Id.* According to the United States, *DeCoteau* was important primarily because of the differences between the cession act there and the *Rosebud* legislation, i.e., the unilateral nature of the congressional action in *Rosebud* and the uncertain payment in trust for the *Rosebud* land.

At oral argument, the United States repeatedly stressed its revisionist theory of the General Allotment Act. The United States maintained that after this act, Congress never intended reservation disestablishment. *DeCoteau* was mentioned only in passing and then primarily to somehow support continued reservation boundaries throughout this period. Tr. at 20, 21, 27, 29, *Rosebud* (No. 75-562).

The *Rosebud* Court proceeded, in the most definitive opinion to date, to squarely address each and every argu-

ment—sophisticated arguments to be sure (and there were many)—advanced in support of the Court restoring the original boundaries of the Rosebud Reservation. Although one or two minor exceptions might exist, a careful reading of *Rosebud*, together with *DeCoteau* as recognized historical background, establishes that the United States, the Yankton Sioux Tribe and supporting *Amici*, can not advance any argument of substance that has not already been answered. (And, as in *DeCoteau*, the public domain concept, whether expressed on the face of the act or in the legislative history, was still important in *Rosebud* and equated with reservation disestablishment.)

Unquestionably, as time went on, the cession format of the earlier period was modified, but these changes in format reflect no change in congressional intent. Thus, it ultimately mattered little that the 1904 *Rosebud* Act was technically not a "cession." As the Court in *Rosebud* explained:

> As a matter of strict English usage, petitioner is undoubtedly correct; "cession" refers to a voluntary surrender of territory or jurisdiction, rather than a withdrawal of such jurisdiction by the authority of a superior sovereign. But as Mr. Justice (then Judge) Holmes commented, we are not free to say to Congress: "We see what you are driving at, but you have not said it, and therefore we shall go on as before." *Johnson v. United States*, 163 F. 30, 32 (CA1 1908). . . .
>
> The use of the word "cession" in the 1904 Act, which was not consented to by the required extraordinary majority of the Tribe, does not make the meaning of the Act ambiguous. . .
>
> The word is technically misused but the meaning is quite clear.

Rosebud, 430 U.S. at 597.

In the instant case, of course, the word "cession" is not technically misused. And the United States' comments

regarding real cessions in *Rosebud* (alternatively, in an attempt to distinguish *Decoteau*) bear repeating now:

> The court of appeals, however, failed to recognize the *crucial difference* that in *DeCoteau* the United States itself purchased the land in the reservation pursuant to an agreement with the Indians; this, the Court held, restored the land to the public domain and extinguished the reservation. 420 U.S. at 446-447.

Memorandum of the United States at 13, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562) (emphasis added).

> The 1891 Act had ratified an agreement in which the Tribe expressly *ceded* to the United States all its "right, title and interest" in the land for a lump sum. The Court contrasted this transaction with the Acts involved in *Seymour* and *Mattz*. . . . The *differences* identified by the Court are *important* to the present case. The 1891 Act was a *negotiated agreement* with the Tribe, whereas the Acts involved in *Seymour* and *Mattz* were "unilateral" Acts of Congress not agreed to by the Tribes. . . .
>
> The 1891 Act was a *straightforward cession for a sum certain in amount*. . . . These *distinctions* led to the conclusion that the Lake Traverse Reservation was extinguished and the land restored to the public domain. . . .
>
> In *DeCoteau* (but not in *Seymour* or *Mattz*) the *United States itself purchased the land in the Reservation pursuant to an agreement with the Indians; this, the Court held, restored the land to the public domain and extinguished the Reservation.*

BUS, Co. Pet. App. at 66a, 67a (emphasis added).

The United States also reminded this Court of the 1934 Interior Department Opinion which they continued to rely upon for *traditional* confirmation that real *cessions disestablished reservations*:

> In this way the *exterior boundaries* of a reservation were further reduced. The lands thereby separated from a reservation were no longer looked upon as being part of that reservation.

54 Interior Dec. 560 (1934) (emphasis added) cited and quoted in part in Memo. of the United States at 19-21 *Rosebud* (No. 75-562) and BUS, Co. Pet. App. at 79a ("The Secretary noted that many reservation lands had been ceded for a sum certain and concluded that '[t]he lands thereby separated from a reservation were no longer looked upon as being a part of that reservation'" (54 I.D. at 560)). *Id.*

It is beyond dispute that both the Sisseton and the Yankton reservation agreements are within the purview of this analysis. For this reason, as the United States pointed out, the list in the 1934 Opinion included some 26 "reservations." It did not include *either* the Sisseton or Yankton cession. BUS, Co. Pet. App. at 80a.

In oral argument, the United States reiterated, by negative implication, this same dominant point:

> [W]henever Congress *without* a binding agreement opens lands to white settlers, it does *not* pay for them and does *not* guarantee any payment but only agrees to act as trustee for future uncertain sales and leaves the property interest in the Indians—as they did in this case—that act does *not* remove the lands from the boundaries of the Reservation.

Tr. at 22, *Rosebud* (No. 75-562) (emphasis added).

A few minutes later, the same cession distinction was stressed in a different context:

> [I]n *DeCoteau*, which distinguishes both cases in a case where sale was made for a sum certain and an agreement was made, as counsel for the Tribe has discussed. . . .

Id. at 28.[6]

---

[6] *See also* Rosebud Sioux Tribe's Brief in *Rosebud* that tracks this position and confirms that same understanding regarding the

5. *Solem v. Bartlett*, 465 U.S. 463 (1984). In *Solem*, the United States combined and restated so many variations of earlier arguments that even a summary review is difficult to present here. Moreover, since the United States did not participate in oral argument, that source is not available. In short, however, it can be fairly stated that the United States in *Solem* argued whatever was necessary to resist reservation disestablishment.

Most important for the present case are the concessions of the United States regarding cessions which were adopted in the Court's Opinion. *Solem*, 465 U.S. at 470, 473 n.15, 474, 476, 478. The State addresses these points. State's Br. at 9, 15-16, 26 n.15.

For example, the United States said:

> [C]*ritically different* from the situation in *DeCoteau* and *Rosebud* in at least the following respects: (1) the relevant legislation contains *no* language of "cession"; (2) there was *no* prior tribal agreement to cede the relevant area. . . .

Br. for the United States as *Amicus Curiae* Supp'ng Resp't (opposing Pet. for Cert.) at 4 n.3, *Solem* (No. 82-1253) (emphasis added).

On the merits, the cession theme was restated with unmistakable clarity:

> The *critical* question remains whether the statute invoked worked an immediate and irrevocable cession. . . .
>
> To be sure, as *DeCoteau* and *Rosebud* illustrate, there are instances in which a Reservation *must* be

---

traditional view that real cessions disestablished reservations. Tribe's Brief at 12, 13 and 16, *Rosebud* (No. 75-562). Counsel for the Rosebud Sioux Tribe has decades of experience in this area of the law. At oral argument, he unequivocally stated:

> A cession is a sale. It is a high-class sale. It is a sale between sovereigns. . . . The Court assumed there was a cession. That is the fundamental error of the Court Below.

Transcript of Oral Argument at 12-13, *Rosebud*, 430 U.S. 584.

> found to have been irrevocably terminated or diminished. . . . In the climate of the times, the *only meaningful question* is whether the legislation meant to accomplish a *present, unequivocal* and *irrevocable* transfer of Reservation lands from the Tribe to the United States.
>
> The *critical* fact in all these cases is that Congress exacted a *present and total surrender of all tribal interest* in the ceded land in return for an *unconditional commitment* by the United States to an agreed payment. . . .
>
> [T]he clear line between *outright* cession and mere opening up of tribal lands was not always observed. . . . But we do not read *Rosebud* as erasing the *traditional distinction*.
>
> What is relevant, however, is that, at the end of the day, *no cession resulted*.

BUS, Co. Pet. App. at 103a, 109a, 110a, 111a, 113a, 122a (emphasis added).

In this light, it is not surprising that *Solem* repeatedly made these same cession observations.

6. *United States v. Dion*, 476 U.S. 734 (1986). In order to maintain the cession distinction essential to the argument in *Solem*, the United States had to make similar concessions in other cases then pending. As a result, at about the same time (1984), the United States recognized that cession disestablishment was the dominant factor in the history of the 1858 Yankton reservation and further, that the 1858 Yankton reservation had in fact been *disestablished* by the 1894 Yankton cession act at issue in the present case. Opening Brief for the Federal Appellant at 16, 17 n.10, *United States v. Dion*, 752 F.2d 1261 (8th Cir. 1985). This submission by the United States was made in the Eighth Circuit Court of Appeals sitting *en banc* in conjunction with the appeals of federal prosecutions of Yankton Sioux tribal members and others for unlawfully killing bald eagles, as the United States has acknowledged. Brief for the United States as *Amicus*

Curiae in Support of Plaintiffs-Appellees at 18 n.8, *Yankton Sioux Tribe v. Southern Missouri Waste Dist.*, 99 F.3d 1439 (8th Cir. 1996) (No. 95-2647).

In *Dion*, in the opening brief, the United States correctly identified the relationship between the 1858 Yankton cession treaty and the 1894 Yankton cession act under a subheading disputing a treaty "right to hunt eagles to extinction" (one Yankton Sioux tribal member had allegedly killed twenty bald eagles in the course of a year). Opening Brief for the Federal Appellant at 16, 17 n.10, *Dion*, 752 F.2d 1261; Transcript at 18, 27, *Dion*, 476 U.S. 734. In addition, and in accord with the cession disestablishment submission in *Solem v. Bartlett*, 465 U.S. 463 (1984), the United States specifically cited with approval the controlling federal and state decisions that recognized and held that the 1858 Yankton reservation was disestablished by the 1894 Yankton cession act:

> In 1858, the Yankton Sioux negotiated a treaty with the United States in which they "ceded and relinquished" to the United States all but 400,000 acres of the lands claimed by them. Treaty with the Yankton Sioux, Art. I, 11 Stat. 743. (April 19, 1858)[10] . . . .[10] In 1894, Congress ratified an agreement with the Yankton Sioux which further diminished the size of their reservation. Act of August 15, 1894, § 12, 28 Stat. 286, 314. See *Weddell v. Meierhenry*, 636 F.2d 211 (8th Cir. 1980); *State v. Williamson*, 211 N.W.2d 184 (S.D. 1973).

Opening Brief of the Federal Appellant at 16, 17 n.10, *Dion*, 752 F.2d 1261.

The two disestablishment cases cited by the United States are both important. First, in *Weddell v. Meierhenry*, 636 F.2d 211 (8th Cir. 1980), the parties and the federal court proceeded on the basis that the reservation had been disestablished in considering a dependent Indian community jurisdictional claim involving the City of Wagner, South Dakota, which is within the 1858 Yankton

reservation. *See* Brief of Cities at 3-6.[7] In the process of rejecting this dependent Indian community claim to preclude state jurisdiction, in *Weddell* the federal panel, without dissent, specifically noted that the disestablishment issue had been decided and conceded:

> The Supreme Court of South Dakota has twice determined that the original Yankton Indian Reservation had been diminished by an Act of Congress. *Wood v. Jameson*, 81 S.D. 12, 130 N.W.2d 95, 99 (1964); *State v. Williamson*, 211 N.W.2d 182, 184 (S.D. 1973). Appellant does not challenge these holdings in this appeal.

Weddell, 636 F.2d at 213 n.2.

Second, in *State v. Williamson*, 211 N.W.2d 182 (S.D. 1973), which also involved criminal offenses in the City of Wagner, South Dakota, as well as in the City of Lake Andes, South Dakota (both within the 1858 Yankton reservation), the Supreme Court of the State of South Dakota reiterated and restated its longstanding cession jurisprudence regarding "outright" cessions. Later that same month, the South Dakota Court again confirmed this cession jurisprudence and the disestablished status of a similar cession in *DeCoteau v. Dist. County Ct.*, 211 N.W.2d 843 (S.D. 1973), which was subsequently affirmed by this Court. *DeCoteau*, 420 U.S. 425 (1975).[8]

---

[7] The criminal activity in *Weddell* originated in a burglary in Wagner, South Dakota, involving the theft of rifles and shotguns by several Yankton Sioux tribal members and other individuals and the armed takeover of a nearby pork plant. The Supreme Court of South Dakota decided the initial appeals in *State v. Winckler*, 260 N.W.2d 356 (S.D. 1977). In the *Winckler* opinion, a unanimous State Supreme Court reiterated that it had previously held the Yankton reservation to be "disestablished" in *State v. Williamson*, 211 N.W.2d 182 (S.D. 1973) and further cited *DeCoteau v. Dist. County Ct.*, 211 N.W. 843 (1973), *aff'd*, 420 U.S. 425 (1975). *Winckler*, 260 N.W.2d at 360.

[8] Judge Wollman, a member of the State Supreme Court at the time, concurred specially, noting:

> [T]he Act of 1894, 28 Stat. 286, expresses a congressional determination to terminate the reservation status of the por-

Eight other briefs were filed in the Eighth Circuit Court of Appeals in *Dion*. No one disagreed with the United States' disestablishment assessment of the 1894 Yankton cession act or the controlling federal and state law.

The *en banc* majority opinion in the Eighth Circuit in *Dion* acknowledged this 1894 Yankton cession act disestablishment in the following fashion, and the dissent did not disagree with this conclusion:

> In 1858, the Yankton Sioux and the United States negotiated a treaty in which the Yankton Sioux ceded and relinquished to the United States all lands claimed by the tribe except for a four hundred thousand acre tract of land[7] . . .[7] The Supreme Court of South Dakota has determined that an act of Congress in 1894 diminished the size of the original reservation. *State v. Williamson*, 87 S.D. 512, 211 N.W.2d 182, 184 (1973); *Wood v. Jameson*, 81 S.D. 12, 130 N.W.2d 95, 99 (1964). *See Weddell v. Meierhenry*, 636 F.2d 211, 213 n.2 (8th Cir. 1980).

Dion, 752 F.2d at 1263 & n.7 (8th Cir. 1985) (footnote omitted).[9]

---

tion of the reservation ceded, sold, relinquished and conveyed to the United States by the Yankton Tribe.

State v. Williamson, 211 N.W.2d 182, 184 (S.D. 1973). In the instant case, Judge Wollman recused himself.

The United States has now belittled *Williamson* and all state and federal Yankton disestablishment precedent prior to "*Solem* and *Hagen*," without explaining why *Seymour*, *Mattz*, *DeCoteau* and *Rosebud* do not also figure in this equation. Brief for United States as *Amicus Curiae* in Support of Plaintiffs-Appellees at 17, *Yankton Sioux Tribe v. Southern Missouri Waste Dist.*, 99 F.3d 1439 (8th Cir. 1996) (No. 95-2647).

[9] The *en banc* court supplemented the citations of the United States to the disestablishment cases of *Weddell v. Meierhenry*, 636 F.2d 211 (8th Cir. 1980) and *State v. Williamson*, 211 N.W.2d 182 (1973) with this reference to *Wood v. Jameson*, 130 N.W.2d 95 (1964) (The court of appeals in *Weddell* had also cited *Wood*). In a habeas corpus case, the South Dakota Supreme Court in *Wood* rejected an Indian country claim of federal jurisdiction for a crime of rape that occurred in Lake Andes, South Dakota, which

State v. Williamson, 211 N.W.2d 182 (S.D. 1973); *Wood v. Jameson*, 130 N.W.2d 95 (S.D. 1964) and *Weddell v. Meierhenry*, 636 F.2d 211 (8th Cir. 1980) all make clear that the 1858 Yankton reservation has been disestablished and that references to the present Yankton reservation are limited to the land still held in trust for the Yankton Sioux Tribe or tribal members. *See also DeCoteau*, 420 U.S. at 446. And it was in this light that the Solicitor General admitted in this Court that the "reservation" nature of the violations in *Dion* were "essentially undisputed." Brief for the United States at 15 n.19, *Dion*, 476 U.S. 734. *See also* Respondent's references to "Indian land" and "his reservation." Transcript at 20-21, *Dion*, 476 U.S. 734.

The opinion of this Court in *Dion* noted early on that the Eighth Circuit simply assumed that the birds were killed on the "reservation" and that the same assumption was made in this Court. *Dion*, 476 U.S. at 735 & n.1. With this assumption, a unanimous Court did not otherwise directly or specifically address the 1894 Yankton cession act issue. However, in the course of discussing the history of the 1858 Yankton reservation, the Court in *Dion* did cite *Wood* in the text of the opinion, in recognition of the fact that the area reserved in 1858 was initially a "legally constituted Indian reservation." *Dion*, 476 U.S. at 737 (citing *Wood*, 130 N.W.2d 95). *See* discussion of *Wood supra* at Note 9. On the very same page in *Wood* that recognized the initial legitimacy of the 1858 Yankton reservation, the *Wood* opinion begins its

---

is within the 1858 Yankton reservation. *Wood*, 113 N.W.2d 95. The *Wood* court, citing numerous state court decisions, distinguished *Seymour v. Superintendent*, 368 U.S. 351 (1962) (as this Court did later in *DeCoteau*) on the basis of the nature of this outright 1894 cession. *Wood v. Jameson*, 130 N.W.2d at 98-99. The *Wood* court also relied on this Court's venerable precedent in *United States v. Pelican*, 232 U.S. 442 (1914) and *Perrin v. United States*, 232 U.S. 478 (1914) (liquor provision to apply "on or off a reservation") and concluded that the "purpose" of Congress was to "disestablish the reservation." *Wood v. Jameson*, 130 N.W.2d at 97-99. See also discussion of *Perrin* in State's Br. at 33.

discussion of the disestablishment of the 1858 Yankton reservation occasioned by the passage of the 1894 Yankton cession act (two sentences later). *Wood*, 130 N.W. 2d at 97. As noted above, the *Wood* analysis included quotations of the cession language of the 1894 cession act and early precedent of this Court, such as *United States v. Pelican*, 232 U.S. 442 (1914) and *Perrin v. United States*, 232 U.S. 478 (1914). *Wood*, 130 N.W. 2d at 97-99. Because the Eighth Circuit in *Dion* expressly cited *Wood* for this disestablishment holding, the reference to *Wood* in this Court's opinion should be viewed in this light.

One final point with respect to the views of the United States in *Dion* regarding the 1858 Yankton treaty, the 1894 Yankton cession act and subsequent acts of Congress. Apart from the previous inconsistent disestablishment concession of the United States with reference to the 1894 Yankton cession act (and all other cessions), the strained argument the United States now submits should also be examined in the context of the views the United States expressed in *Dion* regarding statutory construction and Indian treaties generally. For example:

> [T]he general circumstances of treaty negotiation in the nineteenth century which, in our view, would not have led any of the parties even to form an intention on this issue. In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978), the Supreme Court emphasized that treaties with the Indians "cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them." The historical context of Indian treaty negotiation demonstrates that neither the United States nor the Indian signatories ever contemplated. . . .

Opening Brief for the Federal Appellant at 17-18, *Dion*, 752 F.2d 1261.

> This Court has emphasized that Indian treaties 'cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them.' *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978).

Brief for the United States at 19, *Dion*, 476 U.S. 734.

> It is, of course, axiomatic that a statute must be interpreted in light of the purposes Congress sought to achieve. See, *e.g., Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 118 (1983).

Reply Brief of the United States at 7, *Dion*, 476 U.S. 734.

> The statute should be construed in order to effectuate its purposes.

Transcript at 17, *Dion*, 476 U.S. 734.

These are important concepts. Their significance is not undermined here simply because the United States now chooses to advance an argument that is at odds with acknowledged congressional assumptions and overall congressional purposes.

7. *Yankton Sioux Tribe v. South Dakota*, 796 F.2d 241 (8th Cir. 1986), *cert. denied*, 483 U.S. 1005 (1986). Apart from *Dion*, the United States has only had one opportunity since *DeCoteau* (but before the present litigation) to tell this Court specifically about the *Yankton* statute and how it compared to the *DeCoteau* statute. In that instance, involving a lakebed, the cession comparison is also telling:

> [T]he United States' right to control Lakes Andes and its bed, to the exclusion of the Yankton Sioux Tribe, is in any event secured by the 1892 Cession Agreement. . . . First, Article I is framed in terms that this Court has repeatedly characterized as "express language of cession." *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, No. 83-2148 (July 2, 1985), slip op. at 15 n.19; *Solem v. Bartlett*, 465 U.S. 463, 469 (1984). In *DeCoteau v. District County Court*, 420 U.S. 425, 445 (1975) (emphasis added), this Court, in considering *a similar and contemporaneous cession* agreement, found that *the same language* was "precisely suited" to the purpose

> of conveying to the United States, "for a sum certain, *all of* [*the Indians'*] interest in *all* of their unallotted lands."
>
> Second, the retention of the lakebed by the Tribe would have been inconsistent with the *purposes* of the 1892 Cession Agreement. Those *purposes* consisted not only of opening additional lands for non-Indian settlement, but also of paving the way for the anticipated end of the tribal way of life. . . .

BUS, Co. Pet. App. at 165a, 166a (emphasis on all in original).

While it remains to be seen exactly what the United States might tell this Court now, the County would submit that in this excerpt in the 1986 Brief in Opposition, the United States has already said everything worth saying ("a similar and contemporaneous cession"). This *Yankton* lakebed litigation was pending for over a decade. Although reservation disestablishment was not decided, the Yankton cession agreement was central to the arguments for the United States and other parties. As such, it was thoroughly reviewed and discussed in all respects. At that time, Article XVIII of the Yankton agreement, viewed in context, was not noteworthy and did not even merit special attention in the argument of the United States.

Not surprisingly, the position of the United States on this issue was subsequently modified to one that now supports the recognition of the original Yankton reservation. In the court of appeals, Article XVIII figured prominently in the new argument.

8. *Hagen v. Utah*, 510 U.S. 399 (1994). *Hagen* reflects the most recent views of this Court in resolving disestablishment issues. Due to the history of the Utah legislation, the United States devoted most of its arguments in *Hagen*—naturally in favor of a recognition of original reservation boundaries—to "public domain" terminology. These arguments were generally rejected in *DeCoteau*. Again, in *Hagen* this Court squarely rejected them.

The United States also strongly argued that a cession and sum certain agreement was broadly understood to effect disestablishment:

> Language that "[e]xplicit[ly] refer[s] to *cession*" or otherwise "evidence[es] the present and total surrender of all tribal interests" in the opened area suggests that Congress *meant to sever it* from the reservation. *Ibid.* When such language is buttressed by an unconditional commitment to compensate the tribe, "there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished." [14] [14] In the presence of both of those factors, the Court found a reservation to have been extinguished in *DeCoteau v. District County Court*, 420 U.S. 425, 431-449 (1975).
>
> But the statute at issue in *Rosebud* contained explicit language of *cession*. . . .
>
> That language does not refer to a "*cession*" or otherwise "evidenc[e] the present and total surrender of all tribal interests" in the opened land. . . . [C]ontrasts sharply with that of the statutes at issue in *DeCoteau* and *Rosebud*, the two recent cases in which the Court has found that reservation boundaries were altered by Congress. See *DeCoteau*, 420 U.S. at 445 (statute provided that the Indians did "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands," Act of Mar. 3, 1891, ch. 543, 26 Stat. 1036); *Rosebud*, 430 U.S. at 596-597 (statute provided that Indians did "hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted." Act of Apr. 23, 1904, ch. 1484, 33 Stat. 254). In sum, the 1905 Act contains neither an "[e]xplicit reference to cession" nor any other "language evidencing the present and total surrender of all tribal interests" in the portion of the Reservation opened to non-Indian settlement. *Accordingly*, under *Solem*, it fails to demonstrate a clear congressional intention to alter the boundaries. . . . [L]an-

guage demonstrating that Congress provided for the total surrender of all tribal interests in the portions of the Reservation. . . . Act does not refer to any *cession*. . . .

As the *Rosebud* Court explained, a ruling that the Rosebud Sioux Reservation was not diminished by the 1904 Act at issue there could only have frustrated congressional intent. The statute used *unequivocal language of cession*, and adopted an agreement of the Indians that unequivocally approved the cession (albeit with modifications approved by only a simple majority of the adult male Indians). . . .

[N]one of the relevant documents . . . uses the *indisputable language of cession* that was a feature of all of the relevant documents in *Rosebud*. Moreover, in our view, the *requirement* in *Solem* that the "understanding" be "widely held" requires *proof* that the Indians shared in an understanding that alteration of the Reservation's boundaries was at hand; the *only* obvious manifestation of such an understanding on the part of the Indians is *an agreement of cession*, like the one approved in *Rosebud*.

BUS, Co. Pet. App. at 138a, 141a n.20, 142a, 143a, 149a, 150a (emphasis added).

Significantly, in this instance the United States also participated in oral argument and made explicit representations as to the effect of the use of cession language:

> MR. MANN: . . . [*T*]*he language of cession*. That seems to be—that phrase seems to be the phrase *Congress used when it intended to alter the boundaries of a reservation*.
>
> QUESTION: Well, when it intended to alter the boundaries of the reservation by cession. That much is clear.

Tr. at 26, *Hagen* (No. 92-6281).

The County certainly would not attempt to improve upon the gist of this exchange. Nothing more need be said on this point.

9. *Yankton Sioux Tribe v. Southern Missouri Waste District*, 99 F.3d 1439 (8th Cir. 1996). The United States did not participate in this litigation in the district court. In the court of appeals, the United States, as *amicus curiae*, told the court that because the federal government retains jurisdiction over Indian country generally, the continuing integrity of the exterior boundaries of Indian reservations is of "significant import." Br. of the United States at 1, *Yankton Sioux v. Southern Missouri*, 99 F.3d 1439 (8th Cir. 1996) (No. 95-2647). (The United States did not contest the fact that federal jurisdiction had *not* been exercised in this area for over a century).

Moreover, the United States argued, for the first time, that it had a strong interest in protecting "the integrity of reservation boundaries" because of its "special relationship with Indian tribes." *Id.* The strength of this interest presumably overpowered any inclination to present, address, explain or defend any of the previous United States' cession arguments that were plainly inconsistent with continued reservation status, including the *Dion* disestablishment concession. The United States mentioned none of this and simply noted: "We do not agree with the arguments raised by the County in its brief. They are irrelevant to this case." *Id.* at 19 n.11.[10]

Only two points in the novel argument now advanced by the United States in support of original reservation boundaries are significant at this point in time. First, the commendable concession that this Court's 1914 Yankton decision in *Perrin v. United States*, 232 U.S. 478 (1914), "assumed" disestablishment. *Id.* at 19 n.10. And secondly,

---

[10] At oral argument in the companion case of *United States v. Greger*, 98 F.3d 1080 (8th Cir. 1996), the United States glossed over the 1894 cession act because, unlike the act in *Hagen*, it did not contain probative public domain language on its face. In *Hagen*, the premise of the argument of the United States was just exactly the reverse: public domain language was meaningless, cession language would have been dispositive. *See* text at 28, *supra*.

that as late as 1985 the United States (and everyone else) was continuing to make this same assumption:

> [T]he United States stated in a footnote in its brief that, based on decisions of state courts in South Dakota, the reservation had been diminished by the 1894 treaty.

Id. at 18 n.8.

The panel majority should have been more reluctant in disregarding this venerable precedent.[11]

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

---

[11] Another generic argument that the United States has endorsed and submitted in litigation of this kind promises even more unsettling consequences than the simple reversal of the position of the United States in regard to the 1894 Yankton cession statute. (In light of this Court's precedent, the County has every reason to believe that this Court will squarely reject the revised Yankton cession views of the United States in this case). But the new argument of the United States, submitted subsequent to *Hagen* in the Tenth Circuit and now in the Eighth Circuit Court of Appeals, summarily undermines the effect of all disestablishment precedent on reservation boundaries and would leave local jurisdictions such as Charles Mix County in almost impossible situations.

Because it is beyond the scope of this brief, others have addressed the decisions that recently endorsed this position. *See Ute Indian Tribe v. State of Utah*, 935 F. Supp. 1473 (D. Utah 1996) and *Ute Indian Tribe v. State of Utah*, 114 F.3d 1513 (10th Cir. 1997), where this argument recently received favorable consideration, after *40 months* of needless post-*Hagen* litigation, which is not over yet. *See* Brief of Duchesne County, Utah, and Uintah County, Utah *Amici Curiae*. The County has reproduced the argument itself as the United States submitted it in Co. App. at 1a, *infra*.

Respectfully submitted,

MATTHEW F. GAFFEY
Charles Mix County
State's Attorney
P.O. Box 370
Lake Andes, SD 57356
(605) 487-7441

TOM D. TOBIN
Counsel of Record
TOBIN LAW OFFICES, P.C.
422 Main Street
P.O. Box 730
Winner, SD 57580
(605) 842-2500

Attorneys for Amicus Curiae

Dated: August 7, 1997

APPENDIX

APPENDIX TABLE OF CONTENTS

Page

Excerpts of Brief for United States as *Amicus Curiae* in Support of Plaintiff's-Appellee's, *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 99 F.3d 1439 (8th Cir. 1997) (No. 95-2647) 1a

Excerpt from Page 17 (Footnote 6) From Brief for United States as Amicus Curiae in Support of Plaintiff's-Appellee's, Yankton-Sioux Tribe v. Southern Missouri Waste Management Dept., 99 F. 3d 1439 (8th Cir. 1997) (95-2647).

* * * *

Article I of the 1892 Agreement provides only that "the unallotted lands within the limits the [Yankton Sioux] reservation" are ceded to the United States, and it was only such lands that were covered by the Presidential Proclamation of May 16, 1895. As a result, the State's reliance on Articles I and II of the 1892 Agreement for the proposition that the Reservation was diminished can extend no further than those unalloted lands. The other lands owned by non-Indians on the Reservation presumably were once allotted to tribal members but later sold to non-Indians. The State has pointed to nothing in the 1892 Agreement to suggest that these lands were removed from the Reservation any more than that the allotted lands that remain in Indian ownership were removed from the Reservation. The State's argument in this case, therefore, would yield the anomalous result that some non-Indian land within the Reservation boundaries is part of the Reservation and some is not, which would complicate the jurisdictional maze beyond even that caused by the checkerboard pattern of Indian ownership. Because only Congress may alter reservation boundaries, *see Solen*, 465 U.S. at 470, the size of (and parcels constituting) the Reservation could not have been affected by subsequent transfer of lands from Indians to non-Indians.

* * * *

No. 96-1581

(16)

Supreme Court, U.S.
FILED
AUG 7 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF SOUTH DAKOTA,
Petitioner,

v.

YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,
Respondents,

and

SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF DUCHESNE COUNTY, UTAH AND UINTAH COUNTY, UTAH, *AMICI CURIAE*, IN SUPPORT OF PETITIONER, STATE OF SOUTH DAKOTA

JOANN B. STRINGHAM
Uintah County Attorney
152 East 100 North
Vernal, UT 84078
(801) 781-5436

HERBERT WM. GILLESPIE
Duchesne County Attorney
500 East 100 South
P.O. Box 206
Duchesne, UT 84021
(801) 738-2435
Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

39 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE POST-*HAGEN* ARGUMENT OF THE UNITED STATES IS WITHOUT MERIT	3
A. Preliminary Correction of Serious Misstatement by the United States	3
B. Preliminary Observations Regarding the Submissions and the Decisions in *Seymour*, *Mattz*, *DeCoteau*, *Rosebud*, *Solem*, and *Hagen*	
C. Chronological Response to the Post-*Hagen* Argument Submitted by the United States	5
D. This Court's Opinion in *Hagen* Does Not Support the Post-*Hagen* Argument of the United States	24
E. The United States has Abandoned the Classic "Checkerboard Jurisdiction" Argument	29
CONCLUSION	30

TABLE OF AUTHORITIES

CASES: Page

DeCoteau v. District County Court, 420 U.S. 425 (1975) ..... *passim*
Hagen v. Utah, 510 U.S. 399 (1994) ..... *passim*
Mattz v. Arnett, 412 U.S. 481 (1973) 2
Pittsburg & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387 (10th Cir. 1990), *cert. denied*, 498 U.S. 1012 (1990) 5, 26, 28, 30
Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) ..... *passim*
Seymour v. Superintendent, 368 U.S. 351 (1962) 2, 24, 29
Solem v. Bartlett, 465 U.S. 463 (1984) 2, 4, 21
State v. Hagen, 858 P.2d 925 (Utah 1992) 5
State v. Perank, 858 P.2d 927 (Utah 1992) 5, 13, 14, 18
United States v. Cuch, 79 F.3d 987 (10th Cir. 1996) *cert. denied*, 117 S.Ct. 384 (1996) 5
United States v. Duncan, 857 F.Supp. 852 (D. Utah 1994) 5
Ute Indian Tribe v. Utah, 773 F.2d 1087 (10th Cir. 1985) *cert. denied*, 479 U.S. 994 (1986) 5, 14, 26, 29
Ute Indian Tribe v. Utah, 935 F.Supp. 1473 (D. Utah 1996) 1, 6
Ute Indian Tribe v. Utah, 114 F.3d 1513 (10th Cir. 1997) *reh'g denied* (July 1, 1997) 2, 6

STATUTES:

Act of May 27, 1902, ch. 888, 32 Stat. 245 14
Act of March 3, 1905, ch. 1479, 33 Stat. 1048 14
18 U.S.C. § 1151(c) 1, 28

OTHER AUTHORITIES:

Minutes of Councils Held by James McLaughlin, U.S. Indian Inspector, with the Uintah and White River Ute Indians at Uintah Agency, Utah, From May 18 to May 23, 1903 ..... 8, 25
Brief of the United States, *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985) (*en banc*) (No. 81-1827, 81-1901) 29

TABLE OF AUTHORITIES—Continued

Page

Memorandum in Support of Renewed Motion for Injunctive Relief, *Ute Indian Tribe v. Utah* (D. Utah July 31, 1992) (No. C-75-408-J) 11
Tribe's Brief in Support of Permanent Injunction, *Ute Indian Tribe v. Utah* (D. Utah Sept. 24, 1992) (No. C-75-408-J) .....
Tribe's Reply Brief in Support of Permanent Injunction, *Ute Indian Tribe v. Utah* (D. Utah Dec. 10, 1992) (No. C-75-408-J) 12
United States' Memorandum as *Amicus Curiae* in Support of Ute Indian Tribe's Motion for Injunctive Relief, *Ute Indian Tribe v. Utah* (D. Utah Nov. 23, 1992) (No. C-75-408-J) 13
Brief of Petitioner, *Hagen v. Utah*, 510 U.S. 399 (1994) (No. 92-6281) 4, 20
Brief for the United States as *Amicus Curiae*, *Hagen v. Utah*, 510 U.S. 399 (1994) (No. 92-6281) 14, 18
Brief of *Amicus Curiae* Ute Indian Tribe in Support of Petition for Rehearing, *Hagen v. Utah*, 510 U.S. 399 (1994) (No. 92-6281) 3, 16, 27
Motion of Ute Indian Tribe to Intervene as a Matter of Right, *Hagen v. Utah*, 510 U.S. 399 (1994) (No. 92-6281) 7, 14
Brief of *Amicus Curiae* Ute Indian Tribe in Opposition to Granting the Writ of Certiorari, *Hagen v. Utah*, 510 U.S. 399 (1994) (No. 92-6281) 13
Transcript of Oral Argument, *Hagen v. Utah*, 510 U.S. 399 (1994) (No. 92-6281) 10, 19, 22
Brief for the United States as *Amicus Curiae* in Support of Plaintiffs-Appellees, *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 99 F.3d 1439 (8th Cir. 1996) (No. 95-2647) 2, 3

INTEREST OF AMICI CURIAE

Duchesne County, Utah, and Uintah County, Utah, as *Amici Curiae* in Support of the State of South Dakota, file this brief with the Court for a limited purpose. The Counties want to specifically direct the Court's attention to an argument submitted below by the United States that is premised on an overly restrictive view of the decision of this Court in *Hagen v. Utah*, 510 U.S. 399 (1994). According to this new post-*Hagen* argument, even if an act was intended to diminish or disestablish a reservation or a portion thereof, it would remove from Indian country status *only* those lands ceded, restored to the public domain, or otherwise directly affected, leaving reservation boundaries *intact* so as to encompass all other fee lands in the same area. The argument ignores the fact that when trust title to an allotment is extinguished and passes into fee status, it would otherwise cease to be Indian country. 18 U.S.C. § 1151(c). *DeCoteau*, 420 U.S. 425, 427 n.2, 446-447. It also ignores special acts and other federal orders directed to fee lands, inconsistent with continuing reservation status. As a result, *title searches* would be required to determine jurisdiction, rather than the routine fee/trust checkerboard identifications of the past. A title search requirement of this nature would be unprecedented and completely unworkable. Neither *Hagen* nor any other decision of this Court supports this claim. The Counties think that the State of South Dakota will prevail on the merits in this case. As a result, this post-*Hagen* argument will be implicated and it deserves additional attention.

Duchesne County, Utah, and Uintah County, Utah are in a favorable position to offer views in response to this argument of the United States for two reasons. First, as *amici curiae* participants in *Hagen* and *Hagen*-related litigation for almost two decades, the Counties are as familiar as the United States with the submissions and the record in *Hagen* and similar cases. Secondly, the United States initially submitted this argument in the Tenth Circuit, as *amicus curiae*, in post-*Hagen* proceedings in which the Counties are parties. *See Ute Indian Tribe v. Utah*,

935 F.Supp. 1473 (D. Utah 1996) and *Ute Indian Tribe v. Utah*, 114 F.3d 1513 (10th Cir. 1997), *reh'g denied*, (July 1, 1997), where this argument recently received favorable consideration, after *40 months* of needless post-*Hagen* litigation, which is not over yet.

As a result, the argument is of more than just passing concern in Duchesne County, Utah, and Uintah County, Utah (and in every county similarly situated). In due course, Duchesne County and Uintah County intend to seek relief from the Tenth Circuit litigation by filing a petition for a writ of certiorari in this Court, which will also further address this argument and other related points. In the meantime, the Counties thought the argument should be brought directly to the attention of this Court.

SUMMARY OF ARGUMENT

The post-*Hagen* argument of the United States is based only on isolated sentences in the *Hagen* opinion, taken out of context and used in conjunction with "diminished" terminology to support a reservation concept that would have been unthinkable a century ago. This argument is pure sophistry, and it flies in the face of the submissions and decisions in *Seymour v. Superintendent*, 368 U.S. 351 (1962); *Mattz v. Arnett*, 412 U.S. 481 (1973); *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *Solem v. Bartlett*, 465 U.S. 463 (1984) and *Hagen v. Utah*, 510 U.S. 399 (1994).

In addition, the United States concedes that after the post-*Hagen* argument is recognized, implementation will require *title* searches, instead of the routine fee/trust checkerboard identifications that have been in place for decades in these areas and in areas similarly situated. Br. for United States as *Amicus Curiae* in Supp. of Plaintiffs-Appellees, *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 99 F.3d 1439 (8th Cir. 1996) (96-1581). In a Petition for Rehearing in this Court in *Hagen*, even the Ute Indian Tribe acknowledged that this scenario promised nightmarish consequences and would

be completely unworkable. Br. of *Amicus Curiae* Ute Indian Tribe in Supp. of the Pet. for Reh'g, *Hagen v. Utah*, 510 U.S. 399 (1994) (92-6281). *Hagen* does not support this argument. No decision of this Court supports this argument. The decision of this Court in this case should make that point unmistakably clear.

ARGUMENT

I. THE POST-*HAGEN* ARGUMENT OF THE UNITED STATES IS WITHOUT MERIT.

A. Preliminary Correction of Serious Misstatement by the United States.

In this case, the United States first introduced a version of this argument in the court of appeals by way of a footnote in the Brief for United States at 17 n.6, *Yankton Sioux Tribe*, (No. 95-2647). The United States did not participate in the district court. The entire argument is set forth as follows:

> [6] Article I of the 1892 Agreement provides only that "the unallotted lands within the limits the [Yankton Sioux] reservation are ceded to the United States, and it was only such lands that were covered by the Presidential Proclamation of May 16, 1895. As a result, the State's reliance on Articles I and II of the 1892 Agreement for the proposition that the Reservation was diminished can extend no further than those unallotted lands. The other lands owned by non-Indians on the Reservation presumably were once allotted to tribal members but later sold to non-Indians. The State has pointed to nothing in the 1892 Agreement to suggest that these lands were removed from the Reservation any more than that the allotted lands that remain in Indian ownership were removed from the Reservation. The State's argument in this case therefore, would yield the anomalous result that some non-Indian land within the Reservation boundaries is part of the Reservation and some is not, which would complicate the jurisdictional maze beyond even that caused by the checkerboard pattern of Indian ownership. Because only Congress may alter reservation boundaries, *see*

> *Solem*, 465 U.S. at 470, the size of (and parcels constituting) the Reservation could not have been affected by subsequent transfer of lands from Indians to non-Indians.

Id. at 17 n.6.

At the outset, a critical misstatement by the United States with respect to the "State's argument" must be addressed. In this footnote, the United States clearly suggests that the "State's argument" would yield an "anomalous result" and the "State's argument" should be rejected for that reason. *Id.* The State of South Dakota has never made the argument the United States suggests and neither has any other State. To the contrary, the States have always maintained that only trust land remains Indian country after the diminishment or disestablishment of a reservation area. *See generally* Pet. Br. at 3 n.2. The balance of the footnote is simply the result of the post-*Hagen* argument of the United States. Apart from the fact that the post-*Hagen* argument lacks merit as discussed below, the tact adopted by the United States in this instance to support its position is not acceptable. The Counties respectfully submit that it should not be repeated in the briefs to this Court. If the United States chooses to make an argument, that argument can be made, but the State's argument (or anyone else's) should not be misstated as a part of the process.

B. Preliminary Observations Regarding the Submissions and the Decisions in *Seymour*, *Mattz*, *DeCoteau*, *Rosebud*, *Solem*, and *Hagen*.

One overall observation should be kept in mind in assessing the merits of the post-*Hagen* argument of the United States. The submission and the decisions in *Seymour*, *Mattz*, *DeCoteau*, *Rosebud*, *Solem*, and *Hagen* are all premised on a trust land/fee land jurisdictional distinction that would be the result in a diminished or disestablished portion of a reservation area. The briefs and oral arguments in each of the cases support this conclusion. And the decision in each of the cases confirms

that understanding. But for the Tenth Circuit's *unprecedented* decision accepting the post-*Hagen* position of the United States in spite of all of this, the argument would hardly seem to have merited any more than a summary response. In that light, however, the position deserves the more detailed analysis that follows.

C. Chronological Response to the Post-*Hagen* Argument Submitted by the United States.

An appropriate response to the post-*Hagen* argument of the United States should begin by addressing, in sequence, the argument as it was presented. In this instance, we therefore begin with the Utah submissions subsequent to the decision of this Court in *Hagen*.

1. Introduction. Over four years ago, this Court granted certiorari to resolve a direct conflict between decisions of the Tenth Circuit Court of Appeals and the Supreme Court of Utah. In *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985), *cert. denied*, 479 U.S. 994 (1986), the Tenth Circuit concluded, in a divided *en banc* opinion, that the original boundaries of the Uintah Indian reservation had not been diminished. In *State v. Hagen*, 858 P.2d 925 (Utah 1992) and *State v. Perank*, 858 P.2d 927 (Utah 1992), however, the Supreme Court of the State of Utah reached the opposite conclusion.

In *Hagen*, this Court considered those competing arguments and concluded that the Uintah reservation had in fact been diminished. Panels of the Tenth Circuit subsequently recognized, in passing, the extent to which *Hagen* undermined the holding and rationale of *Ute Indian Tribe*. *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996), *cert. denied*, 117 S.Ct. 384 (1996). *See also United States v. Duncan*, 857 F.Supp. 852 (D. Utah 1994). (And even before *Hagen*, the panel in *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387 (10th Cir. 1990), *cert. denied*, 498 U.S. 1012 (1990) noted some fundamental problems with *Ute Indian Tribe*, as this Court subsequently recognized). *Hagen*, 510 U.S. at 414.

But in Utah, by following the lead of the United States, as *amicus curiae*, the district court once again missed its usual way on this exact same question—this time adopting the post-*Hagen* argument. Unfortunately, the court of appeals also adopted the views of the district court (just like the *en banc* majority mistakenly did in *Ute Indian Tribe*). As a result, in the final analysis the Tenth Circuit Court of Appeals incredibly acknowledged that an unprecedented "*title search*" will be necessary to effectuate the allocation of jurisdiction throughout the hundreds of thousands of acres of the original Uintah reservation. *Ute Indian Tribe v. Utah*, 114 F.3d 1513 (10th Cir. 1997), *reh'g denied, unpublished order* (June 1, 1997). *Even the Ute Indian Tribe had previously admitted before to this Court that this "title search" approach promises an absolutely unmanageable nightmare. Moreover, it would be a nightmare never before carried out anywhere in the United States.*

The legal issues were relatively straightforward with respect to the post-*Hagen* argument. Nevertheless, for over 25 months, the district court in Utah, at the urging of the United States, resisted the mandate of this Court, and then issued a ninety-six page Memorandum Opinion that wholly obscures an otherwise fairly simple question. *Ute Indian Tribe v. Utah*, 935 F.Supp. 1473 (D. Utah 1996). In *Hagen*, this Court squarely rejected the previous views of the United States and the same district court specifically with respect to the status of the original Uintah reservation. Now, the United States and the same district court have somehow convinced a panel of the Tenth Circuit that, in the process, this Court granted certiorari only to fashion a very limited opinion in *Hagen*, but that *Hagen* also created a jurisdictional nightmare in practical terms. This is clearly not the case.

According to this novel argument, this Court intended *Hagen* to *undermine* the most basic premise of all previous disestablishment/diminishment decisions: namely, that

surplus land statutes either disestablished original reservation boundaries and left remaining trust land as Indian country/reservation, or they did not.

Yet, it was because of a recognition of this fundamental premise that the Ute Indian Tribe told this Court in *Hagen:*

> [T]he Utah Supreme Court held that the Uintah Valley Reservation had been diminished by its opening to settlement, *finding* that the Reservation consists only of those lands held in *trust* by the United States for the Tribe or individual Indians. . . . [I]f this Court were to alter the boundaries of the Reservation. Such a judgment would *reduce* the Reservation by almost *three million* acres and *deprive* the Tribe and the United States of all civil and criminal jurisdiction over the *non-trust lands* of the Uintah Valley portion of the Reservation.

Mot. of Ute Indian Tribe to Intervene as a Matter of Right at 4-5, 7, *Hagen v. Utah*, 510 U.S. 399 (1994) (No. 92-6281) (emphasis added) (footnote omitted).

The United States told this Court the same thing.

Later, the United States and the Ute Tribe adopted a novel position which instead assumes that in addition to the trust land, a substantial amount of non-Indian fee land is still within original reservation boundaries which this Court in *Hagen* intended to leave intact. The post-*Hagen* argument is completely untenable. It is contrary to what the Ute Indian Tribe and the United States repeatedly told this Court. *And not a single case can be cited in support of this proposition.*

To argue that this Court would adopt such a radical departure in its disestablishment/diminishment precedent, without even mentioning that fact in the text of the *Hagen* opinion, is pure sophistry. This analysis also expressly conflicts with other precedent the Court repeatedly cited throughout the *Hagen* opinion. Apparently, the Tenth

Circuit panel failed to clearly see what the district court was actually suggesting and in so doing lost sight of the real issue.

As a result, *the decision in the Utah case is the first case in the history of this type of litigation* to leave substantial non-Indian fee lands within original reservation boundaries *after an area had been restored to the public domain*—in other words, after the area has been the subject of this type of a disestablishment surplus land statute.

If the Court of Appeals in the Tenth Circuit had addressed, or at least noted, that portion of the *Hagen* opinion that set forth Inspector McLaughlin's "picturesque phrase" with special emphasis, it could not have recognized any such reservation boundary:

> Contemporary historical evidence supports our conclusion. . . . Inspector McLaughlin explained the effect of these recent developments to the Indians living on the Reservation. . . . " 'You say that [the Reservation boundary] line is very heavy and that the reservation is nailed down upon the border. That is very true as applying to the past many years and up to now, but congress has provided legislation which will pull up the nails which hold down that line and *after next year there will be no outside boundary line to this reservation.*' " . . . Inspector McLaughlin's picturesque phrase reflects the contemporaneous understanding. . . .

Hagen, 510 U.S. at 416, 417 (1994) (quoting and adding emphasis to Minutes of Councils Held by James McLaughlin, U.S. Indian Inspector, with the Uintah and White River Ute Indians at Uintah Agency, Utah, From May 18 to May 23, 1903).

This Court in *Hagen* set forth this quote in the text of the *Hagen* Opinion in support of its "*conclusion*," including the *bracketed language* and the *added emphasis*. With "no outside boundary line to this reservation," all related

precedent in this Court dictated that the diminished reservation "boundary" would coincide with the trust lands in the area, as the United States and the Ute Indian Tribe recognized and told this Court at the time, as noted above. *Id.* Fee lands could not possibly still be within Indian country/reservation, as the Tenth Circuit court of appeals panel erroneously concluded.

Inspector McLaughlin's "picturesque phrase" ("pull up the nails . . . outside boundary") also establishes the proper historical prospective from which the new arguments of the United States and the Ute Indian Tribe should have been viewed. This Court's bracketed language and added emphasis underscore the significance of the point and undermine the novel proposition: namely, that the historic boundaries of the Uintah Valley reservation continue to exist, even after a restoration of the area to the public domain, in such a manner as to encompass these other fee lands (predominately owned by non-Indians) as well as the National Forest.

As a result, despite the clear language of *Hagen* evincing a termination of the historic reservation boundaries, the panel in the Tenth Circuit did not enter a judgment consistent with the decision in *Hagen*. Instead, the panel accepted the novel argument which *preserves* the historic boundaries of the Uintah reservation. Significantly, this unique argument not only contradicts nearly a century of disestablishment/diminishment case law, as noted above, it also contradicts prior submissions by both the United States and the Ute Tribe *throughout* the *Ute* litigation.

The Ute Tribe and the United States led the Tenth Circuit Court of Appeals to believe that the disestablishment of the original reservation boundaries had not been at issue throughout the *Ute* litigation. As we established, however, prior submissions of both parties vitiate such a contention. *See supra* pp. 2, 8, 9. Indeed, the language employed by both parties makes clear that they were well aware that the real issue never changed: Whether the

original reservation boundaries were disestablished—trust lands versus original reservation boundaries.

Consistent with this position, Utah Attorney General Jan Graham referred to a Map exhibit coded to trust land and boundaries and explained to this Court in oral argument:

> MS. GRAHAM: [T]he undisputed reservation, which is 1.2 million acres. . . . [I]n the undisputed reservation, in the *trust* lands, on the tribal lands at Fort Duchesne. . . . [T]here is a reservation there, a big one, 1.2 million acres . . . because of course the reservation, the *trust* lands that are there now are unchallenged by the State and, of course, always have been. . . .

Tr. of Oral Argument at 37, 38, 45, *Hagen*, 510 U.S. 399 (1994) (No. 92-6281) (emphasis added).

The Counties submit that this was the "diminished" reservation referred to by *Hagen*.

On the other hand, the United States has parlayed casual references by this Court and the parties to a "diminished" reservation, intended only to summarily describe this trust land, into an argument that assumes continuing historic reservation "boundaries" that encompass all non-Indian fee lands, except those actually homesteaded. The attention of this Court is warranted here to address this important and far reaching misreading of the decision of the Court in *Hagen*.

The public domain restoration language of the Act which opened the reservation for settlement was directed to "all unallotted lands." As such, it was not intended to simply remove only those lands from reservation status. Instead, this restoration extinguished the historic reservation boundaries.

2. Specific Descriptions in the *Hagen* Submissions Clarify the Trust/Fee Jurisdictional Distinction and Undermine the Post-*Hagen* Argument of the United States.

(a) Descriptions Employed by the United States and the Ute Indian Tribe in *Hagen*.

Immediately after *Perank/Hagen* was decided by the Utah Supreme Court, the Ute Tribe repeatedly told the United States District Court in Utah exactly what was at issue: the disestablishment of the original reservation boundaries, leaving only trust land as Indian Country. It is true that after *Hagen* was decided in this Court, they changed their argument, but what they said before *Hagen* is telling. On July 31, 1992, the Ute Indian Tribe submitted:

> The State Supreme Court's decision, . . . holds that the Uintah Valley Reservation was *disestablished*, except for those lands which are held in *trust* by the United States for the benefit of the Tribe.

Mem. in Supp. of Renewed Mot. for Injunctive Relief at 8, *Ute Indian Tribe v. Utah* (D. Utah July 31, 1992) (No. C-75-408-J) (footnote omitted) (emphasis added).

> – The State court's judgment reduces, by almost *three* million acres, the criminal jurisdictional boundaries of the United States and Tribe.

Id. at 9 (footnote omitted) (emphasis added).[1]

> The State law would subject tribal members who commit offenses off *trust* land to state criminal prosecution.

Id. at 10 (emphasis added).

Two months later, in September, 1992,

> [T]he State Supreme Court ruled that the Reservation was *disestablished*, except for those lands held in *trust* for an individual Indian or the Tribe.

---

[1] The Ute Tribe assumed the legal conclusion in *Perank*, if affirmed, would also undermine the continuing existence of the original Uncompahgre reservation. This point and the fact that the United States conceded that the Uncompahgre reservation no longer exists, is briefly discussed *infra*.

Tribe's Br. in Supp. of Permanent Inj. at 8, *Ute Indian Tribe v. Utah* (D.Utah Sept. 24, 1992) (No. C-75-408-J) (emphasis added).

> If permitted to be entered as a final judgment, *State v. Perank* would reduce the boundaries of the Uintah and Ouray Reservation, and, thus, the jurisdictional territory of the Tribe, under State law, to approximately *1.1 million acres of trust land*.

Id. at 3 (footnote omitted) (emphasis added).

> The question common to both actions was whether Congress intended to *disestablish* the Reservation.

Id. at 12 (emphasis added).

And then, in December, 1992, the Ute Tribe reiterated the same points in no uncertain terms:

> [T]he trial court had concluded that Clint Perank was an Indian and that Myton, Utah (*as well as all non-trust lands*) were *outside* the boundaries of the Reservation. . . .

Tribe's Reply Br. in Supp. of Permanent Inj. at 9, *Ute Indian Tribe v. Utah* (D.Utah Dec. 10, 1992) (No. C-75-408-J) (emphasis added).

> [T]he *same* arguments in support of its position that the Reservation had been *disestablished* as it advanced. . . .

Id. at 17 (emphasis added).

> [S]eized upon the opportunity to challenge the Tenth Circuit's decision that, with two exceptions not relevant to these proceedings, the Reservation had not been *disestablished*.

Id. at 18 (emphasis added).

The views of the United States were submitted to the district court at approximately the same time. In November, 1992, the United States unequivocally addressed this issue in similar terms:

> On July 17, 1992, the Supreme Court of Utah held in *State v. Perank*, 191 Utah Adv. Rep. 5 (1992), and two companion cases that the *exterior boundaries* of the Uintah and Ouray Indian Reservation (hereinafter "Reservation") have been *disestablished*. The state court ruling directly conflicts . . .

United States' Mem. as *Amicus Curiae* in Supp. of Ute Indian Tribe's Mot. for Injunctive Relief at 2, *Ute Indian Tribe v. Utah* (D.Utah Nov. 23, 1992) (No. C-75-408-J) (emphasis added) (footnote omitted).

Nor did the Ute Indian Tribe or the United States confine their views confirming the scope of the issue decided by the Utah Supreme Court to submissions in federal district court. The Ute Indian Tribe told this Court the same thing for other reasons in opposing certiorari in *Hagen* in November, 1992:

> [T]he issue of whether Congress intended to *disestablish* the Uintah Valley Reservation, Utah.

Br. of *Amicus Curiae* Ute Indian Tribe in Opp'n to Granting the Writ of *Certiorari* at i, *Hagen*, 510 U.S. 399 (emphasis added).

> The current controversy, in which the Tribe was not invited to, and, heretofore, did not, participate, threatens to *diminish* by more than *three* million acres the *jurisdictional territory* of the Tribe. . . .

Id. at ii (emphasis added).

It was in this light that this Court, fully informed, granted the petition for certiorari, notwithstanding the opposition of the Ute Indian Tribe.

The United States, consistent with all previous submissions, also viewed the issue in the same light. However, the United States agreed that certiorari should be granted in *Hagen* because plenary review was appropriate. The review, according to the United States, would resolve the conflict between the views expressed by the Utah

Supreme Court and the *Ute Indian Tribe* decision. The United States posed the question in the following manner:

> In *Perank*, the Utah Supreme Court concluded that the May 1902 Act and the March 1905 Act diminished the Uintah Indian Reservation and that the town of Myton accordingly lies outside the boundaries of the Reservation.

Br. for the United States as Amicus Curiae, at 5, *Hagen*, 510 U.S. 399 (citing Respondent's Br. App. at 289-639, *State v. Perank*, 858 P.2d 927 (Utah 1992)).

> The decision of the Utah Supreme Court in this case conflicts with the resolution of the same question by an en banc decision of the federal court of appeals . . .

Id. (citing *Ute Indian Tribe v. Utah*, 773 F.2d 1087, 1088-89 (10th Cir. 1985) (en banc), *cert. denied*, 479 U.S. 994 (1986)).

On the merits, the Ute Indian Tribe next filed a motion to intervene as a matter of right in this Court in May, 1993. Again, the Ute Tribe repeatedly recognized, emphasized, and stressed the scope of the issue presented:

> This case will determine for all time the exterior boundaries of the Uintah and Ouray Reservation (hereafter the "Reservation"), which is located in northeastern Utah. . . . [A]n issue that will finally determine the scope of the jurisdiction. . . .

Mot. of Ute Indian Tribe to Intervene as a Matter of Right at 2, *Hagen*, 510 U.S. 399.

> The ruling of the Tenth Circuit recognized that the Tribe's jurisdiction extends to some 4.4 million acres . . . the Utah Supreme Court held that the Uintah Valley Reservation had been dimished by its opening to settlement, *finding* that the Reservation consists only of those lands held in *trust* by the United States for the Tribe or individual Indians. The ruling of the Utah Supreme Court has the effect

> of reducing the size of the Reservation, and correspondingly the *area* over which the Tribe may exercise jurisdiction, by approximately *three* million acres.

Id. at 4-5 (emphasis added).

> Such a judgment would *reduce* the Reservation by almost *three million* acres and *deprive* the Tribe and the United States of all civil and criminal jurisdiction over the *non-trust lands* of the Uintah Valley portion of the Reservation. More importantly, because of the "checkerboard" nature of land ownership patterns, a judgment reducing the boundaries of the Reservation would result in a *tract-book* search to determine both civil and criminal jurisdiction.

Id. at 7-8 (emphasis added) (footnote omitted).

> [T]ribal members would, if the Reservation were to be adjudged diminished, be subjected to criminal prosecutions in state court for infractions occurring on *non-trust lands* of the Reservation. *See DeCoteau v. District County Court*, 420 U.S. 425 (1975). Third, tribal members residing on *non-trust lands* of the Reservation would no longer be able to avail themselves of tribal court jurisdiction. . . . [T]ribal members not residing, working and locating their property on *trust* lands of the Reservation would be burdened. . . .

Id. at 8-9 (emphasis added).

> As a practical matter, a diminishment of the Reservation would have the effect of creating two distinct classes of tribal members within the historic boundaries of the Reservation, those who live on *trust* lands and those who do not. Those members who reside on *trust* lands will continue to be subject to tribal and federal law, may make use of tribal courts and may participate in tribal government. However, those tribal members who now reside on *non-trust* lands of the Reservation . . . become persons subject to the jurisdiction of the State of Utah.

Id. at 9 n.5 (emphasis added).

> [T]he boundaries of the Reservation would no longer be at issue. . . .

Id. at 10 n.7.

The Court denied the Motion to Intervene.

In June, 1993, the Ute Indian Tribe then submitted its brief *amicus curiae* in this Court. For the third time, the Ute Indian Tribe described to this Court the issues in the same manner:

> There Is No Statutory Language of *Termination, Abolishment* or *Cession* in the Act Opening the Uintah Valley Reservation to Settlement by Non-Indians.

Br. of *Amicus Curiae* Ute Indian Tribe at i, *Hagen*, 510 U.S. 399 (emphasis added).

> [T]he Unallotted Lands Were Not *Disestablished*.

Id. at ii (emphasis added).

> [T]he *boundaries* of the Uintah Valley Reservation are at issue in this action.

Id. at 1 (emphasis added).

> [T]he 1905 Act did not *disestablish* the Reservation.

Id. at 2 (emphasis added).

> [T]he 1905 Act opened the Reservation and that the Act did not *disestablish* the Reservation, the Utah Supreme Court reached a contrary result. . . . [T]he court found, in diametric opposition to the federal courts that previously had considered the issue, that the Uintah Valley Reservation had been *disestablished*.

Id. at 6 (emphasis added) (footnote omitted).

> This Court granted the petition for writ of *certiorari* to review the Utah Supreme Court's resolution of the reservation-boundary issue because it irreconcilably conflicts with the prior decisions of the federal courts on the same issue.

Id. at 7 (footnote omitted).

> [T]he Court has acknowledged that, in a limited number of circumstances, Congress intended a particular surplus land Act to *disestablish* the opened area from the affected reservation. *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District County Court*, 420 U.S. 425 (1975).
>
> Congressional intent determines when a particular surplus land Act *disestablished* unallotted lands. . . .

Id. at 9 (emphasis added).

> While a decision that the Reservation has been *disestablished* would subject *Indians* to the full panoply of *state* law for conduct on *non-trust lands*. . . .

Id. at 10 n.11 (first and last emphasis added).

> [L]egislative history of the 1905 Act parallels that of the 1892 Act which this Court held did not effect a *disestablishment* of the Klamath River Reservation. . . . Here, as this Court pointed out in *Mattz*, "Congress was fully aware of the means by which *termination* could be effected." *Id.* at 504. But clear *termination* language was *not* employed in the 1905 Act.

Id. at 23 n.24 (last emphasis in original).

> Moreover, *McLaughlin's* discussions with the Utes focused on opening the Reservation pursuant to the *manner* prescribed in the 1902 Act. *See id.* at 1. As discussed above, the Reservation was opened in the *manner* prescribed in the 1905 Act. Therefore, any discussions between McLaughlin and the Utes were *irrelevant* except to the extent, if any, that they influenced Congress to abandon any intent it may have had to *disestablish* the Reservation.

Id. at 25 n.25 (emphasis added).

After this Court granted the petition for certiorari, the United States also repeated the arguments made initially in this Court in *Ute Indian Tribe*. At this point, the issue was still described in the same terms:

> QUESTION PRESENTED: Whether the provisions of the Act of May 27, 1902, ch. 888, 32 Stat. 245, and the Act of Mar. 3, 1905, ch. 1479, 33 Stat. 1048, that relate to settlement of non-Indians on the Uintah Indian Reservation *altered the boundaries* of the Reservation. . . .

Br. for the United States as *Amicus Curiae* supp'g Pet'r at i, *Hagen*, 510 U.S. 399 (No. 92-6281) (emphasis added).

> This case involves the boundaries of the Uintah Indian Reservation. The location of the boundaries affects the scope of the law enforcement obligations and powers of the United States under the Indian Major Crimes Act, 18 U.S.C. 1153, and other federal statutes that apply only in Indian country.

Id. at 1.

> [T]he Utah Supreme Court concluded that the provisions of the 1902 Act and the 1905 Act opening lands to non-Indian settlement *diminished* the Uintah Indian Reservation and that the town of Myton accordingly lies *outside the boundaries of the Reservation.*

Id. at 7 (emphasis added) (citing Respondents Br. App. at 28a-63a, *State v. Perank*, 858 P.2d 927 (Utah 1992)).

> Like several of this Court's *previous cases*, the present controversy turns on the *effect* of a surplus land Act opening an Indian reservation to settlement by non-Indians.

Id. (emphasis added).

> The operative language here and in those cases contrasts sharply with that of the statutes at issue in *DeCoteau* and *Rosebud*, the two *recent cases* in which the Court has found that *reservation boundaries were altered* by Congress.

Id. at 15 (citing *DeCoteau*, 420 U.S. at 445) (emphasis added).

> [T]here is no document in this case that establishes the "unmistakable *baseline purpose of disestablishment*" that was so important to the Court. . . .

Id. at 23 (emphasis added) (citing *Rosebud Sioux Tribe v. Kneip*, 430 U.S. at 592).

> [T]he Indians in this case steadfastly refused to consent to *any alteration* of the Reservation boundaries. . . .

Id. at 23 (emphasis added).

> [T]he Utah Supreme Court *erred* in relying (Resp. App. at 37a) on Inspector McLaughlin's advice to the Indians that "there will be *no outside boundary line* to this reservation."

Id. at 23 n.31 (emphasis added).[2]

Although the Ute Indian Tribe did not participate in Oral Argument before this Court, the United States did. Nothing in the Transcript of Oral Argument supports the post-*Hagen* position of the United States:

> QUESTION: . . . speaking of restoration to the public domain, if land had been restored, would the *reservation boundary be excluded*. . . .

Tr. of Oral Argument at 18, *Hagen*, 510 U.S. 399 (emphasis added).

> MR. MANN: . . . the language would not have been sufficient to *alter the boundaries* of the reservation.

Id. (emphasis added).

(b) Language employed by the Petitioner in *Hagen*.

The preceding extended discussion of the views of the Ute Indian Tribe and the United States fairly reflects the issue as submitted and decided in the Utah Supreme Court and in this Court. In all respects, the views of the

---

[2] This Brief of the United States is reproduced in the Appendix to the Brief for Charles Mix County at the petition stage of these proceedings.

parties and other *amici* mirror this understanding. There is no need in this brief to further document that position, however, with one exception. That exception involves the arguments of Petitioner in *Hagen*. Petitioner's views are noteworthy in this regard because they were submitted by former attorneys of record for the Ute Indian Tribe involved in the federal district court, the court of appeals, and this Court in opposing certiorari in the *Ute Indian Tribe* litigation. As such, these arguments reflect a familiarity with all aspects of the disestablishment issue in *Ute Indian Tribe* and *Hagen*. This is the perspective from which Petitioners' submissions on the merits in *Hagen* should be viewed:

> [*Hagen*] had lived for five to six years on the Ute Reservation on *nontrust land* in the vicinity of Myton, Utah.

Br. of Pet. at 4, *Hagen*, 510 U.S. 399 (emphasis added).

> [T]he issue of Uintah Valley Reservation *disestablishment*. . . .

Id. at 5 (emphasis added).

> The *status* of the Uintah Valley Reservation was the focus of attention, not the periphery of concern in the federal court litigation.

Id. at 16-17 (emphasis added).

> If the Court upholds the State of Utah Supreme Court decision of July 17, 1992, then the State of Utah and its subdivisions will exercise general civil and criminal jurisdiction over Indians whenever they are located off *trust* lands.

Id. at 29 (emphasis added).

> Boundaries Are Not *Abolished* When Indians and NonIndians Are Encouraged to Live Side by Side. . . . [I]t will be helpful to review briefly *the Court's five disestablishment cases.*

Id. at 32 (emphasis added).

> [O]ne was found to have *diminished* the reservation in question. That *conclusion* was reached in *De-*

> *Coteau*, 420 U.S. at 446, because the Court . . . the Indians and the United States both were satisfied that the mere retention of *allotments*, rather than the retention of the *reservation boundary*, would provide an adequate "fulcrum for tribal affairs."

Id. at 33 (emphasis added) (footnote omitted).

> The plan selected by Congress to ultimately open the Uintah Valley Reservation lacked the two critical *characteristics* found by the Court to have accomplished a reservation *extinguishment*.

Id. at 37 (emphasis added).

> The State of Utah keeps trying, without success, to sell the federal courts on the hypothesis that the predecessor 1902 Act, simply because it included the phrase "restored to the public domain," established a baseline intent to *disestablish* which was carried forward in the 1905 Act which actually opened the Reservation.
>
> Obviously, this comparison confirms that the Ute Indians, *unlike* the Rosebud Sioux (*Rosebud, supra*) and the Sisseton-Wahpeton Sioux (*DeCoteau, supra*) were unwilling to abandon and vacate the Uintah Valley Reservation. . . . The Utah Supreme Court improperly analyzes a portion of the 1903 *McLaughlin* report as evidence of an intent to surrender the Reservation boundary.

Id. at 43 n.24 (emphasis added).

> [I]t is entirely unfair (and inaccurate after *Solem*) for Utah to contend that restoring Indian lands to the public domain in and of itself *extinguishes a reservation boundary*. . . .

Id. at 48 (emphasis added).

In the Reply Brief, the views of Petitioner reflect the same position:

> Before the Court today, Utah seeks a ruling that, in fact, the *boundaries* of the Uintah Valley Reserva-

tion were *disestablished* . . . . federal courts preserving the boundary of the Uintah Valley Reservation. . . .

Id. at 2 (emphasis added).

A review of the 1902-1905 Acts at issue here shows that unlike *Rosebud* and *DeCoteau*, the opening of Ute lands was made with no reference to an agreed cession of Reservation *boundaries*. Nor do the 1902-1905 Ute Acts describe the Reservation as *"vacated," "discontinued"* or *"abolished"*—language which Congress has used elsewhere to *terminate* a Reservation.

Id. (emphasis added).

This appeal will determine whether the State of Utah criminal justice system (as opposed to federal and tribal courts) will prosecute Indians committing crimes on . . . presently owned in *fee* by nonIndians. Regardless of the outcome of this case, federal and Tribal courts will continue to prosecute Indians on . . . lands retained by the Ute Indian Tribe for its members.

Id. at 16-17 (emphasis added).

At oral argument, the same counsel for Petitioner on the merits briefs *supra*, (that represented the Ute Indian Tribe in the district court, the court of appeals, and before this Court in opposing certiorari in the *Ute Indian Tribe* litigation), presented the issue in even more succinct terms:

MR. SENECA: [T]he question presented is whether or not the *boundary* of the Uintah Reservation was *disestablished*. . . .

Tr. of Oral Argument at 3, *Hagen*, 510 U.S. 399 (emphasis added).

MR. SENECA: . . . Now, it's couched in terms of whether or not the reservation was *disestablished*, and the reason it's couched in those terms is that if

the reservation *boundary* had been *disestablished*, then Myton, Utah, is not in Indian country. . . .

Id. at 5 (emphasis added).

MR. SENECA: [T]his Court is going to have to decide whether or not that reservation *boundary* has been *distestablished* or not.

Id. at 9 (emphasis added).

COURT: [L]anguage of reverting to the public domain would be treated as diminishing the reservation boundary.

Id. at 11.

MR. SENECA: Not—not—

Id.

COURT: [A]t a loss to understand what that phrase could possibly have meant in that statute unless it meant the diminishment of the reservation.

Id.

COURT: And you're saying that allowing white settlers to come onto the reservations would be referred to as restoring the reservation to the public domain, permitting the entry by white settlers would be described in that fashion with those words?

Id. at 12.

MR. SENECA: Yes.

Id.

COURT: I cannot imagine that.

Id.

MR. SENECA: [T]he *DeCoteau* case, where there was a clear understanding between the Indians and the Government that that reservation *boundary* was to be vacated, to be *disestablished*.

Id. (emphasis added).

MR. SENECA: In this instance, there is no such agreements. In fact, the Ute Indians resisted the allotment of their reservation all the way. There

> was never any agreement by the Ute Indian Tribes to be involved in *disestablishment*.

Id. at 13 (emphasis added).

> QUESTION: Mr. Mann, let me ask you the same question that I asked Mr. Seneca. If all we have before us is the language of the 1902 act, speaking of restoration to the public domain, if land had been restored, would the reservation *boundary* be excluded, in your view? Was that language clear enough under the *Seymour* case, and *DeCoteau*, and some of the others?

Id. at 18 (emphasis added).

Any argument that now maintains that this Court did not consider the issue and resolve it in this context should be squarely rejected.

D. This Court's Opinion in *Hagen* Does Not Support the Post-*Hagen* Argument of the United States.

This Court began its analysis in *Hagen v. Utah* with a general observation:

> Our cases considering *operative* language of restoration have uniformly equated it with a congressional purpose to *terminate* reservation status.

Hagen, 510 U.S. at 413 (second emphasis added).

And the Court further stated:

> Likewise, in *Decoteau* we emphasized the distinction between reservation and public domain lands: "That the lands ceded in the other agreements were *returned to the public domain, stripped of reservation status,* can hardly be questioned. . . . The sponsors of the legislation stated repeatedly that the ratified agreements would return the ceded lands to the 'public domain.'" 420 U. S., at 446 (emphasis added).

Id. at 413.

The Court later set forth the following quotation in the text of the *Hagen* Opinion in support of its conclusion, including the bracketing and special emphasis:

> Contemporary historical evidence supports our conclusion. . . . Inspector McLaughlin explained the effect of these recent developments to the Indians living on the Reservation. . . . "'You say that [the Reservation boundary] line is very heavy and that the reservation is nailed down upon the border. That is very true as applying to the past many years and up to now, but congress has provided legislation which will pull up the nails which hold down that line and *after next year there will be no outside boundary line to this reservation.*'" . . . Inspector McLaughlin's picturesque phrase reflects the contemporaneous understanding. . . .

Id. at 416-417 (quoting and adding emphasis to Minutes of Councils Held by James McLaughlin, U.S. Indian Inspector, with the Uintah and White River Ute Indians at Uintah Agency, Utah, From May 18, to May 23, 1903).

The United States now maintains that the result in *Hagen* does not support diminishment/disestablishment in any recognized sense. And the United States nevertheless advances this argument in spite of all of the above.

At bottom, the sole basis for the United States' support for this argument is a narrow focus on two sentences in the *Hagen* Opinion, taken out of context, and viewed without any historical perspective whatsoever:

> In light of our precedents, we hold that the restoration of unallotted reservation lands to the public domain evidences a congressional intent *with respect to those lands* inconsistent with the continuation of reservation status. Thus, the existence of such language in the operative section of a surplus land Act indicates that the Act *diminished the reservation.*

Hagen, 510 U.S. at 414 (emphasis added).

While the post-*Hagen* argument stresses the lack of reservation status "with respect to *those* lands," (rather than the lack of reservation status of the *area* affected) and "diminished the reservation" (as opposed to a *dis-*

established or *terminated* the reservation descripiton), it omits any reference to the "termination" description of *Ute Indian Tribe* in the very next sentence. This sentence in the *Hagen* Opinion *undermines* both points and with them, the entire foundation for the novel post-*Hagen* argument.

In context, *Hagen* states:

> In light of our precedents, we hold that the restoration of unallotted reservation lands to the public domain evidences a congressional intent with respect to those lands inconsistent with the continuation of reservation status. Thus, the existence of such language in the operative section of a surplus land Act indicates that the Act diminished the reservation. Indeed, we have found only one case in which a Federal Court of Appeals decided that statutory restoration language did not *terminate a reservation*, *Ute Indian Tribe*, 773 F.2d, at 1092, a conclusion the Tenth Circuit has since disavowed as "unexamined and unsupported." *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1400, cert. denied, 498 U.S. 1012 (1990).

Hagen, 510 U.S. at 414 (emphasis added).

First, the Court prefaces the entire paragraph by expressly referencing "our precedents." *Id.* In context, the complete paragraph makes clear that the Court was not fashioning or allowing any result that would accommodate such a novel argument even if it had been advanced and, of course, it was not. This *Hagen* "terminate a reservation" description of the overall issue in *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985) (en banc), squarely refutes any argument to the contrary. *See also DeCoteau*, 420 U.S. 425 ("terminated").

Subsequent to the decision of *Hagen*, the Ute Tribe attempted to submit an *amicus curiae* brief in support of the petition for rehearing in this Court. The Court did not allow the *amicus* brief to be filed. Counsel for Petitioner in *Hagen* thereafter promptly resubmitted the same text under the caption of a Motion to Supplement Petition for Rehearing. It was in this form that the new post-*Hagen* theory of what was really at issue in *Hagen* first surfaced. This Court denied the petition without comment.

Apart from the apparent *dilemma* of attempting to present argument that counters traditional disestablishment considerations and addresses disestablishment precedent and issues in those terms, (as the United States did and continues to do to this day), while at the same time maintaining that disestablishment in the sense of those cases was *never* really an issue, the substance of the motion is noteworthy in only one other respect.

In the process of telling this Court that its decision in *Hagen* only excised the unallotted homestead land from the Uintah reservation, leaving the historic reservation boundary otherwise intact (according to the new post-*Hagen* theory), the submission makes one critical concession. This concession, in the Counties' view, is telling here insofar as practical considerations have any role in this process. According to the admission, if this *new post-Hagen theory* were really the holding of *Hagen*, "consistent law enforcement" and the "administration of civil laws" would be "virtually impossible" throughout the entire area. Br. of *Amicus Curiae* Ute Indian Tribe in Supp. of the Pet. for Reh'g at 4, *Hagen*, 510 U.S. 399. We agree. Similarly, according to the submission, it would also be "virtually impossible to bring any continuity or organization to such regulatory activities as zoning, liquor regulation and taxation." *Id.* We also agree. In addition, the submission goes on to assert that:

> The *jurisdictional chaos* is further increased because, within the townsites established under the 1905 Presidential Proclamation, the lots that had not been purchased were restored to the Tribe by the 1945 Restoration Order. Thus, the State may have juris-

> diction over one lot, but the Tribe and United States may have jurisdiction over the lot next door. Conceivably, a store within a townsite or Roosevelt City could be located on two lots—one a former homestead and one a former allotment or parcel restored to the Tribe. Under such circumstances, the majority's decision could result in the *absurd situation* of a tribal member being subject to or exempt from paying State sales taxes depending on the location within the store of the item purchased.

Id. at 4-5 (emphasis added) (footnote omitted).

Importantly, the Counties further agree with the hypothetical conclusion in this argument. As stated:

> If all of the non-trust lands had been disestablished from the Reservation, as Utah implied, jurisdictional determinations would require a tract book search to discover the *trust/non-trust* status of the land [*DeCoteau* and *Rosebud*]. However, given the various categories of land existing on the Reservation, under the majority's decision [new post-*Hagen* theory] jurisdictional determinations will require a tract-by-tract *title search* in order to ascertain whether a particular site is homesteaded land, former allotment land now in fee status, land restored to tribal ownership under the 1945 Restoration Order, land partitioned under the Ute Partition Act, present allotted land or tribal trust land.

Id. at 3-4 (first emphasis added).

In this instance, the submission is absolutely correct. To the extent that *Hagen* represents disestablishment/diminishment in the traditional sense, only trust lands are Indian country under 18 U.S.C. § 1151(c). In this situation, trust tract searches are occasionally necessary. Of course, this result was approved in *DeCoteau* and *Rosebud* for the reasons there stated. *DeCoteau*, 420 U.S. at 427 n.2, 446-447, 429 n.3. *See also Yazzie*, 909 F.2d at 1421-22. However, to the extent that anyone accepts the new post-*Hagen* theory, a complete title search would be

necessary for each and every arrest on fee lands throughout the entire area to determine if the ultimate source of title was actually homesteaded land. Because the vast majority of all crimes are committed on these fee lands (population centers, highways, and so forth) "jurisdictional chaos" would truly result. The Tenth Circuit should have squarely rejected the new post-*Hagen* argument.[a]

E. The United States has Abandoned the Classic "Checkerboard Jurisdiction" Argument.

Otner arguments of the United States are also plainly inconsistent with the novel post-*Hagen* position of historic reservation boundaries surrounding all but homesteaded lands. From the beginning, the United States repeatedly used the classical "impractical pattern of checkerboard jurisdiction" argument in resisting reservation "disestablishment."

> [T]o find disestablishment in this case would result in an "impractical pattern of *checkerboard* jurisdiction," *Seymour, supra*, at 358. . . .

Br. of the United States at 14-15, *Ute Indian Tribe*, 773 F.2d 1087 (1985) (*en banc*) (footnote omitted).

---

[a] Although not an issue here, to the extent that the Tenth Circuit's latest decision summarily precludes any reconsideration regarding the status of the Uintah National Forest or the original Uncompahgre reservation (as mistakenly set forth in *Ute Indian Tribe*, 773 F.2d at 1089-1093) because of "finality" principles, it is in further conflict with *Hagen*.

Considering the very significant observation of this Court in *Hagen* that the Tenth Circuit's en banc opinion altered *decades* of "justifiable expectations," *Hagen*, 510 U.S. at 421, the balance of the Tenth Circuit's latest opinion regarding "finality" does not really ring true. In addition, the views of the Tenth Circuit in this respect do not reflect any consideration of contrary views noted in decades of previous federal and state opinions noted by this Court in *Hagen*. In this respect, the Tenth Circuit, like the Eighth Circuit in the instant case, would benefit from additional guidance from this Court.

Of course, this "checkerboard" argument makes sense only in the context of trust lands not within reservation limits as noted in *DeCoteau v. District County Court*, 420 U.S. 425 (1975) and *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) diminishment/disestablishment situations. By no stretch of the imagination could it possibly apply to the situation the United States now maintains was the intended result of *Hagen*.[4]

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed and the post-*Hagen* argument of the United States should be rejected in the process.

Respectfully submitted,

JoANN B. STRINGHAM
Uintah County Attorney
152 East 100 North
Vernal, UT 84078
(801) 781-5436

HERBERT WM. GILLESPIE
Duchesne County Attorney
500 East 100 South
P.O. Box 206
Duchesne, UT 84021
(801) 738-2435
Counsel of Record

Dated: August 7, 1997

---

[4] *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1420-1422 (10th Cir. 1990) has since clarified and correctly stated the prevailing law on checkerboard jurisdiction in the Tenth Circuit. *See also DeCoteau*, 420 U.S. at 427 n.2, 429 n.3, 446-447.

APPENDICES

APPENDIX A

The only other Act of Congress that contains provisions relative to the boundaries and size of the Lake Traverse Reservation is the Act of March 3, 1891, *supra.* ratifying an Agreement of December 12, 1889 between three United States commissioners and the chiefs, headmen, and male adult members of the Sisseton and Wahpeton Bands. (Appendix at 7 contains the full text of the Act.) The Bands agreed to open their permanent reservation for settlement. The only express language of Congress pertinent to the question of disestablishment or diminishment of the Reseravtion is found in § 26 (reciting Article I of the 1889 Agreement) and § 30.

* * * *

A conclusion that these sections disestablish the permanent Lake Traverse Reservation, as described in Article III of the 1867 Treaty, or separate any tracts therefrom is untenable. No act of Congress has ever changed the 1867 Treaty boundaries. That boundaries of reservations are changed by Congress only by "unequivocal" specific description of the lands excluded from the reservation and specific delineation of the new boundaries is the explicit meaning of *Celestine, supra,* and is evident from examination of the many contemporaneous acts which opened Indian reservations for settlement,[6] including the Act of March 3, 1891, opening Lake Traverse and six other servations. *Mattz v. Arnett, supra,* 412 U.S. at 504, fn. 22; *United States ex rel. Feather v. Erickson, supra,* 489 F.2d at 101-102. Significantly, of the seven reservations opened for settlement by the Act of March 3, 1891,[7] the portions of land excluded from the reservation and the new boundaries resulting therefrom are specifically delineated by definite property lines for all but Lake Traverse.[8]

* * * *

APPENDIX B

* * * In contrast to the instant reservation, one other tribe agreed to "cede, relinquish, and forever and absolutely surrender to the United States all their claim, title and interest of every kind and character in and to" *a described tract.*[3] Another agreed to "cede, convey, transfer, relinquish, and surrender forever and absolutely, without any reservation" all their claim, title, and interest in *a described tract.*[4] Another agreed to "cede, sell, and relinquish to the United States all their right, title, and interest in and to all that portion" of a named reservation *as specifically described.*[5] Another agreed to sell to the United States "all that portion" of the reservation *described by metes and bounds.*[6] Congress made an unmistakable change when it came to the lands ceded in the instant case. (Emphasis added).

APPENDIX C

QUESTION: But you do have language of "cession".

MR. SACHSE: You do have language of "cession", that is correct.

QUESTION: Isn't that even stronger?

MR. SACHSE: But there is *no specific area ceded,* what's ceded is what is not allotted—

QUESTION: But, as a matter of fact, it's treated as the public domain.

MR. SACHSE: I—I don't know what you mean by that.

QUESTION: Well, what happened after the ceded property?

MR. SACHSE: After the property was ceded,—

QUESTION: Yes.

MR. SACHSE: —the government sold that land under—

QUESTION: Treated it like the public domain.

MR. SACHSE: Well, only in the exact same sense that it—

QUESTION: Well, it was handled as part of the public domain, by the same system that the public domain was handled.

QUESTION: Weren't they acting for the Indians?

MR. SACHSE: That is to say—and I'll try to get this in the—I think I may do better to break it down into historical perspective. (Emphasis added).

APPENDIX D

HOUSE OF REPRESENTATIVES.

59TH CONGRESS, *2d Session.*

REPORT NO. 7613.

SALE AND DISPOSITION OF CERTAIN LANDS IN ROSEBUD INDIAN RESERVATION, S. DAK.

FEBRUARY 14, 1907.—Committed to the Committee of the hWole House on the state of the Union and ordered to be printed.

Mr. BURKE, of South Dakota, from the Committee on Indian Affairs, submitted the following

REPORT.

[To accompany H. R. 24987.]

No. 96-1581

Supreme Court, U.S.
FILED
AUG 7 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

STATE OF SOUTH DAKOTA,

Petitioner,

v.

YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,

Respondents,

and

SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, ALABAMA, ALASKA, IDAHO, MISSOURI, NEVADA, UTAH AND WYOMING IN SUPPORT OF STATE OF SOUTH DAKOTA, ET AL.

DANIEL E. LUNGREN
Attorney General of the State of California
*THOMAS F. GEDE
Special Assistant Attorney General
1300 I Street
Sacramento, CA 95814
Telephone: (916) 323-7355
Counsel for Amici Curiae
(Additional counsel on inside cover)
**Counsel of Record*

ALAN G. LANCE
Attorney General of the State of Idaho
STEVEN W. STRACK
Assistant Attorney General
P.O. Box 83720
Boise, ID 83720
Telephone: (208) 334-4143

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

29 pp

BILL PRYOR
Attorney General
State of Alabama

BRUCE M. BOTELHO
Attorney General
State of Alaska

ALAN G. LANCE
Attorney General
State of Idaho

JEREMIAH W. (JAY) NIXON
Attorney General
State of Missouri

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada

JAN GRAHAM
Attorney General
State of Utah

WILLIAM U. HILL
Attorney General
State of Wyoming

TABLE OF CONTENTS

Page

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT..... 2

ARGUMENT 4

I THE OPERATIVE LANGUAGE OF THE CESSION ACT DISESTABLISHED THE RESERVATION AND REMOVED THE OPENED LANDS FROM INDIAN COUNTRY..... 4

A. The Operative Language of Cession and Sale Governs the Question of Disestablishment of the Reservation 5

B. The Savings Clause Does Not Operate to Negate the Cession and the Tribal Relinquishment of All Claim, Right, Title and Interest in the Ceded Lands..... 8

C. Other Provisions of the Agreement and Act Point to Disestablishment 10

D. The Historical Context Also Points to Disestablishment of Reservation Lands 11

II THE HISTORY OF CONGRESSIONAL ACTIONS WITH REGARD TO INDIAN LANDS AND THIS COURT'S PRECEDENTS DEMONSTRATE THAT AN IMPLICATION OF DISESTABLISHMENT ARISES WHEN CONGRESS, IN A SURPLUS LANDS ACT, DETERMINES TO TRANSFER LANDS FROM INDIAN OWNERSHIP..... 13

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Bates v. Clark,
95 U.S. 204 (1877) 20

Brendole v. Confederated Tribes and Bands of the Yakima Indian Nation,
492 U.S. 408 (1989) 18

Clairmont v. United States,
225 U.S. 551 (1912) 20

DeCoteau v. District County Court,
420 U.S. 425 (1975) 4, 5, 6, 7, 12

Dick v. United States,
208 U.S. 340 (1908) 10

Ex parte Kan-gi-shun-ca (Ex parte Crow Dog),
109 U.S. 556 (1883) 19

Hagen v. Utah,
510 U.S. 399 (1994) 2, 4, 6, 7, 11

Mattz v. Arnett,
412 U.S. 481 (1973) 7

Montana v. United States,
450 U.S. 544 (1981) 2, 18

Oregon Fish & Wildlife Dept. v. Klamoth Tribe,
473 U.S. 753 (1985) 6

Pittsburgh & Midway Coal Mining Co. v. Yazzie,
909 F.2d 1387 (10th Cir. 1990) 17

Rosebud Sioux Tribe v. Kneip,
430 U.S. 584 (1977) 4, 10, 11

TABLE OF AUTHORITIES – Continued

Page

Seymour v. Superintendent,
368 U.S. 351 (1962) 7, 16

Solem v. Bartlett,
465 U.S. 463 (1984) ..... *passim*

South Dakota v. Bourland,
508 U.S. 679 (1993) 14, 18

Spalding v. Chandler,
160 U.S. 394 (1896) 13

Strate v. A-1 Contractors,
117 S.Ct. 1404 (1997) 2

United States v. Shoshone Tribe,
304 U.S. 111 (1938) 13, 14

CONSTITUTIONAL PROVISIONS

United States Constitution 1

FEDERAL STATUTES

Revised

§ 2139 (1878) 19

§ 2145 (1878) 19

§ 2152 (1878) 19

Title 18

§ 1151(a) 16

CONGRESSIONAL MATERIALS

17 Cong. Rec. 1630 (1886) 15

18 Cong. Rec. 190 (1886) 15

TABLE OF AUTHORITIES – Continued

Page

18 Cong. Rec. 191 (1886) 15

26 Cong. Rec. 8257 (1894) 12

OTHER AUTHORITIES

Treaty of April 19, 1858, 11 Stat. 743 .....7, 8, 9, 10

Yankton Sioux Agreement of 1892 8

art. I 7, 9

art. II 9

art. XVIII 8, 9

Act of February 8, 1887, ch. 119, sec. 5, 24 Stat. 388 15

Act of June 30, 1834, ch. 161, 4 Stat. 729 19

Act of August 15, 1894 5

art. I 3, 6, 7

art. II 6, 7

art. VIII 17

art. XVII 11

General Allotment Act 14, 15, 18

Public Land Law Review Commission, *Study of Withdrawals and Reservations of Public Domain Lands* 1 (1969) 17

S. Exec. Doc. 27, 53rd Cong., 2d Sess. at 17-19 (Mar. 31, 1893, Report of the Yankton Indian Commission) 9

TABLE OF AUTHORITIES – Continued

Page

Statement of Mr. Herman, J.A. 3785 .....12, 17

Statements of Mr. Wilson of Washington, Mr. Pickler of South Dakota, J.A. 422; 26 Cong. Rec. 8257 (1894) 12

Trial testimony of Herbert Hoover, Trial Tr. at 53-54 9

INTEREST OF AMICI

Amici States face the real possibility that, a century after the fact, lands assumed to have been removed from Indian country status by various nineteenth century congressional acts will "revive" as Indian reservation lands, divesting States and local governments of considerable civil and criminal jurisdiction. This case represents an opportunity for this Court to settle its diminishment jurisprudence in such a manner as to reduce litigation which arises repeatedly, in which Tribes and the United States attempt to distinguish away this Court's precedent.

The United States Constitution charges the federal government with the management of Indian affairs. The federal government has often struggled with this responsibility. At first it attempted to segregate Tribes by placing them on reservations that non-Indians could not enter without government permission. It then attempted to integrate Tribes into society by abolishing reservations and tribal governments and selling former reservation lands to non-Indians. When this policy did not produce the desired results, Congress revitalized tribal governments and restored lands to tribes. The result of these various federal policies has been a jumbling of Indian and non-Indian lands, and a blurring of the laws and legal standards defining jurisdiction on such lands. Non-Indians residing on former tribal lands often find themselves subject to tribal claims of regulatory and taxing authority. Such claims by a government in which they cannot participate often breeds frustration, as they face burdens and disadvantages not imposed on others.

At the same time, tribal governments cannot provide non-Indians the full range of services and protections to be expected from a government and which state governments routinely provide. For example, they cannot enforce criminal laws against non-Indians. As for civil regulations, this Court has stated as a general rule that tribes lack such jurisdiction, but has found several exceptions. *Montana v. United States*, 450 U.S. 544, 564-67 (1981); *Strate v. A-1 Contractors*, 117 S.Ct. 1404, 1414-16 (1997). As one can imagine, tribes eager to assert their sovereignty argue that almost every conceivable regulation fits within the exceptions. The result is a jurisdictional morass that places great burdens upon the states. Obligated to enforce the law on non-Indian lands and provide governmental services to non-Indians, states are faced at every turn with the argument that the tribe has jurisdiction and therefore state jurisdiction is preempted.

This question presented in this case may help to clarify jurisdiction on many former tribal lands now owned in fee by non-Indians. The states submit that when authorizing the sale of such lands to non-Indians, Congress intended the non-Indian residents to be subject to state jurisdiction, unless express and specific provisions were made to the contrary.

SUMMARY OF ARGUMENT

Following this Court's precedent and traditional analysis, as reaffirmed in *Hagen v. Utah*, 510 U.S. 399 (1994), there is little doubt but that Congress diminished the reservation in this case, eliminated the original

boundaries of the reservation, and restored state civil and criminal jurisdiction on the opened and ceded lands. The express cession language of the act opening the Yankton Sioux Reservation evidenced the kind of "present and total surrender of tribal interests," that "strongly suggests that Congress meant to divest from the reservation all unallotted opened lands." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). The critical language is in the operative language of the agreement in which the Yankton Sioux Indians "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands . . . " Act of August 15, 1894, art. I. The Eighth Circuit failed to address the "almost irrebutable presumption" of disestablishment or diminishment that arises when such cession language is coupled with the payment of a sum certain, as occurred in this case.

Instead, the Eighth Circuit majority relied upon a savings clause that recited that the earlier 1858 Treaty establishing the reservation remain in effect. It overlooked that the thrust of the savings clause, which is not in the operative language of the agreement, appears directed at the continuation of the payment of annuities by the federal government. Further, the 1858 Treaty only protected the interests of the Indians on the lands they possessed, and given the operative language which divested the Indians of the possession of the unallotted surplus lands, certainly the savings clause cannot serve to retain an Indian reservation on those lands.

Additionally, entirely aside from the question of disestablishment, the extinguishment of a tribe's title to reservation lands, as occurred here, necessarily implies

that Congress intended to transfer governmental authority over those lands to the state, unless there is express language preserving federal or tribal authority over the transferred lands. Except for a limited federal reservation of a portion of the ceded and opened lands, no such preservation of federal or tribal authority appears in the agreement or act, and, in fact, any such preservation that would suggest a continuing Indian reservation would be inconsistent with the operative language of the act.

Further, it should make no difference whether a tribe receives a "sum certain" for the sale of the lands, *see, e.g., DeCoteau v. District County Court*, 420 U.S. 425, 448 (1975), or whether it receives the proceeds of the sale of the lands to non-Indians. *See, generally, Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977). A more compelling question is whether Congress intended non-Indians settling upon opened lands to be subject to tribal jurisdiction. Clearly, it could not when it ratified an agreement in which the Tribe relinquished "all claim, right, title and interest" in the ceded lands.

ARGUMENT

I

THE OPERATIVE LANGUAGE OF THE CESSION ACT DISESTABLISHED THE RESERVATION AND REMOVED THE OPENED LANDS FROM INDIAN COUNTRY

In *Hagen v. Utah*, 510 U.S. 399 (1994), this Court reaffirmed its traditional approach to diminishment cases, starting with an examination of the statutory language used to open the Indian lands. *Id.*, at 411-412. The

Court also will examine the historical context surrounding the passage of the surplus land act and the subsequent settlement by non-Indians on the opened lands. *Ibid.*; also *DeCoteau v. District County Court*, 420 U.S. 425, 445 (1975). Using the traditional approach, amici States submit there is little doubt but that Congress diminished the reservation in this case, eliminated the original boundaries of the reservation, and restored state civil and criminal jurisdiction on the opened and ceded lands. The well-reasoned dissent of Circuit Judge Magill in this case provides reasons enough, as he thoroughly outlines the errors of the majority opinion and points to a conclusion more consistent with this Court's precedent. Amici States fear that were this Court to adopt the conclusion reached by the Eighth Circuit majority, it would strongly suggest to other courts that they may easily disregard the intent of Congress expressed in the operative language of similar acts, and in doing so, restore vast amounts of land, especially in the Western States, to the status of "Indian country." This would unsettle long-held understandings that state civil and criminal jurisdiction applies on the open and ceded lands, lead to difficult and protracted litigation and deprive non-Indians on the privately-held lands of certainty in their day-to-day affairs.

A. The Operative Language of Cession and Sale Governs the Question of Disestablishment of the Reservation.

The express cession language of the August 15, 1894 Act opening the Yankton Sioux Reservation evidences a "present and total surrender of tribal interests," *Solem v. Bartlett*, 465 U.S. 463, 470 (1984), wherein it recites that

the Yankton Sioux Indians: "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands . . . " Act of August 15, 1894, art. I. This Court has held that such an explicit reference to cession and surrender of tribal interests "strongly suggests that Congress meant to divest from the reservation all unallotted opened lands." *Solem*, at 471. Apart from the payment of a sum certain to the Tribe in Article II, which further buttresses the cession language in Article I, it is difficult to see how the tribal "relinquishment" of "all claim, right, title and interest" in the unallotted lands can conceivably preserve reservation status in those unallotted lands. With the payment of the sum certain, this Court informs us that a nearly conclusive presumption arises that the reservation has been diminished. *Solem*, at 471; *Hagen*, at 411. Yet, the Eighth Circuit barely acknowledges this Court's instruction and does not follow it.

DeCoteau also informs us that the "relinquishment" of "all claim, right, title and interest" to all the ceded lands is not merely to *proprietary* interests, leaving tribal *governmental* interests somehow to survive as to those lands. First of all, the tribe and the government used the word "all" in describing the interests relinquished – certainly they cannot have meant to preserve significant tribal governmental authority, such as civil and criminal authority, on those lands. Those are major interests and rights associated with the land. *See, Oregon Fish & Wildlife Dept. v. Klamath Tribe*, 473 U.S. 753, 768, 772-773 (1985) (no right to fish preserved on ceded lands where Tribe ceded "all their claim, right, title, and interest in and to" those lands). In *DeCoteau*, the Court made it clear that the tribe and the government were satisfied that the retention of

allotments would provide an *adequate fulcrum for tribal affairs. DeCoteau v. District County Court*, 420 U.S. at 446. Here, too, nothing suggests that the relinquishment of all interests in the ceded lands was limited to a possessory or title claim, leaving a "reservation" for the Tribe to govern. Indeed, by the terms of the 1858 treaty, the Tribe's reservation was to consist of lands that it "owned, possessed, or claimed." Treaty with the Yankton Sioux, art. 1, 11 Stat. 743. If the Tribe relinquished its possessory claims, it had to have understood that it was losing its reservation. It should be noted that in those cases in which the Court has found no diminishment or termination following an act which opened the reservation for settlement, the Court noted there was no tribal cession and relinquishment of interests, as here. *See Mattz v. Arnett*, 412 U.S. 481 (1973); *Seymour v. Superintendent*, 368 U.S. 351, 355 (1962). Amicus Charles Mix County thoroughly discusses those two cases as to their relevancy and meaning.

Critical to the analysis is that these cession and payment provisions are the fundamental *operative* language of the agreement and act. In contrast, for example, this Court held that the act in *Solem* only authorized the Secretary of Interior to sell and dispose of unallotted reservation lands, and the language which referred to restoring such lands to the public domain were not in the *operative* language of that act. *See Hagen v. Utah*, at 413. Accordingly, this Court held that the act in *Solem* did not diminish the reservation there. *Solem*, at 472-474. Apart from whether *Solem* would be decided the same way today, it is clear that this case provides a sharp contrast to *Solem* where Articles I and II in the 1984 Act provide language which is "precisely suited to disestablishment" purposes. *Solem* at 473, n. 15.

B. The Savings Clause Does Not Operate to Negate the Cession and the Tribal Relinquishment of All Claim, Right, Title and Interest in the Ceded Lands

The Eighth Circuit majority rests its decision on the savings clause found in Article XVIII, which recites that the earlier 1858 Treaty establishing the reservation remain in full force and effect and that the "Yankton Indians shall continue to receive their annuities . . . " As the South Dakota Supreme Court and Eight Circuit Judge Magill have opined, the savings clause can only reasonably go to the continued payment of annuities. It also follows that the government's obligations in the 1858 Treaty to protect the Indians would continue *as to the lands remaining* after the cession and sale. To suggest anything more negates not only the "cession" and "sale" of the unallotted lands, but also the "relinquishment" by the Tribe of "*all* claim, right, title and interest" in those lands. (Emphasis added.) Given the *total* "relinquishment" of all Tribal interests in the unallotted lands, how can the savings clause, which is *not* part of the operative language of the Agreement, preserve reservation status? A reservation is meant to set aside lands, lands "reserved" from sale, in which the Tribe has a continuing right of occupancy, an interest in the land's use and beneficial, if not actual, title. In fact, as the Circuit majority states in this case, the 1858 Treaty acknowledged the authority of the Tribe over the reservation. However, in the 1892 Agreement, the Yankton Sioux disclaimed and relinquished *all interests* in those specific lands ceded and sold to the United States. No reading of the savings clause in Article XVIII can undo the operative

disclaimer by the Tribe of all claims, rights, title and interest in those lands.

The Circuit majority baldly concludes Article XVIII can be read together with Articles I and II to allow for the continuation of the reservation. Amici States submit the provisions can be read together, but only as to the allotted lands held in Indian title, and as to the continued payment of annuities. The historical circumstances confirm that at the time the savings provision was agreed to, the Yankton Sioux were most concerned about a potential governmental cut-off of annuities. *See, e.g.*, S. Exec. Doc. 27, 53rd Cong., 2d Sess. at 17-19 (Mar. 31, 1893, Report of the Yankton Indian Commission); Trial testimony of Herbert Hoover, Trial Tr. at 53-54.

Additionally, the savings clause must be read in the context of those provisions of the 1858 Treaty that define the Tribe's interests. Indeed, the savings clause can be read to provide for continuing jurisdiction over lands conveyed in fee to non-Indians only if the 1858 treaty *originally* provided for tribal jurisdiction over such lands. In 1858, the federal government promised to protect the Tribe in "the quiet and peaceable possession" of its reserved lands. Treaty with the Yankton Sioux, art. 4, 11 Stat. 743, 744. By the terms of the 1858 treaty, the Tribe's reservation was to consist of lands that they "owned, possessed, or claimed." *Id.*, art. 1, 11 Stat. at 473. This description of the lands reserved for the Tribe also describes the limits of the Tribe's jurisdiction, which, by the terms of the Treaty, applied only to lands within its possession. By opening lands to non-Indian ownership and possession, Congress necessarily removed the lands

from the Tribe's possession. Article I of the 1892 Agreement relinquished the Tribe's claim, right, title and interest in the ceded lands. Clearly, the Tribe could not have possession. The savings clause, then, cannot be read to erase the effects of the sale. Instead, should be properly read as retaining all treaty rights on lands having the same character as the lands reserved in the 1858 treaty, i.e., lands that remained in the ownership and possession of the Tribe or individual Indian allottees.

C. Other Provisions of the Agreement and Act Point to Disestablishment.

Historically, Congress was aware that by opening reservation lands and conveying them to non-Indians, it was necessarily removing such lands from the operation of tribal and federal laws applicable to Indian country. As a general rule, where special federal concerns were present, Congress expressly retained jurisdiction. Importantly, such jurisdiction was typically limited and restricted to the minimum jurisdiction necessary to address the specific concern. For example, many surplus land acts provided for continuing federal jurisdiction over the distribution of liquor to Indians. *See, e.g., Rosebud Sioux Tribe v. Kneip*, 430 U.S. at 613. The type of language required to retain continuing federal jurisdiction over ceded lands has been previously addressed by this Court. In *Dick v. United States*, 208 U.S. 340 (1908), the Court reviewed a surplus land act extinguishing Indian title to the Nez Perce Reservation, but providing that the ceded lands would be "subject for a period of twenty-five years to all the laws of the United States prohibiting the

introduction of intoxicants into the Indian country. . . ." Id. at 345.

Here, the Act provides in Article XVII a prohibition on the sale of liquor on the ceded lands. As Judge Magill reasonably concluded: "The inclusion of a liquor prohibition provision in an allottment statute is indicative of an intent to diminish the reservation, because standing law had already prohibited the introduction of alcohol into Indian country," citing *Rosebud*, 430 U.S. at 613-615. While the Circuit majority found no evidence that the negotiators were aware of the 1892 liquor prohibition act, that does not compel the conclusion the majority reached. It does not logically follow that the inclusion of the liquor prohibition was negotiated on the assumption that the ceded and sold surplus lands were to be considered reservation lands. Judge Magill's analysis rings truer.

D. The Historical Context Also Points to Disestablishment of Reservation Lands

As instructed by *Hagen*, amici States also point to the historical context surrounding the passage of the surplus land act and the subsequent settlement by non-Indians on the opened lands. Amici States support the reading given the legislative history as set forth by South Dakota, the amici counties and waste management district. This history points to an understanding by the Congress, *at the time of the passage of the Act*, that it fully intended by adopting the cession and sum certain language a disestablishment of the reservation and that the original boundaries of the reservation would not remain intact.

The negotiations reveal the Tribe understood, in the bargaining for the best possible price for the sale of the surplus lands, that it was similar to the cession of the surplus lands of the Sisseton and Wahpeton Tribe, whose reservation was held to be disestablished by the same means in *DeCoteau v. District County Court*, 420 U.S. at 445. The Secretary of Interior reported on January 16, 1894, to the United States Senate, then considering ratification, on the Yankton Sioux negotiations and included the report of the Commissioner of Indian Affairs, which itself demonstrated the similarities to the cession agreement at issue in *DeCoteau*. The congressional debate itself points to an understanding that neither the Tribe nor the United States expected that the reservation was to remain intact: the debate on Yankton included regular references to uniform and similar policies of procuring "lands from the Indians" and "closing up our reservations." *See* Statements of Mr. Wilson of Washington, Mr. Pickler of South Dakota, J.A. 422, 427; 26 Cong. Rec. 8257 (1894); *also see* Statement of Mr. Herman ("They are lands belonging to the Indian reservation and to certain bands of Indians. They do not become lands of the United States at all until after the ratification of the treaty made with the Indians. Then and only then do they become subject to our land laws.") J.A. 3785.

II

THE HISTORY OF CONGRESSIONAL ACTIONS WITH REGARD TO INDIAN LANDS AND THIS COURT'S PRECEDENTS DEMONSTRATE THAT AN IMPLICATION OF DISESTABLISHMENT ARISES WHEN CONGRESS, IN A SURPLUS LANDS ACT, DETERMINES TO TRANSFER LANDS FROM INDIAN OWNERSHIP.

In this section, amici States offer the Court an historical perspective relating to the cession acts and disestablishment of Indian reservations. While these views may not be determinative of this case, they may inform the Court as to key elements of the relevant history.

With a few notable exceptions, such as navigable waterways and mission stations, all lands within the original boundaries of Indian reservations were owned in fee by the United States, with the occupant tribe holding a temporary or perpetual right of use and occupation, a property right commonly referred to as "Indian title." *United States v. Shoshone Tribe*, 304 U.S. 111, 116-17 (1938) (tribe possessed "[t]he right of perpetual and exclusive occupancy" to reserved lands); *Spalding v. Chandler*, 160 U.S. 394, 403 (1896) (within reservation tribe retained "right to the perpetual occupancy of the land with the privilege of using it in such mode as they saw fit. . . . "). This basic fact shaped the initial rules establishing the respective boundaries of federal, tribal and state jurisdiction within Indian reservations. Tribal jurisdiction was

equated with tribal ownership of lands. Tribal authority over non-Indians was founded on the principle that the occupant tribe, as owner of the lands, had the power to exclude non-members, and this power to exclude necessarily included a lesser power to regulate the conduct of non-members. *South Dakota v. Bourland*, 508 U.S. 679, 688-91 (1993). The power to exclude non-members was often expressly embodied in the terms of a treaty, *see Bourland*, 508 U.S. at 687-88, but was understood also to be inherent in the nature of Indian title. *See United States v. Shoshone Tribe*, 304 U.S. at 116-17 (noting tribe's inherent right to "exclusive occupancy" of reserved lands).

Tribal ownership of all lands within reservation boundaries provided a "bright-line" rule: inside the boundaries of the reservation, jurisdiction over most affairs rested in the tribe or the federal government. Outside the reservation, jurisdiction rested in the state or territorial government. Thus, in nineteenth century America, large sections of the western United States remained under tribal control.

The inexorable pressure of white settlement, however, caused the Government to whittle away at the reservations, so that the bounds of tribal ownership grew smaller and smaller. Eventually, pressure to reduce tribal landholdings, along with a desire to integrate Indians into the dominant society, led Congress to adopt the General Allotment Act. The Act provided for the allotment of tribal lands to tribal members in severalty, and further provided that once allotment was completed, the Secretary of Interior could negotiate with the tribe "for

the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell . . . " Act of February 8, 1887, ch. 119, sec. 5, 24 Stat. 388, 389.

Senator Henry L. Dawes, the principal author of the legislation, explained that its provisions were intended to authorize the Secretary of Interior, by negotiation or otherwise, "to reduce the limits and open up to the public all those parts of those reservations not necessary for the purpose of maintaining upon the reservation such of these Indians as in his opinion he cannot wisely put out upon the land." 17 Cong. Rec. 1630 (1886). Senator Dawes and others also emphasized that the purpose of the Act was to break up tribal organizations and "individualize" Indians. 17 Cong. Rec. 1630 (1886) (remarks of Sen. Dawes); 18 Cong. Rec. 191 (1886) (remarks of Rep. Perkins).

One of the purposes of the General Allotment Act was to provide a road map for Indian policy, as opposed to the prior method of separate negotiations with each tribe, which had led to a hodgepodge of treaties and statutes with unique and not always consistent provisions. One Congressman noted the "pressing necessity for the adoption of a general Indian policy." 18 Cong. Rec. 190 (1886) (remarks of Rep. Skinner). The provisions of the General Allotment Act defined Indian policy for the next several decades. One result was what this Court has termed "surplus land acts," in which portions of reservations remaining after allotment were opened to

non-Indian ownership, mostly through negotiation but often through unilateral action by Congress.

This Court has stated that "it is settled law that some surplus land Acts diminished reservations, and other surplus land Acts did not." *Solem v. Bartlett*, 465 U.S. 463, 469 (1984) (citations omitted). Thus, the Court's approach has been to examine each surplus land act independently for evidence that Congress intended to diminish the reservation. As this court has noted, the "question" of diminishment was not considered by Congress when enacting surplus land acts, because "[t]he notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century." *Solem*, 465 U.S. at 468.

Amici States suggest that the question of disestablishment should be approached from this historical perspective and that, in the ordinary case, the transfer of ownership of lands from Indians to non-Indians raised a strong implication that "Indian country" status was thereby lost. Certainly, it is true that in 1948 Congress changed the definition of Indian country to include all lands within the limits of a reservation, 18 U.S.C. 1151(a), but nothing suggests that Congress intended this definition to apply retroactively. If Congress believed it was extinguishing a reservation in 1894 or in 1900, it did so in fact. While *Seymour v. Superintendent*, 368 U.S. at 357-358, suggests the section 1151 definition settles the matter in that case, amici States respectfully submit that pre-1948 cessions operated to diminish or disestablish reservations when unallotted lands were ceded. Amici submit the

Tenth Circuit correctly states this proposition in *Pittsburgh & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1421-1422 (10th Cir. 1990).

From a proper historical perspective, amici States note that the sale of lands to non-Indians extinguished all federal title, so that the lands would cease to be a "reservation" in the normal sense of the word. The term "reservation" has been used to describe public lands that have been withdrawn from sale and set aside for specific purposes. Public Land Law Review Commission, *Study of Withdrawls and Reservations of Public Domain Lands* 1 (1969). Just as Congress understood the lands would not be subject to federal public lands laws until the Yankton agreement was ratified, *see* Statement of Mr. Herman, *supra*, so it understood that once the lands were sold to non-Indians, they ceased to be public lands and ceased to be dedicated to any particular federal purpose. Thus, it is highly unlikely that Congress, when opening lands to sale, would have understood those lands to remain reserved in any sense of the word – either for the Tribe or for federal purposes. In this case, the Government *did* "reserve[ ] from sale to settlers" a part of the the surplus lands "ceded and sold to the United States" for "agency, schools and other purposes." Act of August 15, 1894, Article VIII. Contrary to the Circuit majority's conclusion, such a federal reservation implies Congress understood that lands *not* reserved and otherwise sold off, could not remain in "reservation" status. The Circuit majority simply reads too much into the reservation in Article VIII – the Federal Government wished to retain some of the purchased lands for its own purposes, and not allow them for sale. Without such a reservation, the opened

lands would become available for sale under the homestead and public lands acts.

Additionally, as this Court recognized in *South Dakota v. Bourland*, 508 U.S. 679 (1993), conveyance of lands in fee simple to non-Indians extinguishes tribal rights to the use and occupation of the lands:

> [W]hen an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands. The abrogation of this greater right, at least in the context of the type of area at issue in this case, implies the loss of regulatory jurisdiction over the use of the land by others.

Id. at 689 (footnote omitted). The "type of area" referred to by the Court was an area of the reservation that had "been broadly opened to the public," as opposed to a "closed" or pristine area with a few non-Indian landholdings. *See id.* at 689 n. 9; *see generally Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (comparing "opened" and "closed" portions of reservation). By *broadly* opening lands to non-Indian ownership, Congress knew that such lands would no longer be available for the exclusive use of the tribe, a hallmark of reservation status.

Further, the surplus land acts were enacted to carry out the general policy established in the General Allotment Act. The Court has recognized that the allotment of Indian lands "was consistently equated with the dissolution of tribal affairs and jurisdiction." *Montana v. United States*, 450 U.S. 544, 559 n. 9 (1981) (citations omitted). In carrying out the allotment policy, it would make little

sense for Congress to submit non-Indians to tribal jurisdiction by preserving the "reservation" status of lands opened to non-Indian settlement. In fact, this Court has noted that "[i]t defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government." *Id.* If Congress intended non-Indians purchasing allotments from tribal members would not be subject to tribal jurisdiction, it would follow that Congress also intended non-Indians purchasing lands opened for the express purpose of non-Indian settlement would be free from tribal jurisdiction.

Finally, and most importantly, at the time Congress was enacting the surplus land acts, it was an established principle that once a tribe surrendered title to certain lands, federal and tribal jurisdiction over those same lands ceased, unless expressly reserved. At the time, most jurisdictional questions involving Indian tribes revolved around whether the affected area was "Indian country." *See, e.g.*, Rev. Stat. § 2139 (1878) (prohibiting introduction of liquor into Indian country); Rev. Stat. § 2145 (1878) (extending federal criminal laws to Indian country); Rev. Stat. § 2152 (1878) (persons fleeing into Indian country to be arrested and extradited with permission of chiefs). In 1834, Congress had defined the Indian country as the area west of the Mississippi not within existing states and territories, and the area east of the Mississippi "to which Indian title had not been extinguished." Act of June 30, 1834, ch. 161, 4 Stat. 729. Upon adoption of the Revised Statutes, the definition was repealed, but it continued to provide guidance to the Court. *Ex parte Kan-gi-shun-ca (Ex parte Crow Dog)*, 109 U.S. 556, 560-61 (1883). By 1877, it

had been established that the term "Indian country" referred to the land described in the 1834 statute "so long as the Indians retain their original title to the soil," and ceases to be Indian country whenever they lose that title, in the absence of any different provision by treaty or by act of Congress. *Bates v. Clark*, 95 U.S. 204, 209 (1877).

In *Clairmont v. United States*, 225 U.S. 551 (1912), the Court stated:

> The simple criterion is that as to all the lands thus described it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further act of Congress, unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case.

Id. at 558, *quoting Bates v. Clark*, 95 U.S. at 208.

Clairmont did not require any particular method of extinguishment in order to remove non-Indian lands from tribal jurisdiction. The only requirement was that the tribe "part with the title." *Clairmont*, 225 U.S. at 558. Amici thus conclude, consistent with this historical and legal background, that when Congress in a surplus land act determined to transfer land from Indians to non-Indian, a strong implication arose that Congress intended to disestablish the reservation.

We submit further that this implication is fully consistent with, and indeed may be read as part of, the "almost insurmountable presumption" of disestablishment which arises when a surplus land agreement uses

"cession and sum certain language" and that the implication discussed here provides a significant part of the analytical basis for that presumption.

We finally submit, that nothing in the record before this Court overcomes the implication created by the Congressional action in the Yankton Act.

CONCLUSION

This Court has the opportunity to settle its Indian reservation disestablishment and diminishment jurisprudence and send a clear message to other courts that they cannot so easily disregard the intent of Congress expressed in the turn-of-the-century surplus lands acts, much as the Eighth Circuit did here. Amici States face protracted litigation over 100-year old Acts of Congress and the potential for the "revival" of Indian country that has not been acknowledged to exist for a century.

While the operative language of the Yankton Sioux cession agreement and ratifying act raised an almost insurmountable presumption of disestablishment of the Yankton reservation, the Circuit majority did not address the presumption nor did it heed this Court's precedent. Further, the Court of Appeals' conclusion that Congress intended to retain tribal jurisdiction over lands opened to non-Indian settlement does not withstand scrutiny. It cannot be denied that Congress opened the lands at issue for the specific purpose of non-Indian settlement, an act totally at odds with continued tribal jurisdiction. Because the surplus lands act at issue did not expressly provide for tribal jurisdiction over the opened lands, the only

conclusion that is supported by the language of the act and the policies underlying it is that the opened lands were removed from the reservation and placed under the full and unrestricted jurisdiction of the State of South Dakota.

Respectfully submitted,

ALAN G. LANCE
Attorney General of the State of Idaho
STEVEN W. STRACK
Assistant Attorney General
P.O. Box 83720
Boise, ID 83720
Telephone: (208) 334-4143

DANIEL E. LUNGREN
Attorney General of the State of California
*THOMAS F. GEDE
Special Assistant Attorney General
1300 I Street
Sacramento, CA 95814
Telephone: (916) 323-7355
Counsel for Amici Curiae
**Counsel of Record*

Supreme Court, U.S.
FILED
AUG 7 1997
CLERK

No. 96-1581

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STATE OF SOUTH DAKOTA,
Petitioner,
v.

YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,
Respondents,
and

SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF LEWIS COUNTY, IDAHO, *AMICUS CURIAE*, IN SUPPORT OF PETITIONER, STATE OF SOUTH DAKOTA

KIMRON R. TORGERSON
Lewis Co. Prosecuting Attorney
P.O. Box 398
Nezperce, ID 83543
(208) 937-2271
Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

43 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. GENERAL CESSION DOCUMENTATION UNDERMINES THE OPINION OF THE PANEL MAJORITY	5
II. SPECIFIC NEZ PERCE DOCUMENTATION CONFIRMS DISESTABLISHMENT IN THE TRADITIONAL SENSE AND ERODES THE NEW ARGUMENT OF THE UNITED STATES	7
III. RELEVANT CASE LAW CLEARLY SUPPORTS DISESTABLISHMENT	11
IV. THE NEZ PERCE AGREEMENT IS NOT LIMITED IN LANGUAGE OR SCOPE	14
V. THIS COURT SHOULD PUT ALL SIMILAR ISSUES TO REST AND AUTHORITATIVELY RESOLVE ALL DOUBTS REGARDING THE EFFECTS OF CESSION AGREEMENTS IN THIS CASE	16
CONCLUSION	17
APPENDIX	
A. Act of August 15, 1894, ch. 290, 28 Stat. 286, 326-332 (APPENDIX A)	1a
B. Proclamation of November 8, 1895, 29 Stat. 873 (APPENDIX B)	13a

TABLE OF AUTHORITIES

CASES: Page

DeCoteau v. District County Court, 420 U.S. 425 (1975) ..... *passim*
Dick v. United States, 208 U.S. 340 (1908) ..... *passim*
Dole v. Steelworkers, 494 U.S. 26 (1990) 16
Ex Parte Tilden, 218 F. 920 (D. Idaho 1914) 12, 13
Hagen v. Utah, 510 U.S. 399 (1994) ..... *passim*
King v. St. Vincent's Hospital, 502 U.S. ——, 112 S.Ct. 570 (1991) 16
Mattz v. Arnett, 412 U.S. 481 (1973) 5
NLRB v. Federbush Co., 121 F.2d 954 (CA2 1941) 15
Perrin v. United States, 232 U.S. 478 (1914) 13
Pittsburg & Midway Coal Min. Co. v. Yazzie, 909 F.2d 1387 (10th Cir. 1990), *cert. denied*, 498 U.S. 1012 (1990) 11, 14
Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) 5, 9, 12
Seymour v. Superintendent, 368 U.S. 351 (1962) 5
Solem v. Bartlett, 465 U.S. 463 (1984) 4, 5
State v. Greger, 559 N.W.2d 854 (S.D. 1997) 4
State v. Lott, 123 P. 491 (Idaho 1912) 12, 13
United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365 (1988) 16
United States v. Forty-three Gallons of Whiskey, 108 U.S. 491 (1883) 13
United States v. Heirs of Boisdore, 49 U.S. (8 How.) 113 (1849) 16
United States National Bank of Oregon v. Independent Insurance Agents, 113 S.Ct. 2173 (1993) 16
Ute Indian Tribe v. Utah, 114 F.3d 1513 (10th Cir. 1997) 8
Yankton Sioux Tribe v. Southern Missouri Waste Management Dist., 99 F.3d 1439 (8th Cir. 1996) 3, 4, 14

STATUTES:

Act of August 15, 1894, ch. 290, 28 Stat. 286 ..... 2, 6, 7, 15
Proclamation of November 8, 1895, 29 Stat. 873 9

TABLE OF AUTHORITIES—Continued

Page

Act of March 2, 1889, c. 405, 25 Stat. 888 15
Act of March 3, 1891, 26 Stat. 1036 6
Act of June 18, 1934, 48 Stat. 984 10
Public Law 280, Idaho Code § 67-5101 13

CONGRESSIONAL MATERIALS:

S. Ex. Doc. No. 31, 53d Cong., 2d Sess. (1894) 2, 7, 8
26 Cong. Rec. 8258, 8265-69, 53d Cong., 2d Sess. (1894) 6
H.R. Rep. No. 6913, 53d Cong., 2d Sess. (1894) 7
53 Cong. Rec. 6425, 6426, 8269, 53d Cong., 2d Sess. (1894) 9
H.R. Doc. No. 5, Vol. II, 54th Cong., 2d Sess. (Vol. 13) (1897) 10

OTHER AUTHORITIES:

Annual Report of the Commissioner of Indian Affairs (1894) 9
Report of the Secretary of the Interior, H. Ex. Doc. 1, pt. 5, 53d Cong., 3d Sess. (Vol. 14) at IX (1894-95) 9
Lewiston Tribune (Idaho), November 20, 1895 10
Lewiston Teller (Idaho), November 21, 1895 10
Railroad Right of Way—Special Act; Spokane & Palouse Ry. Co., 22 Pub. Lands Dec. 674 (1896) 10
Lee v. Thomas, 29 Pub. Lands Dec. 251 (1899) 10
F. McReynolds, 40 Pub. Lands Dec. 413 (1912) 10
Official General Land Office Map of the State of Idaho (1939) 10
F. Cohen, Handbook of Federal Indian Law (1942 ed.) 13
F. Cohen, Handbook of Federal Indian Law (1982 ed.) 13
Brief of Petitioner, *DeCoteau v. District County Court*, 420 U.S. 425 (1975) (No. 73-1148) 15
Brief for the State of North Dakota as *Amici Curiae*, *DeCoteau v. District County Court*, 420 U.S. 425 (1975) (No. 73-1148) 15

TABLE OF AUTHORITIES—Continued

	Page
Lewiston Morning Tribune (Idaho) November 27, 1996	16
Lewiston Morning Tribune (Idaho) February 27, 1997	17
Respondent Yankton Sioux Tribe and Darrell Drapeau's Brief in Opposition to Petition for Writ of Certiorari, *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.* (May 7, 1997) (No. 96-1581)	15
Brief of Duchesne County, Utah, and Uintah County, Utah, *Amici Curiae* in Support of Petitioner, *South Dakota v. Yankton Sioux Tribe.* (No 96-1581) (August 7, 1997)	8

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

No. 96-1581

STATE OF SOUTH DAKOTA,
Petitioner,
v.
YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,
Respondents,
and
SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF LEWIS COUNTY, IDAHO, *AMICUS CURIAE*, IN SUPPORT OF PETITIONER, STATE OF SOUTH DAKOTA

INTEREST OF AMICUS CURIAE

The interest that prompts the filing of this Brief of Lewis County, Idaho, *Amicus Curiae*, in Support of Petitioner, State of South Dakota, can be simply stated. The 1894 Indian appropriation act that ratified the Yankton

cession agreement also ratified a similar Nez Perce cession agreement. Act of August 15, 1894, ch. 290, 28 Stat. 286, 326; Lewis Co. App. at 1. It was not unusual for Congress to adopt this format for the ratification of more than one cession agreement, as *DeCoteau v. District County Court*, 420 U.S. 425 (1975) attests. *DeCoteau*, 420 U.S. at 439-441 & nn. 21, 22. As a result, although the Nez Perce agreement started out as a separate measure with independent cession instructions, agency correspondence, and tribal negotiations, and although it was reported separately as S. Ex. Doc. No. 31, 53d Cong., 2d Sess. (1894), the subsequent congressional debate addressed, among other subjects, all aspects of both the Yankton agreement and the Nez Perce agreement—sometimes separately but more often together.

In this instance, the Nez Perce cession agreement, like the Yankton agreement, encompassed *all* of the unallotted lands of the 1863 Nez Perce reservation. *See also DeCoteau*, 420 U.S. at 438, 446-47. And as we will show, other pertinent factors are also remarkably similar to those found in the Yankton case. For example, today, the 1863 Nez Perce reservation is a rural area primarily owned and populated by non-Indians. Approximately ninety percent (90%) of the land is owned by non-Indians and approximately ninety percent (90%) of the population is also non-Indian. In this rural area of central Idaho, for nearly three-quarters of a century, the jurisdictional history has also been equally clear. Early on, state and federal cases, including the decision of this Court in *Dick v. United States*, 208 U.S. 340 (1908), were premised upon Nez Perce reservation disestablishment. However, recent assertions of tribal jurisdiction over non-members and/or claims regarding the lack of state jurisdiction over tribal members have caused the issue to resurface in the State of Idaho.

Of course, it is true that the Nez Perce and Yankton cession documents differ in one material respect. Parties in *DeCoteau* and in this case have, for a *number*

of different reasons, *recognized and conceded* that the Nez Perce cession presents a *stronger* case for disestablishment than either *DeCoteau* or *Yankton*. *DeCoteau*, 420 U.S. 425; *Yankton Sioux Tribe v. Southern Missouri Waste Management*, 99 F.3d 1439 (8th Cir. 1996). Moreover, in this instance, the court below has agreed with this assessment and repeated that recognition in the text of the panel majority opinion:

> A number of savings clauses in other agreements also state that earlier agreements and treaties will 'be in full force and effect,' but none include such a strong phrase as 'the same as though this agreement had not been made,' and most include language explaining that prior treaties will remain in force so long as they are 'not inconsistent' with the later agreement. . . . *Dick v. United States*, 208 U.S. 340, 352, 28 S.Ct. 399, 402-03, 52 L.Ed. 520 (1908) [Nez Perce] (treaty provisions 'not inconsistent with the provisions of this agreement are hereby continued in full force and effect').
>
> Article XVIII contains no similar limitation. It does not state that only consistent aspects of the earlier treaty are to continue.

Southern Missouri Waste Dist., 99 F.3d at 1447; Pet. App. at 16. In this instance, the distinction, according to the panel majority, is tied to the fact that the Nez Perce cession is not burdened by the Yankton Article XVIII savings clause. *Id.*

We recognize that most litigants would ordinarily seize such a determinative factor and join in the court's claim that it makes all the difference. In all candor, however, Lewis County, as a friend of the Court, cannot represent to this Court that this point or any other point deemed significant by the panel majority truly deserves deference or support. We cannot support any part of the opinion of the panel majority for the simple reason that it does not follow the precedent of this Court, or the

intent of Congress. Our views are in agreement with those of the dissent and the Supreme Court of the State of South Dakota. *Yankton Sioux Tribe v. Southern Missouri Waste Dist.*, 99 F.3d 1439, 1458 (8th Cir. 1996) (Magill, J., dissenting); Pet. App. at 44; *South Dakota v. Greger*, 559 N.W.2d 854 (S.D. 1997); Pet. App. at 125-158.

Lewis County, Idaho, has the support of a recently formed association of local governmental units, the North Central Idaho Jurisdictional Alliance, in filing this brief *amicus curiae*. The Alliance consists of three counties, eight cities, three school districts and seven highway districts in North Central Idaho, whose geographic boundaries include land which was within the Nez Perce reservation as it existed prior to 1894.

SUMMARY OF ARGUMENT

We rely on the decisions of this Court, which has decided six cases of this general nature since the 1960's. According to this precedent, a sum certain cession statute of this exact kind is "precisely suited" for disestablishment. *DeCoteau*, 420 U.S. at 445. It presents an "almost insurmountable presumption" of disestablishment, or a "nearly conclusive presumption" of disestablishment. *Solem v. Bartlett*, 465 U.S. 463, 470-471 (1984); *Hagen v. Utah*, 510 U.S. 399, 411 (1994).

In *Hagen*, even the dissenting Justices did not disagree on this point. Justice Blackmun summarized in *Hagen*:

> In contrast, the only two cases in which this Court previously has found diminishment involved statutes and underlying tribal agreements to " 'cede, sell, relinquish, and convey to the United States all [the Indians'] claim, right, title, and interest' " in unallotted lands, *DeCoteau*, 420 U.S., at 439, n.22, or to " 'cede, surrender, grant, and convey to the United States all [the Indians'] claim, right, title, and interest' " in a defined portion of the reservation, *Rosebud*, 430 U.S., at 591, n.8. The Court held that in the presence of statutory language "precisely suited" to diminishment, *id.*, at 597, supported by the express consent of the tribes, "the intent of all parties to effect a clear conveyance of all unallotted lands was evident." *DeCoteau*, 420 U.S., at 436, n.16. I need hardly add that no such language or underlying Indian consent accompanies the statute at issue in this case.

Hagen, 510 U.S. at 427 (Blackmun, J., dissenting).

In addition, Lewis County, Idaho, as *amicus curiae*, will continue to rely upon the Nez Perce case of *Dick v. United States*, 208 U.S. 340 (1908) and the recognition of this Court in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 613-615 n.47 (1977) of the important role that the analysis of *Dick* plays in cases of this nature.

Nothing in the Nez Perce documentation, or those portions of the congressional debates directed to the Nez Perce agreement, supports any other conclusion.

ARGUMENT

I.

GENERAL CESSION DOCUMENTATION UNDERMINES THE OPINION OF THE PANEL MAJORITY.

As a preliminary matter, it should be noted that the decision of this Court in *DeCoteau* certainly appears to be controlling in this situation. If this is the case, the jurisdiction of the Nez Perce Tribe would necessarily be limited to tribal trust lands. *DeCoteau*, 420 U.S. at 427 n.2, 446-447. Tribal jurisdiction simply would not extend to the fee land site at issue in this controversy. *Id. See generally Seymour v. Superintendent*, 368 U.S. 351 (1962); *Mattz v. Arnett*, 412 U.S. 481 (1973); *DeCoteau*, 420 U.S. 425; *Rosebud*, 430 U.S. 584; *Solem*, 465 U.S. 463 and *Hagen*, 510 U.S. 399. (We understand that Utah Counties are briefing this trust/fee question).

In further support of the position that *DeCoteau* is important here, Lewis County has attached to this brief a copy of the 1894 Nez Perce statute in the appendix. Act of August 15, 1894, ch. 290, 28 Stat. 286, 326; Lewis County App. at 1-4. Even a cursory comparison of the provisions of the Sisseton-Wahpeton Act and the Nez Perce act unequivocally substantiates the argument that the 1894 Nez Perce statute is also the functional twin of the 1891 *DeCoteau* statute. For example, the "operative language" of each statute provides:

> [C]ede, sell, relinquish, and convey to the United States all their claim, right, title, and interest. . . .

Act of March 3, 1891, 26 Stat. 1036 (Sisseton-Wahpeton act—appended in *DeCoteau*, 420 U.S. at 449).

> [C]ede, sell, relinquish, and convey to the United States all their claim, right, title, and interest. . . .

28 Stat. at 326 (Nez Perce act, Lewis Co. App. at 1).

Beyond the "operative language" on the face of the statute, which this Court has found to be most significant in resolving questions of this nature, the other Nez Perce documentation confirms the significance and strength of the comparison. In fact, in the congressional debates, key congressional speakers specifically reference agreements from the past as precedent for the 1894 legislation. 26 Cong. Rec. 8258, 8265-69, 53d Cong., 2d Sess. (1894). Mr. Pickler: ". . . The same kind of treaty we have always made." *Id.* at 8265. Mr. Pickler: ". . . These are treaties, just as all other cessions of land have been." *Id.* at 8268.[1]

[1] As previously pointed out, although three years and one session of Congress separate the passage of the Sisseton-Wahpeton and the Yankton and Nez Perce Acts, parts of the process were actually under consideration in both session. Many of the key congressional participants in the process continued to hold office through the passage of the 1894 Act. And the fact that approximately *one-third* of the members in the House of Representatives and *two-thirds* of the members in the entire Senate for the 51st Congress (Sisseton-Wahpeton) were still there in the 53rd Congress when the 1894 Acts were finally considered, debated and passed, is significant.

In every other respect, the remainder of the Nez Perce documentation confirms this same understanding. For the most part, this documentation is set forth in Sen. Ex. Doc. No. 31, 53d Cong., 2d Sess. (1894), which contains the official Nez Perce correspondence, reports, transcripts and cession agreement, and also in the congressional debates and reports on the 1894 Act. *See* H.R. Rep. No. 6913, 53d Cong., 2d Sess. (1894); Act of August 15, 1894, 28 Stat. 286.

II.

SPECIFIC NEZ PERCE DOCUMENTATION CONFIRMS DISESTABLISHMENT IN THE TRADITIONAL SENSE AND ERODES THE NEW ARGUMENT OF THE UNITED STATES.

The transcripts of the tribal negotiations contained in Sen. Ex. Doc. No. 31 are particularly telling. In *Hagen v. Utah*, 510 U.S. 399 (1994), this Court set forth, with special emphasis, the boundary discussions significant there.

> 'You say that [the Reservation boundary] line is very heavy and that the reservation is nailed down upon the border. That is very true as applying to the past many years and up to now, but congress has provided legislation which will pull up the nails which hold down that line and *after next year there will be no outside boundary line to this reservation.*' Minutes of Councils Held by James McLaughlin, U.S. Indian Inspector, with the Uintah and White River Ute Indians at Uintah Agency, Utah, from May 18, to May 23, 1903.

Hagen, 510 U.S. at 417 (emphasis in original).

The Nez Perce transcripts document a similar understanding:

> Salmon River Billy: . . . [T]he country had been inclosed according to the treaty and prevented the entrance on the reservation of any white man and any who should try to set aside or break down the boundaries of that reservation. . . . Perhaps it may be on account of having another President, who is a Democrat; perhaps it is he who has made the *edict for breaking down the lines of the reservation.*

Sen. Ex. Doc. No. 31 at 56 (1894) (emphasis added).[2]

In addition, the federal commissioners here also specifically cited the *DeCoteau* example ("the Sisseton and Wahpeton Indians have sold their land"), among others, in their discussions with the tribe in an effort to gain general support for the Nez Perce Agreement. Sen. Ex. Doc. No. 31 at 30. And in response to the price to be paid per acre, Commissioner Allen again referenced the *DeCoteau* Agreement:

> The Government has made you the most liberal offer in my opinion that has been made to any tribe since Harrison was President. The only tribe that I can remember that have received $2.50 per acre for any considerable quantity of land is the *Sisseton and Wahpeton tribe in Dakota.* They had a smaller body of land, very little of which was waste land not good for agriculture. We paid the same price we propose to pay you for all your land. . . .

Id. at 45 (emphasis added).

Later in the congressional debates, this same disestablishment concept was again described, but in different terms. References to "public domain" appear in more

[2] The recent decision in the Tenth Circuit Court of Appeals that complicates *Hagen* in this respect, *Ute Indian Tribe v. Utah,* 114 F.3d 1513 (10th Cir. 1997), is discussed in the Brief of Duchesne County, Utah, and Uintah County, Utah, as *Amicus Curiae* in Support of the Petitioner, State of South Dakota *South Dakota v. Yankton Sioux Tribe,* (Aug. 7, 1997) (No. 96-1581). This Nez Perce "breaking down the lines" documentation clearly supports the position of the Utah Counties.

than one instance. 53 Cong. Rec. 6425, 6426, 8269 53d Cong., 2d Sess. (1894). There is little doubt that *Hagen* conclusively resolved the significance of that concept in reservation disestablishment cases. *Hagen,* 510 U.S. at 412-414.

In light of our precedents, we hold that the

> restoration of unallotted reservation lands to the public domain evidences a congressional intent with respect to those lands inconsistent with the continuation of reservation status.

Id. at 414.

Here, as in the Yankton case, after the passage of the 1894 Nez Perce Act, the Commissioner of Indian Affairs, in his Annual Report to Congress, unequivocally stated that the Nez Perce lands would be "restored to the public domain." Annual Report of the Commissioner of Indian Affairs at 26 (1894). Similarly, the Secretary of Interior's Annual Report reflects this same understanding: "restoring to the public domain." Report of the Secretary of the Interior, H. Exec. Doc. 1, pt. 5, 53d Cong., 3d Sess. (Vol. 14) at IX (1894-95).

As provided in the 1894 Act, on November 8, 1895, the President of the United States, Grover Cleveland, described the "cession and agreement" and proclaimed that the area "acquired" from the Nez Perce tribe would be open to settlement on November 18, 1895. Proclamation of November 8, 1895, 29 Stat. 873, 875; Lewis Co. App. at 13a, 20a.[3] At the time, the local press reported the common perception of the event in the following manner:

> RESERVATION IS NO MORE . . . At twelve o'clock Monday the Nez Perce reservation passed

[3] The Presidential Proclamations opening the reservation to settlement were deemed especially significant in *Rosebud,* 430 U.S. at 602-603 and *Hagen,* 510 U.S. at 419-420. In this instance, the cession terminology of the Nez Perce Proclamation similarly reflects this same important construction. Nez Perce Proclamation of November 8, 1895, 29 Stat. 873; Lewis Co. App. at 13a.

> into history . . . heads began bobbing up all over the former reservation. . . .
>
> *Lewiston Tribune* (Idaho), November 20, 1895 at 1.
>
> CANNON BOOMED AT NOON . . . The cannon was fired in front of the land office, at twelve o'clock, Monday. This was the death knell of the great Nez Perce reservation, and the introduction of new conditions to follow these important changes.
>
> *Lewiston Teller* (Idaho), November 21, 1895 at 1.

Even the local Indian agent recognized that the reservation "formerly embraced" the "ceded lands." H.R. Doc. No. 5, Vol. II, 54th Cong., 2d Sess. (Vol. 13) at 141 (1897).

As a result, the 1863 Nez Perce reservation was thereafter treated in the same manner as the original Sisseton-Wahpeton reservation. It was deleted from official reservation maps, and described as a "former" reservation in numerous other instances. *Frederick W. McReynolds*, 40 Pub. Lands Dec. 413 (1912); *Lee v. Thomas*, 29 Pub. Lands Dec. 251 (1899); *Railroad Right of Way—Special Act; Spokane & Palouse Ry. Co.*, 22 Pub. Lands Dec. 674 (1896). Even after the Indian Reorganization Act of 1934, Act of June 18, 1934, 48 Stat. 984, the Department of the Interior continued to delineate the "FORMER NEZ PERCE INDIAN RESERVE" on the Official General Land Office Map of the State of Idaho (1939).

The foregoing is significant to the result in the case now before this Court because of the overall identity between the historical context and contemporaneous understanding of the Yankton and Nez Perce openings in the post-1894 Act time period. South Dakota, Southern Missouri and their other *amici* have amply documented the strong contemporaneous indicators of disestablishment particular to the Yankton Reservation in their briefs. The similar indicators in the Nez Perce record simply confirm the view that Congress, the Commissioner of Indian Affairs, the local Indian populations and the non-Indian populations each perceived that disestablishment was intended by both the Yankton and Nez Perce Acts.

Moreover, we are constrained to point out, in response to the arguments made elsewhere by the Nez Perce tribe, that other later generic references to a Nez Perce "reservation" lack significance.

First, the Court in *Hagen* noted that "confusion" in the subsequent legislative records did nothing to alter a conclusion firmly grounded upon "textual and contemporaneous evidence" of disestablishment. *Hagen*, 510 U.S. 420. *See also Pittsburg & Midway Coal Min. Co. v. Yazzie*, 909 F.2d 1387, 1416 (10th Cir. 1990), *cert. denied*, 498 U.S. 1012 (1990). Secondly, here, as in *Hagen*, the subsequent demographics further support a conclusion of disestablishment. Within the 1863 Nez Perce reservation, roughly 90% of the population is non-Indian and roughly 90% of the lands are non-Indian fee lands. As this Court noted in *Hagen*, in this same situation, "a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area." *Hagen*, 510 U.S. at 421.

We conclude that the contemporaneous history of the opening of the Nez Perce reservation strongly supports the disestablishment of the Yankton reservation, which proceeded along the same track, and supports the disestablishment of the Nez Perce reservation itself.

III.

RELEVANT CASE LAW CLEARLY SUPPORTS DISESTABLISHMENT.

If disestablishment was the intended result of the 1894 Nez Perce legislation, one would expect the early case law to generally reflect that status. Again, this is, in fact, the case. Early on, this Court decided *Dick*, 208 U.S. 340, involving the ceded Nez Perce reservation.

In the text of the Opinion, the Court in *Dick* quoted, with approval, that:

> The superintendent of the Nez Perce Indians testified: "I do not know of any reservation or any part of the reservation used for Government purposes or for Indian purposes within the boundary of the village of Culdesac. I have no idea there is any such reservation within such village. Culdesac is seven or eight miles from the exterior boundaries of the Indian school reservation." The lands upon which the village of Culdesac is located were part of those ceded to the United States by the agreement of 1893 with the Indians, and before the above transaction in that village about whiskey occurred the title to such lands had passed by patent from the United States under the townsite laws. . . .

Dick, 208 U.S. at 351. *See Rosebud*, 430 U.S. at 614, 615 and 624 citing *Dick* in support of the conclusion that a 1910 Rosebud Act with a similar liquor provision had similarly disestablished that portion of the Rosebud reservation.

In 1912, the Idaho Supreme Court in *State v. Lott*, 123 P. 491 (Idaho 1912), agreed with *Dick* in this respect:

> The argument and reasoning of the Dick Case is authority for and sustains the view that the general government has only retained exclusive jurisdiction over the Nez Perce Indians, and what *formerly* constituted the Nez Perce Indian reservation, to the extent and for the purpose of prohibiting the introduction of intoxicants. . . .

Lott, 123 P. at 495 (emphasis added).

In *Ex Parte Tilden*, 218 F. 920 (D. Idaho 1914), the federal district court addressed a writ of habeas corpus presented by a Nez Perce Indian who had shot another person on a railroad right of way within the "former" reservation and was prosecuted in state court. The court noted:

> The status of what is referred to as the Nez Perce reservation is pretty fully set forth in the opinion in the case of *Dick v. United States*, 208 U.S. 340, 28 Sup. Ct. 399, 52 L.Ed. 520. Villages and towns inhabited almost exclusively by white people have grown up upon the territory *formerly* embraced within its limits.

Ex parte Tilden, 218 F. at 921 (emphasis added).

After further examining *Dick*, the court concluded that the lands "within the boundaries of what was *formerly* the Nez Perce Indian reservation" were no longer "Indian country" for any purpose other than enforcement of the liquor prohibition statutes. *Id.* at 924 (emphasis added).

To summarize, as *Dick*, 208 U.S. 340, *Lott*, 123 P. 491, and *Ex parte Tilden*, 218 F. 920, generally attest, the view of the original Nez Perce reservation as a "former" reservation was fairly uniform and certainly controlling in the resolution of "reservation" related issues, at least through the 1950's. In addition, *Dick* figures prominently in the "buffer" lands analysis (lands that "adjoin" Indian country) set forth in the 1942 edition of Felix Cohen's Handbook of Federal Indian Law. F. Cohen, Handbook of Federal Indian Law at 353 (1942 ed.). This 1942 text cites *Dick* as one of three cases that support liquor restrictions of this nature. *Id.* at 353 n.26. The other two cases are *Perrin v. United States*, 232 U.S. 478 (1914) (1892 Yankton cession) and *United States v. Forty-three Gallons of Whiskey*, 108 U.S. 491 (1883) (1854 Chippewa cession). All three involve "formerly Indian country" areas. F. Cohen, Handbook of Federal Indian Law at 307 (1982 ed.).

In more recent years, with the adoption of Idaho's version of Public Law 280, Idaho Code § 67-5101, the need to specifically identify the location of reservation boundaries, trust lands or fee lands with respect to "Indian country" was lessened and distinctions necessarily blurred. Additionally, throughout the history of the area, there are

other references to a "Nez Perce reservation" that can readily be seen as colloquialisms, convenient ways to designate a geographic area in easily recognizable form. *See* a discussion of this point in *Yazzie*, 909 F.2d at 1416. *See also Hagen*, 510 U.S. at 420.

IV.

THE NEZ PERCE AGREEMENT IS NOT LIMITED IN LANGUAGE OR SCOPE.

The Eighth Circuit Court of Appeals and Respondent Yankton Sioux Tribe both found a *distinction* to be significant:

> A number of savings clauses in other agreements also state that earlier agreements and treaties will 'be in full force and effect,' but none include such a strong phrase as 'the same as though this agreement had not been made,' and most include language explaining that prior treaties will remain in force so long as they are 'not inconsistent' with the later agreement. . . . *Dick v. United States*, 208 U.S. 340, 352, 28 S.Ct. 399, 402-03, 52 L.Ed. 520 (1908) ([Nez Perce] treaty provisions '*not inconsistent with* the provisions of this agreement are hereby continued in full force and effect').
>
> Article XVIII contains no similar limitation. It does not state that only consistent aspects of the earlier treaty are to continue.

Yankton Sioux Tribe, 99 F.3d at 1447; Pet. App. at 16.

> [E]ach contained limiting words which completely distinguish all other savings clauses from the Yankton Sioux agreement . . . *Dick v. United States*, 208 U.S. 340, 352 (1908) ([Nez Perce] treaty provisions "not inconsistent with the provisions of this agreement are hereby continued in full force and effect").
>
> Article XVIII in the Yankton Sioux agreement contains no such limiting language.

Resp. Yankton Sioux Tribe and Darrell Drapeau's Br. in Opp'n to Pet. for Writ of Cert., *Yankton Sioux Tribe* (May 7, 1997) (No. 96-1581).

In addition, the petitioner in *DeCoteau* listed the Nez Perce Act of August 15, 1894, 28 Stat. 326, in conjunction with other acts where Congress concededly disestablished Indian reservations:

> These Acts include the Act March 2, 1889, c.405, 25 Stat. 888 dividing a portion of the Great Reservation of the Sioux into six separate reservations and opening the remainder to settlement, and those opening to settlement the reservations of . . . Nez Perce, Act of August 15, 1894.

Br. of Pet. at 15, *DeCoteau* (No. 73-1148).

In *DeCoteau*, the State of Idaho also joined the State of North Dakota as *Amici Curiae*. Br. for the State of North Dakota, *et al.* as *Amici Curiae* at 1, *DeCoteau* (No. 73-1148). The scope of that brief, like the scope of the *DeCoteau* opinion, was not limited to the specifics of the Sisseton-Wahpeton agreement. It submitted, in general terms, the strong, definite, acquired and clear meanings of the terms "cede," "sell," "relinquish" and "convey." *Id.* at 1. That submission was intended to resolve cessions in the context of both the Yankton agreement and the Nez Perce agreement. The *Decoteau* opinion was crafted in the same manner.

In another case dealing with a different issue, this Court summarized a related statutory construction concept in the following language:

> Along with punctuation, text consists of words living "a communal existence," in Judge Learned Hand's phrase, the meaning of each word informing the others and "all in their aggregate tak[ing] their purport from the setting in which they are used." *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (CA2 1941). Over and over we have stressed that "[i]n expound-

ing a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122, 12 L.Ed. 1009 (1849) (quoted in more than a dozen cases, most recently *Dole v. Steelworkers*, 494 U.S. 26, 35, 110 S.Ct. 929, 934, 108 L.Ed.2d 23 (1990)); see also *King v. St. Vincent's Hospital*, 502 U.S. ——, ——, 112 S.Ct. 570, 574, 116 L.Ed.2d 578 (1991). No more than isolated words or sentences is punctuation alone a reliable guide for discovery of a statute's meaning. *Statutory construction "is a holistic endeavor," United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371, 108 S.Ct. 626, 630, 98 L.Ed. 2d 740 (1988), and, at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter.*

U.S. Nat. Bank of Or. v. Independent Ins. Agents, 113 S.Ct. 2173, 2182 (1993) (emphasis added).

V.

THIS COURT SHOULD PUT ALL SIMILAR ISSUES TO REST AND AUTHORITATIVELY RESOLVE ALL DOUBTS REGARDING THE EFFECTS OF CESSION AGREEMENTS IN THIS CASE.

Tribal attempts to resurrect the 1863 Nez Perce reservation boundaries have been most noticeable recently in conjunction with assertions of tribal jurisdiction over non-members and fee lands. For example, in a number of instances non-Indian entities have been instructed to fully comply with a Tribal Employment Rights Ordinance (including the payment of substantial tribal TERO taxes and total compliance with tribally dictated hiring practices) or face tens of thousands of dollars of tribal fines or other tribal enforcement actions in tribal court. *Lewiston Morning Tribune* (Idaho) November 27, 1996 at 8A. For some projects, it has been estimated that the TERO requirements would increase existing costs hundreds of

thousands of dollars. *Id.* Entities that are said to be subject to TERO include local governmental subdivisions and school districts as well as other private contractors.

In addition, the Nez Perce tribe has recently assessed an ad valorem tax against certain non-Indian businesses that conduct business on non-Indian lands within the 1863 reservation boundaries. *Lewiston Morning Tribune* (Idaho), February 27, 1997 at 1,4. ("'(The tribe) is feeling a real need for injections of revenue' . . . tribal legal counsel Douglas Nash"). Although the exact status of this ad valorem tax is now unclear, the amount at risk is substantial—potentially involving hundreds of thousands, if not millions of dollars (2.7 percent tax on assessed value). *Id.*

In light of all of the above, the status of the 1863 Nez Perce reservation is still of substantial concern to resident non-members and local governmental entities two decades after the decision of this Court in *DeCoteau*. Now is the time for this Court to correct this misunderstanding in no uncertain terms.

If not, our local jurisdictions have been told that we can expect to defend ourselves in litigation on this issue for the next three to five years at a probable cost of one million dollars. *DeCoteau* resolved this issue. This Court should make that point in a manner that will ensure that such litigation is unnecessary.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed. The decision in this Court in *DeCoteau* sets forth what should have been the controlling principles.

Respectfully submitted.,

KIMRON R. TORGERSON
Lewis Co. Prosecuting Attorney
P.O. Box 398
Nezperce, ID 83543
(208) 937-2271
Counsel of Record

Dated: August 7, 1997

APPENDICES

APPENDIX TABLE OF CONTENTS

	Page
Act of August 15, 1894, ch. 290, 28 Stat. 286, 326-332 (APPENDIX A)	1a
Proclamation of November 8, 1895, 29 Stat. 873 (APPENDIX B)	13a

APPENDIX A

AGREEMENT WITH THE NEZ PERCE INDIANS IN IDAHO.

SEC. 16. Whereas Robert Schleicher, James F. Allen, and Cyrus Beede, duly appointed commissioners on the part of the United States, did on the first day of May, eighteen hundred and ninety-three, conclude an agreement with the principal men and other male adults of the Nez Perce tribe of Indians upon the Lapwai Reservation, in the State of Idaho, which said agreement is as follows:

Whereas the President, under date of October thirty-first, eighteen hundred and ninety-two, and under the provisions of the Act of Congress entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," approved February eighth, eighteen hundred and eighty-seven, authorized negotiations with the Nez Perce Indians in Idaho for the cession of their surplus lands; and

Whereas the said Nez Perce Indians are willing to dispose of a portion of the tract of land in the State of Idaho reserved as a home for their use and occupation by the second article of the treaty between said Indians and the United States, concluded June ninth, eighteen hundred and sixty-three:

Now, therefore, this agreement made and entered into in pursuance of the provisions of said Act of Congress approved February eighth, eighteen hundred and eighty-seven, at the Nez Perce Agency, by Robert Schleicher, James F. Allen, and Cyrus Beede, on the part of the United States, and the principal men and male adults of the Nez Perce tribe of Indians located on said Nez Perce Reservation, witnesseth:

ARTICLE I.

The said Nez Perce Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of said reservation, saving and excepting the following described tracts of lands, which are hereby retained by the said Indians, viz:

In township thirty-four, range four west: Northeast quarter, north half and southeast of northwest quarter, northeast quarter of southwest quarter, north half and east half of southwest quarter, and the southeast quarter of southeast quarter, section thirteen, four hundred and forty acres.

In township thirty-four, range three west: Sections ten, fifteen, thirty-six, one thousand nine hundred and twenty acres.

In township thirty-three, range three west: Section one; northwest quarter of northeast quarter, north half of northwest quarter section twelve, seven hundred and sixty acres.

In township thirty-five, range two west: South half of northeast quarter, northwest quarter, north half and southeast quarter of southwest quarter, southeast quarter section three; east half, east half of northwest quarter, southwest quarter section ten, section eleven; north half, north half of south half, section twenty-one; east half of northeast quarter, section twenty; section twenty-two, twenty-seven, thirty-five, four thousand two hundred acres.

In township thirty-four, range two west; North half, southwest quarter, north half and southwest quarter and west half of southeast quarter of southeast quarter, section thirteen; section fourteen; north half section twenty-three, west half of east half and west half of northeast quarter, northwest quarter, north half of southwest quarter; west half of east half and northwest quarter and east half of

southwest quarter of southeast quarter, section twenty-four; section twenty-nine, two thousand seven hundred acres.

In township thirty-three, range two west: West-half and southeast quarter section six; sections sixteen, twenty-two, twenty-seven; north half and north half of south half section thirty four, two thousand eight hundred and eighty acres.

In township thirty-four, range one west: West-half section two; sections three, four; north half and southwest quarter section eight; north half section nine; north half and north half of southwest quarter section eighteen; northwest quarter section seventeen, two thousand nine hundred and sixty acres.

In township thirty-seven, range one east: Section twenty; section twenty-one, less south half of south half of southwest quarter of southeast quarter (ten acres), one thousand two hundred and seventy acres.

In township thirty-six, range one east: South-half of sections three, four; sections eleven, twelve, one thousand nine hundred and twenty acres.

In township thirty-six, range two east: Sections sixteen, seventeen, eighteen, twenty; all of section twenty-five west of boundary line of reservation; sections twenty-six, twenty-seven, four thousand two hundred and forty acres.

In township thirty-five, range two east: North half of sections sixteen, seventeen, section twenty-seven: north half of section thirty-four, one thousand six hundred acres.

In township thirty-four, range two east: East half and east half of west half of southeast quarter section twenty-four, one hundred acres.

In township thirty-four, range three east: South half of sections nineteen, twenty; north half; north half of south half; southwest quarter and north half of southeast

quarter of southwest quarter; north half of south half of southeast quarter section twenty-three; north half; north half and north half of southwest quarter and southeast quarter of southwest quarter; southeast quarter section twenty-four; north half and southeast quarter of northeast quarter; north half of northwest quarter section twenty-five; south half of northeast quarter of northeast quarter section twenty-six; section twenty-nine; northeast quarter of northeast quarter and south half section thirty; northwest quarter and north half of southwest quarter section thirty-one; northeast quarter; north half and southeast quarter of northwest quarter section thirty-two; northwest quarter; north half of southwest quarter, section thirty-three, three thousand seven hundred acres.

In township thirty-three, range four east: South half of southeast quarter section eighteen; northeast quarter and fraction northeast of river in east half of northwest quarter section nineteen; fraction west of boundary line of reservation, in section twenty-two; west half and southeast quarter of section thirty-five, one thousand four hundred and forty acres.

In township thirty-two, range four west: Fraction in west half of northeast quarter of southwest quarter; fraction in northwest quarter of southeast quarter section one; section two; south half of section six; west half and southeast quarter of northeast quarter of section nine, one thousand four hundred and ten acres.

In township thirty-one, range four west: South half of northeast quarter; southeast quarter of northwest quarter; northeast quarter of southwest quarter; southeast quarter section seventeen; northwest quarter, section twenty-one, four hundred and eighty acres. Total, thirty-two thousand and twenty acres.

ARTICLE II.

It is also stipulated and agreed that the place known as "the boom" on the Clearwater River, near the mouth

of Lapwai Creek, shall be excepted from this cession and reserved for the common use of the tribe, with full right of access thereto, and that the tract of land adjoining said boom, now occupied by James Moses, shall be allotted to him in such manner as not to interfere with such right. Also that there shall be reserved from said cession the land described as follows: "Commencing at a point at the margin of Clearwater River, on the south side thereof, which is three hundred yards below where the middle thread of Lapwai Creek empties into said river; run thence up the margin of said Clearwater River at low-water mark, nine hundred yards to a point; run thence south two hundred and fifty yards to a point; thence southwesterly, in a line to the southeast corner of a stone building, partly finished as a church; thence west three hundred yards to a point; thence from said point northerly in a straight line to the point of beginning; and also the adjoining tract of land lying southerly of said tract, on the south end thereof; commencing at the said corner of said church, and at the point three hundred yards west thereof, and run a line from each of said points. One of said lines running on the east side and the other on the west of said Lapwai Creek: along the foothills of each side of said creek; up the same sufficiently far so that a line being drawn east and west to intersect the aforesaid lines shall embrace within its boundaries, together with the first above-described tract of land, a sufficient quantity of land as to include and comprise six hundred and forty acres;" for which described tracts of land the United States stipulates and agrees to pay to William G. Langford, his heirs or assigns, the sum of twenty thousand dollars, upon the execution by said Langford, his heirs or assigns, of a release and relinquishment to the United States of all right, title, interest, or claim, either legal or equitable, in and to said tracts of land, derived by virtue of a quit-claim deed of February fourteenth, eighteen hundred and sixty-eight, to the said William G. Langford, from Langdon S. Ward, treasurer of the American Board of Commissioners for

Foreign Missions, which release and relinquishment shall be satisfactory to the Secretary of the Interior, and it is stipulated and agreed by said Nez Perce Indians that upon the execution and approval of such release and relinquishment the right of occupancy of said Indians in said described tracts shall terminate and cease and the complete title thereto immediately vest in the United States: *Provided*, That any member of the said Nez Perce tribe of Indians entitled to an allotment now occupying and having valuable improvements upon any of said lands not already occupied or improved by the United States may have the same allotted to him in such subdivisions as shall be prescribed and approved by the Secretary of the Interior, in lieu of an equal quantity of agricultural land allotted to him elsewhere; and for this purpose shall relinquish any patent that may have been issued to him before the title to said "Langford" tracts of land shall vest in the United States, and shall have a new patent issued to him of the form and legal effect prescribed by the fifth section of the act of February eight, eighteen hundred and eighty-seven (twenty-fourth Statutes, three hundred and eighty-eight), covering the new allotment and that portion of the former allotment not surrendered. It is further agreed that five acres of said tract, upon which the Indian Presbyterian Church is located, as long as same shall remain a church, shall be patented to the trustees of said church; that the said five acres shall not include improvements made by the United States; the said five acres to be selected under the direction of the Commissioner of Indian Affairs.

ARTICLE III.

In consideration for the lands ceded, sold, relinquished, and conveyed as aforesaid the United States stipulates and agrees to pay to the said Nez Perce Indians the sum of one million six hundred and twenty-six thousand two hundred and twenty-two dollars, of which amount the sum of six hundred and twenty-six thousand two hundred and

twenty-two dollars shall be paid to said Indians per capita as soon as practicable after the ratification of this agreement. The remainder of said sum of one million six hundred and twenty-six thousand two hundred and twenty-two dollars shall be deposited in the Treasury of the United States to the credit of the "Nez Perce Indians, of Idaho," and shall bear interest at the rate of five per centum per annum, which principal and interest shall be paid to said Indians per capita as follows, to wit: At the expiration of one year from the date of the ratification of this agreement the sum of fifty thousand dollars, and semiannually thereafter the sum of one hundred and fifty thousand dollars with the interest on the unexpended portion of the fund of one million dollars until the entire amount shall have been paid, and no part of the funds to be derived from the cession of lands by this agreement made shall be diverted or withheld from the disposition made by this article on account of any depredation or other act committed by any Nez Perce Indian, prior to the execution of this agreement, but the same shall be actually paid to the Indians in cash, in the manner and at the times as herein stipulated.

ARTICLE IV.

It is further stipulated and agreed that the United States will purchase for the use of said Nez Perce Indians two portable steam saw mills, at a cost not exceeding ten thousand dollars, and will provide for said Indians, for a period not exceeding two years, and at a cost not exceeding twenty-four hundred dollars, a competent surveyor, for the purpose of fully informing said Indians as to the correct locations of their allotments and the corners and lines thereof.

ARTICLE V.

It is further stipulated and agreed that the lands by this agreement ceded, shall not be opened for public settlement until trust patents for the allotted lands shall have been

duly issued and recorded, and the first payment shall have been made to said Indians.

ARTICLE VI.

It is further stipulated and agreed that any religious society or other organization now occupying under proper authority, for religious or educational work among the Indians, any of the lands ceded, shall have the right for two years from the date of the ratification of this agreement, within which to purchase the land so occupied, at the rate of three dollars per acre, the same to be conveyed to such society or organization by patent, in the usual form.

ARTICLE VII.

It is further stipulated and agreed that all allotments made to members of the tribe who have died since the same were made, or may die before the ratification of this agreement, shall be confirmed, and trust patents issued in the names of such allottees, respectively.

ARTICLE VIII.

It is further stipulated and agreed that the first per capita payment, provided for in Article VIII of this agreement, shall be made to those members of the Nez Perce tribe whose names appear on the schedule of allotments made by Special Agent Fletcher, and to such as may be born to them before the ratification of this agreement: *Provided*, That should it be found that any member of the tribe has been omitted from said schedule, such member shall share in the said payment, and shall be given an allotment, and each subsequent payment shall be made to those who receive the preceding payment and those born thereafter: *Provided*, That not more than one payment shall be made on account of a deceased member.

ARTICLE IX.

It is further agreed that the lands by this agreement ceded, those retained, and those allotted to the said Nez Perce Indians shall be subject, for a period of twenty-five years, to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country, and that the Nez Perce Indian allottees, whether under the care of an Indian agent or not, shall, for a like period, be subject to all the laws of the United States prohibiting the sale or other disposition of intoxicants to Indians.

ARTICLE X.

Representation having been made by the Indians in council that several members of the Nez Perce tribe, to the number of about fifty, as per list hereto attached, served the United States under General O. O. Howard, in the late war with Joseph's Band of said tribe, as scouts, couriers, and messengers, and that they have received no pay therefor; it is agreed that the United States, through its properly constituted authority, will carefully examine each of the cases herewith presented, and make such remunerations to each of said claimants as shall, upon such examination, be found to be due; not exceeding the sum of two dollars and fifty cents per day each, for the time actually engaged in such service; it being understood and agreed that the time of service of said claimants in no case exceeded sixty days. And it also having been made to appear that Abraham Brooks, a member of the Nez Perce tribe of Indians, was engaged in the service of the United States in the late war with Joseph's Band of Nez Perces, and it also appearing that the said Abraham Brooks was wounded in said service, and that by reason thereof, he is now in failing health, and has been for several years; that he is now nearly blind in consequence thereof; it is agreed that an investigation of all the facts in the case shall be made by the proper authorities of the United States, as early as practicable, and that if found substantially as herein

represented, or if found worthy under the law in such cases provided, he shall be allowed and paid by the United States a pension adequate to the service and disability.

ARICLE XI.

The existing provisions of all former treaties with said Nez Perce Indians not inconsistent with the provisions of this agreement are hereby continued in full force and effect.

ARTICLE XII.

This agreement shall not take effect and be in force until ratified by the Congress of the United States.

In witness whereof the said Robert Schleicher, James F. Allen, and Cyrus Beede, on the part of the United States, and the principal men and other male adults of the Nez Perce tribe of Indians, have hereunto set their hands.

Concluded at the Nez Perce Agency, this first day of May, anno domini eighteen hundred and ninety-three.

ROBERT SCHLEICHER,
JAMES T. ALLEN,
CYRUS BEEDE,
A. B. LAWYER; and others.

Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the said agreement be, and the same hereby is, accepted, ratified, and confirmed.

That for the purpose of carrying the provisions of this Act into effect there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of one million six hundred and sixty-eight thousand six hundred and twenty-two dollars, of which amount the sum of one million dollars shall be placed to the credit of "the Nez Perce Indians of Idaho" in the Treasury of the United States, and shall bear interest at the rate of five

per centum per annum. Said sum of one million six hundred and sixty-eight thousand six hundred and twenty-two dollars, together with the interest on said sum of one million dollars, shall be paid to said Indians, or expended for their benefit, as provided in articles two, three, four, and eight of said agreement; "out of which sum the Secretary of the Interior shall pay to the heirs, administrator, or legal representatives of William G. Langford, deceased, the sum of twenty thousand dollars, upon a release and relinquishment to the United States by said heirs, administrator, or legal representatives of all right, title, interest, or claim, either legal or equitable, in and to the tract of land described in article two of said agreement as therein provided: *Provided*, That none of the money agreed to be paid said Indians, nor any of the interest thereon, shall be, or become, liable to the payment of any judgment or claim for depredations committed by said tribe or any member thereof before the date of said agreement.

That immediately after the issuance and receipt by the Indians of trust patents for the allotted lands, as provided for in said agreement, the lands so ceded, sold, relinquished, and conveyed to the United States shall be opened to settlement by proclamation of the President, and shall be subject to disposal only under the homestead, town site, stone and timber, and mining laws of the United States, excepting the sixteen and thirty-sixth sections in each Congressional township, which shall be reserved for common school purposes and be subject to the laws of Idaho: *Provided*, That each settler on said lands shall, before making final proof and receiving a certificate of entry, pay to the United States for the lands so taken by him, in addition to the fees provided by law, the sum of three dollars and seventy-five cents per acre for agricultural lands, one-half of which shall be paid within three years from the date of original entry; and the sum of five dollars per acre for stone, timber, and mineral lands, subject to the regulations prescribed by existing laws; but the rights

of honorably discharged Union soldiers and sailors, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States, shall not be abridged except as to the sum to be paid as aforesaid.

That the Commissioner of Indian Affairs be, and he hereby is, authorized to employ a competent surveyor for a period not exceeding two years, at a compensation not exceeding one thousand two hundred dollars per annum, for the purpose stipulated in article four of said agreement, and he is also authorized to purchase two portable sawmills, as provided in article four.

That the Secretary of the Interior is hereby authorized to examine the claim of those Indians who served the United States under General O. O. Howard in the late war with Joseph's band of said tribe as scouts, couriers, and messengers, referred to in article ten of said agreement, and also as to the claim of Abraham Brooks, mentioned in said article, and report his findings and recommendations to Congress.

APPENDIX B

By the President of the United States of America.

A PROCLAMATION.

Whereas, pursuant to section five, of the act of Congress approved February 8, 1887, (24 Stats. 388), entitled "An act to provide for the allotment of lands in severalty to the Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes", certain articles of cession and agreement were made and concluded at the Nez Perce Agency, Idaho, on the first day of May, eighteen hundred and ninety-three, by and between the United States of America and the Nez Perce Indians, whereby said Indians, for the consideration therein mentioned, ceded and conveyed to the United States all their claim, right, title and interest to all the unallotted lands set apart as a home for their use and occupation by the second article of the treaty between said Indians and the United States, concluded June ninth, eighteen hundred and sixty-three (14 Stats., 647), and included in the following boundaries, to wit:

> Commencing at the N. E. corner of Lake Wa-ha, and running thence, northerly, to a point on the north bank of the Clearwater river, three miles below the mouth of the Lapwai, thence down the north bank of the Clearwater to the mouth of the Hat-wai creek; thence due north to a point seven miles distant; thence eastwardly, to a point on the north fork of the Clearwater, seven miles distant from its mouth; thence to a point on Oro Fino Creek, 5 miles above its mouth; thence to a point on the north fork of the south fork of the Clearwater, one mile above the bridge, on the road leading to Elk City, (so as to include all the Indian farms now

within the forks;) thence in a straight line, westwardly to the place of beginning,

saving and excepting the sixteenth and thirty-sixth sections of each Congressional township, which shall be reserved for common-school purposes and be subject to the laws of Idaho, and excepting the tracts described in articles one and two of the agreement, viz:

The said Nez Perce Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of said reservation, saving and excepting the following described tracts of lands, which are hereby retained by the said Indians, viz:

In township thirty-four, range four west: Northeast quarter, north half and southeast of northwest quarter, northeast quarter of southwest quarter, north half and east half of southwest quarter, and the southeast quarter of southeast quarter, section thirteen, four hundred and forty acres.

In township thirty-four, range three west: Sections ten, fifteen, thirty-six, one thousand nine hundred and twenty acres.

In township thirty-three, range three west: Section one; northwest quarter of northeast quarter, north half of northwest quarter section twelve, seven hundred and sixty acres.

In township thirty-five, range two west: South half of northeast quarter, northwest quarter, north half and southeast quarter of southwest quarter, southeast quarter section three; east half, east half of northwest quarter, southwest quarter section ten, section eleven; north half, north half of south half, section twenty-one; east half of northeast quarter,

section twenty; sections twenty-two, twenty-seven, thirty-five, four thousand two hundred acres.

In township thirty-four, range two west: North half, southwest quarter, north half and southwest quarter and west half of southeast quarter of southeast quarter, section thirteen; section fourteen; north half section twenty-three, west half of east half and west half of northeast quarter, northwest quarter, north half of southwest quarter, west half of east half and northwest quarter and east half of southwest quarter of southeast quarter, section twenty-four; section twenty-nine, two thousand seven hundred acres.

In township thirty-three, range two west: West half and southeast quarter section sixteen, twenty-two, twenty-seven; north half and north half of south half section thirty-four, two thousand eight hundred and eighty acres.

In township thirty-four, range one west: West half section two; sections three, four; north half and southwest quarter section eight; north half section nine; north half and north half of southwest quarter section eighteen; northwest quarter section seventeen, two thousand nine hundred and sixty acres.

In township thirty-seven, range one east: Section twenty; section twenty-one, less south half of south half of southwest quarter of southeast quarter (ten acres), one thousand two hundred and seventy acres.

In township thirty-six, range one east: South half of sections three, four; sections eleven, twelve, one thousand nine hundred and twenty acres.

In township thirty-six, range two east: Sections sixteen, seventeen, eighteen, twenty; all of section twenty-five west of boundary line of reservation; sections twenty-six, twenty-seven, four thousand two hundred and forty acres.

In township thirty-five, range two east: North half of sections sixteen, seventeen, section twenty-seven; north half of section thirty-four, one thousand six hundred acres.

In township thirty-four, range two east: East half and east half of West half of southeast quarter section twenty-four, one hundred acres.

In township thirty-four, range three east: South half of sections nineteen, twenty; north half; north half of south half; southwest quarter and north half of southeast quarter of southwest quarter; north half of south half of southeast quarter section twenty-three; north half; north half and north half of southwest quarter and southeast quarter of southwest quarter; southeast quarter section twenty-four; north half and southeast quarter of northeast quarter; north half of northwest quarter section twenty-five; south half of northeast quarter of northeast quarter section twenty-six; section twenty-nine; northeast quarter of northeast quarter and south half section thirty; northwest quarter and north half of southwest quarter section thirty-one; northeast quarter; north half and southeast quarter of northwest quarter section thirty-two; northwest quarter; north half of southwest quarter, section thirty-three, three thousand seven hundred acres.

In township thirty-three, range four east: South half of southeast quarter section eighteen; northeast quarter and fraction northeast of river in east half of northwest quarter section nineteen; fraction west of boundary line of reservation, in section twenty-two; west half and southeast quarter of section thirty-five, one thousand four hundred and forty acres.

In township thirty-two, range four east: Fraction in west half of northeast quarter of southwest quarter; fraction in northwest quarter of southeast quarter

section one; section two; south half of section six; west half and southeast quarter of northeast quarter of section nine, one thousand four hundred and ten acres.

In township thirty-one, range four east: South half of northeast quarter; southeast quarter of northwest quarter; northeast quarter of southwest quarter; southeast quarter section seventeen; northwest quarter section twenty-one, four hundred and eighty acres. Total, thirty-two thousand and twenty acres.

ARTICLE II.

It is also stipulated and agreed that the place known as "the boom" on the Clearwater River, near the mouth of Lapwai Creek, shall be excepted from this cession and reserved for the common use of the tribe, with full right of access, thereto, and that the tract of land adjoining said boom, now occupied by James Moses, shall be allotted to him in such manner as not to interfere with such right. Also that there shall be reserved from said cession the land described as follows: "Commencing at a point at the margin of Clearwater River, on the south side thereof, which is three hundred yards below where the middle thread of Lapwai Creek empties into said river; run thence up the margin of said Clearwater River at low-water mark, nine hundred yards to a point; run thence south two hundred and fifty yards to a point; thence southwesterly, in a line to the southeast corner of a stone building, partly finished as a church; thence west three hundred yards to a point; thence from said point northerly in a straight line to the point of beginning; and also the adjoining tract of land lying southerly of said tract, on the south end thereof; commencing at the said corner of said church, and at the point three hundred yards west thereof, and run a line from each of said points. One of said lines running on the east side and the other

on the west of said Lapwai Creek; along the foothills of each side of said creek; up the same sufficiently far so that a line being drawn east and west to intersect the aforesaid lines shall embrace within its boundaries, together with the first above described tract of land, a sufficient quantity of land as to include and comprise six hundred and forty acres;

and excepting the land embraced in the William Craig donation claim, in Township 35 North, range 3 west. (See case of Caldwell v. Robinson, Federal Reporter, Vol. 59, p. 653); and

Whereas it is further stipulated and agreed by article six of the agreement that any religious society or other organization now occupying under proper authority, for religious or educational work among the Indians, any of the lands ceded, shall have the right for two years from the date of the ratification of this agreement, within which to purchase the land so occupied, at the rate of three dollars per acre, the same to be conveyed to such society or organization by patent, in the usual form; and

Whereas, it is further agreed by article nine of the agreement that the lands by this agreement ceded, those retained, and those allotted to the said Nez Perce Indians shall be subject, for a period of twenty-five years, to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country, and that the Nez Perce Indian allottees, whether under the care of an Indian agent or not, shall, for a like period, be subject to all the laws of the United States prohibiting the sale or other disposition of intoxicants to Indians; and

Whereas, it is provided in the act of Congress, accepting, ratifying, and confirming said agreement, approved August fifteenth, eighteen hundred and ninety-four (28 Stats., pp. 286 to 338), section 16:

That immediately after the issuance and receipt by the Indians of trust patents for the allotted lands, as

provided for in said agreement, the lands so ceded, sold, relinquished, and conveyed to the United States shall be opened to settlement by proclamation of the President, and shall be subject to disposal only under the homestead, town-site, stone and timber, and mining laws of the United States, excepting the sixteenth and thirty-sixth sections in each congressional township, which shall be reserved for common-school purposes and be subject to the laws of Idaho: *Provided*, That each settler on said lands shall, before making final proof and receiving a certificate of entry, pay to the United States for the lands so taken by him, in addition to the fees provided by law, the sum of three dollars and seventy-five cents per acre for agricultural lands, one-half of which shall be paid within three years from the date of original entry; and the sum of five dollars per acre for stone, timber, and mineral lands, subject to the regulations prescribed by existing laws; but the rights of honorably discharged Union soldiers and sailors, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States, shall not be abridged except as to the sum to be paid as aforesaid;

and

Whereas all the terms, conditions, and considerations required by said agreement made with said tribe of Indians hereinbefore mentioned, and the laws relating thereto, precedent to opening said lands to settlement have been, as I hereby declare, provided for, paid and complied with;

Now, therefore, I, Grover Cleveland, President of the United States, by virtue of the power in me vested by the statutes hereinbefore mentioned, and by said agreement, do hereby declare and make known that all of the unallotted and unreserved lands acquired from the Nez Perce Indians, by said agreement, will, at and after the hour of 12 o'clock noon, (Pacific Standard time) on the

8th day of November 1895 and, not before, be opened to settlement under the terms of and subject to all the conditions, limitations, reservations, and restrictions contained in said agreement, the statutes above specified and the laws of the United States applicable thereto.

The lands to be so opened to settlement are for greater convenience particularly described in the accompanying schedule, entitled "Schedule of Lands within the Nez Perce Indian Reservation, Idaho, to be opened to settlement by Proclamation of the President", and which schedule is made a part hereof.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this 8th day of November in the year of our Lord, one thousand eight
[SEAL.] hundred and ninety-five, and of the Independence of the United States the one hundred and twentieth.

GROVER CLEVELAND

By the President:

RICHARD OLNEY
Secretary of State.

Supreme Court, U.S.
FILED
SEP 24 1997
CLERK

No. 96-1581

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

STATE OF SOUTH DAKOTA,
Petitioner,
v.
YANKTON SIOUX TRIBE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF AMICI CURIAE OF STANDING ROCK SIOUX TRIBE AND ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION IN SUPPORT OF RESPONDENT YANKTON SIOUX TRIBE

REID PEYTON CHAMBERS *
ARTHUR LAZARUS, JR., P.C.
WILLIAM R. PERRY
KYLE T. NAYBACK
SONOSKY, CHAMBERS, SACHSE & ENDRESON
1250 Eye Street, N.W., Suite 1000
Washington, D.C. 20005
(202) 682-0240
Attorneys for Amici Curiae
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE PROVISIONS OF THE 1892 AGREEMENT AND 1894 ACT PRESERVED THE BOUNDARIES OF THE YANKTON SIOUX RESERVATION	3
A. The language of the Agreement and Act does not support a holding of disestablishment	4
1. The Article XVIII Savings Clause	4
2. The Article I Cession and the Article II Payment	11
3. Other Provisions	12
B. Any ambiguity in the Agreement and Act must be resolved in favor of continued existence of the Reservation	14
II. EVENTS SURROUNDING EXECUTION AND RATIFICATION OF THE 1892 AGREEMENT SHOW NO INTENT TO DISESTABLISH THE YANKTON SIOUX RESERVATION	17
A. Congress expressed continued Reservation existence	17
B. Statements and actions by executive officers contemporaneous with the Agreement and Act support the continued existence of the Reservation	18
C. The legislative history of the 1894 Act shows no intent to disestablish the Reservation	20
CONCLUSION	21

TABLE OF AUTHORITIES

Cases — Page

Carpenter v. Shaw, 280 U.S. 363 (1930) 14
Chan v. Korean Air Lines, Ltd., 490 U.S. 122 (1989) 10
Choate v. Trapp, 224 U.S. 665 (1912) 16
County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) 2, 14
County of Yakima v. Confederated Tribes of the Yakima Indian Nation, 502 U.S. 251 (1992) 2, 16
Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970) 19
DeCoteau v. District County Court, 420 U.S. 425 (1975) ..... *passim*
Ex parte Crow Dog, 109 U.S. 556 (1883) 16
Hagen v. Utah, 510 U.S. 399 (1994) ..... *passim*
Jones v. Meehan, 175 U.S. 1 (1899) 19
Mattz v. Arnett, 412 U.S. 481 (1973) 4, 9
Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968) 16
Montana v. United States, 450 U.S. 544 (1981) 6
Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) ..... *passim*
Seymour v. Superintendent, 368 U.S. 351 (1962) 4, 9
Solem v. Bartlett, 465 U.S. 463 (1984) ..... *passim*
Tulee v. Washington, 315 U.S. 681 (1942) 19
United States v. Dion, 476 U.S. 734 (1986) 16
Washington v. Washington Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) 2, 14
West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83 (1991) 9
Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 15, 16
Yankton Sioux Tribe v. Southern Missouri Waste Dist., 99 F.3d 1439 (8th Cir. 1996) 7

Statutes and Treaties

Act of Apr. 11, 1882, c. 74, 22 Stat. 42 6
Act of Jan. 26, 1887, c. 47, 24 Stat. 367 7
Act of May 1, 1888, c. 213, 25 Stat. 113 7
Act of July 4, 1888, c. 519, 25 Stat. 240 7
Act of Jan. 14, 1889, c. 24, 25 Stat. 642 7

TABLE OF AUTHORITIES—Continued

Page

Act of Feb. 23, 1889, c. 203, 25 Stat. 687 7
Act of Mar. 1, 1889, c. 317, 25 Stat. 757 6
Act of Mar. 2, 1889, c. 391, 25 Stat. 871 7
Act of Mar. 2, 1889, c. 405, 25 Stat. 888 ..... 6, 7
Act of Mar. 2, 1889, c. 421, 25 Stat. 1012 7
Act of Mar. 2, 1889, c. 422, 25 Stat. 1013 7
Act of Oct. 1, 1890, c. 1271, 26 Stat. 658 7
Act of Jan. 12, 1891, c. 65, 26 Stat. 712 7
Act of Feb. 13, 1891, c. 165, 26 Stat. 749 6
Act of Mar. 3, 1891, c. 543, 26 Stat. 989 ..... 6, 7
Act of June 17, 1892, c. 120, 27 Stat. 52 7
Act of July 1, 1892, c. 140, 27 Stat. 62 7
Act of July 13, 1892, c. 164, 27 Stat. 136 7
Act of Feb. 20, 1893, c. 147, 27 Stat. 469 7
Act of Mar. 3, 1893, c. 203, 27 Stat. 557 7
Act of Mar. 3, 1893, c. 209, 27 Stat. 612 ..... 6, 7
Act of Aug. 14, 1894, c. 290, 28 Stat. 286 ..... *passim*
Act of Feb. 20, 1895, c. 113, 28 Stat. 677 8
Act of Feb. 20, 1895, c. 114, 28 Stat. 679 8
Act of Mar. 2, 1895, c. 188, 28 Stat. 876 8
Act of Feb. 26, 1896, c. 30, 29 Stat. 16 17
Act of June 10, 1896, c. 398, 29 Stat. 321 6
Act of June 7, 1897, c. 31, 30 Stat. 62 8
Act of June 4, 1898, c. 376, 30 Stat. 429 8
Act of June 28, 1898, c. 517, 30 Stat. 495 8
Act of July 1, 1898, c. 542, 30 Stat. 567 5
Act of July 1, 1898, c. 545, 30 Stat. 571 8
Act of Feb. 22, 1899, c. 183, 25 Stat. 676 14
Act of Feb. 28, 1899, c. 222, 30 Stat. 909 8
Act of Mar. 3, 1899, c. 450, 30 Stat. 1362 8
Act of June 6, 1900, c. 813, 31 Stat. 672 ..... 5, 8
Act of Feb. 11, 1901, c. 350, 31 Stat. 766 8
Act of Mar. 1, 1901, c. 676, 31 Stat. 861 5
Act of May 27, 1902, c. 888, 32 Stat. 245 8
Act of July 1, 1902, c. 1361, 32 Stat. 636 8
Act of July 1, 1902, c. 1362, 32 Stat. 641 8
Act of July 1, 1902, c. 1375, 32 Stat. 716 5
Act of Feb. 3, 1903, c. 399, 32 Stat. 795 8
Act of Mar. 3, 1903, c. 994, 32 Stat. 982 8

TABLE OF AUTHORITIES—Continued

	Page
Act of Feb. 20, 1904, c. 161, 33 Stat. 46	5
Act of Apr. 21, 1904, c. 1402, 33 Stat. 189	8
Act of Apr. 23, 1904, c. 1484, 33 Stat. 254	5, 10
Act of Apr. 27, 1904, c. 1495, 33 Stat. 302	8
Act of Apr. 27, 1904, c. 1620, 33 Stat. 319	5
Act of Apr. 27, 1904, c. 1624, 33 Stat. 352	6
Act of Apr. 28, 1904, c. 1786, 33 Stat. 539	8
Act of Apr. 28, 1904, c. 1820, 33 Stat. 567	5
Act of Dec. 21, 1904, c. 22, 33 Stat. 595	8
Act of Feb. 8, 1904, c. 553, 33 Stat. 706	8
Act of Mar. 3, 1905, c. 1452, 33 Stat. 1060	5
Act of Mar. 3, 1905, c. 1479, 33 Stat. 1048	5, 8
Act of Mar. 20, 1906, c. 1125, 34 Stat. 80	8
Act of Mar. 22, 1906, c. 1126, 34 Stat. 80	8
Act of Apr. 21, 1906, c. 1645, 34 Stat. 124	8
Act of Apr. 26, 1906, c. 1876, 34 Stat. 137	8
Act of June 5, 1906, c. 2580, 34 Stat. 213	8
Act of June 21, 1906, c. 3504, 34 Stat. 325	8
Act of June 28, 1906, c. 372, 34 Stat. 539	8
Act of Mar. 1, 1907, c. 2285, 34 Stat. 1015	8
Act of Mar. 2, 1907, c. 2536, 34 Stat. 1230	5
Act of Mar. 4, 1907, c. 2933, 34 Stat. 1413	8
Act of May 29, 1908, c. 217, 35 Stat. 458	5
Act of May 29, 1908, c. 218, 35 Stat. 460	1, 5, 13
Act of May 30, 1908, c. 237, 35 Stat. 558	1, 8
Act of May 27, 1910, c. 257, 36 Stat. 440	6
Act of May 30, 1910, c. 260, 36 Stat. 448	5
Act of June 1, 1910, c. 264, 36 Stat. 455	6
Act of June 25, 1910, c. 431, 36 Stat. 855	8
Act of Mar. 3, 1911, c. 210, 36 Stat. 1063	8
Act of Mar. 4, 1911, c. 246, 36 Stat. 1345	8
Act of May 11, 1912, c. 121, 37 Stat. 111	8
Act of Feb. 14, 1913, c. 54, 37 Stat. 675	1, 6
Indian General Allotment Act of 1887, 25 U.S.C. §§ 331 *et seq.*	3, 5
Treaty of April 19, 1858, 11 Stat. 286	4, 11

TABLE OF AUTHORITIES—Continued

Legislative Materials	Page
S. Exec. Doc. No. 27, 53d Cong., 2d Sess. (1894)	13, 19, 20
53 Cong. Rec. 8268 (1894)	20
Miscellaneous	
Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism and Interpretation in Federal Indian Law*, 107 Harvard L. Rev. 381 (1993)	15
Richard B. Collins, *Indian Consent to American Government*, 31 Ariz. L. Rev. 365 (1989)	15
Restatement 2d of Contracts, § 201(1) (1981)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 96-1581

STATE OF SOUTH DAKOTA,
Petitioner,

v.

YANKTON SIOUX TRIBE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF AMICI CURIAE OF STANDING ROCK SIOUX TRIBE AND ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION IN SUPPORT OF RESPONDENT YANKTON SIOUX TRIBE

INTEREST OF AMICI CURIAE [1]

Amici are federally recognized Indian tribes, each with a Reservation that was allotted and opened to non-Indian homesteaders by Congress. Act of May 30, 1908, c. 237, 35 Stat. 558 (Fort Peck); Act of May 29, 1908, c. 218, 35 Stat. 460 (Standing Rock); Act of February 14, 1913,

---

[1] Pursuant to Rule 37.6 of the Rules of this Court, counsel for Amici states that no counsel for a party authored this brief in whole or part, and that no person or entity other than Amici and their counsel made any monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief amici curiae, and those consents have been filed with the Clerk.

c. 54, 37 Stat. 675 (Standing Rock). Amici have an interest in the proper development and application of the law relating to disestablishment.

SUMMARY OF ARGUMENT

1. The Agreement of December 31, 1892 between the Yankton Sioux Tribe and the United States, ratified by the Act of August 15, 1894, c. 290, 28 Stat. 286, 314, contains language not found in *any* other surplus land agreement or Act. Article XVIII of the Yankton Agreement and Act provides that the Treaty of April 19, 1858—which established the Reservation boundaries—shall be "in full force and effect, the same as though this agreement had not been made." Among the dozens of surplus land Acts enacted to further its now repudiated allotment policy, Congress used this language only once: in the 1894 Yankton Act. This unique savings clause must be given effect—it must not be read as surplusage, or as no different in meaning from the qualified savings clauses Congress used in many other surplus land Acts. Rather, the 1894 Act should be construed, consistent with Article XVIII and the Act as a whole, to preserve the Reservation's boundaries.

2. To the extent the Court finds tension between Article XVIII and other provisions in the 1894 Act, the conflict must be resolved in favor of continuing the Reservation boundaries as defined in the 1858 Treaty. *County of Yakima v. Confederated Tribes of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247-48 (1985); *Washington v. Washington Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979).

3. The negotiations between the Yankton Sioux Tribe and the United States, the legislative history of the 1894 Act, and the executive branch implementation of the Act contain no statements indicating an intent to change reservation boundaries. During the negotiations leading to

the 1892 Agreement, the Yanktons were reassured that "there is no cause for apprehension that this agreement will in any way interfere with the treaty of 1858." Similarly, nothing in the congressional reports or debate on the 1894 Act suggests any change in reservation boundaries. And, in implementing the Act, President Cleveland proclaimed "[l]ands within the Yankton Reservation" opened to settlement. Thus, the circumstances surrounding the 1894 Act support continuation of the Reservation boundaries, not disestablishment.

ARGUMENT

I. THE PROVISIONS OF THE 1892 AGREEMENT AND 1894 ACT PRESERVED THE BOUNDARIES OF THE YANKTON SIOUX RESERVATION.

The question presented in this case is whether the Agreement of December 31, 1892 between the Yankton Sioux Tribe and the United States ("1892 Agreement"), ratified by the Act of August 15, 1894, c. 290, 28 Stat. 286, 314 ("1894 Act"), effected a change in the boundaries of the Yankton Sioux Reservation in South Dakota. Neither the 1892 Agreement nor the 1894 Act even mentions, much less speaks directly to, any intent of the United States or the Tribe to disestablish the Reservation.[2] Nor can an intent to alter the Reservation's boundaries properly be implied, as we discuss below.

Several dozen Indian reservations—including those of *Amici* tribes—were allotted and opened to non-Indian homesteaders in the three decades after the Indian General Allotment Act of 1887, 25 U.S.C. §§ 331-355. The six reservation boundary cases this Court has decided over the

---

[2] Both parties to this Agreement—the Tribe and the United States—are before the Court taking the position that there was no change in reservation boundaries. *See Restatement 2d of Contracts*, § 201(1) (1981) ("where the parties have attached the same meaning to a promise or agreement . . . it is interpreted in accordance with that meaning.").

last 35 years have created "a fairly clean analytic structure" for distinguishing those surplus land Acts that altered reservation boundaries from those Acts that simply offered non-Indians the opportunity to purchase lands not allotted to Indians within established reservation boundaries. *Solem v. Bartlett*, 465 U.S. 463, 470 (1984); *see Hagen v. Utah*, 510 U.S. 399, 410-11 (1994); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *Mattz v. Arnett*, 412 U.S. 481 (1973); *Seymour v. Superintendent*, 368 U.S. 351 (1962). The Court has declared that the most probative evidence of whether diminishment has occurred is the statutory language used to open the Indian lands. *Hagen*, 510 U.S. at 411; *Solem*, 465 U.S. at 470. But, the Court has not previously had occasion to consider the statutory language that Congress enacted in the 1894 Yankton Act, and nowhere else.

A. The language of the Agreement and Act does not support a holding of disestablishment.

1. *The Article XVIII Savings Clause.*

The 1894 Act ratifies a unique savings clause—Article XVIII—which provides:

> Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement, and its ratification by Congress, *all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made,* and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858.

28 Stat. 318 (emphasis added). The 1858 Treaty in Article I established the boundaries of the Yankton Sioux Reservation. Treaty of April 19, 1858, 11 Stat. 286. The 1894 Act, by declaring that all provisions of that Treaty "shall be in full force and effect, the same as though this

agreement had not been made" (Article XVIII), on its face preserved the integrity and continued existence of those boundaries.

No other surplus land Act contains a savings clause like Article XVIII of the 1894 Act—stating *without any qualification* that *all* provisions of a prior treaty "shall be in full force and effect, the same as though this agreement had not been made. . . ." 28 Stat. 318.[3] The three surplus land Acts at issue in *Rosebud*, for example, recite that nothing therein "shall be construed to deprive the said Indians of the Rosebud Reservation, South Dakota, of any *benefits to which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this agreement*."[4] This was the most common language where Congress used a savings clause, as fifteen other agreements ratified by Congress had savings clauses preserving former treaty provisions, but only to the extent those provisions were not "inconsistent" with the provisions of the agreement.[5] Four agreements had savings

---

[3] Counsel for *Amici* Tribes have reviewed the surplus land Acts adopted after the 1887 General Allotment Act, 24 Stat. 388, 25 U.S.C. §§ 331-355 as set forth in Kappler, *Indian Affairs, Laws and Treaties* (Vols. I, III).

[4] Act of April 23, 1904, c. 1484, 33 Stat. 254, 255 (art. V) (emphasis added); *see* Act of March 2, 1907, c. 2536, 34 Stat. 1230, 1232 § 8; Act of May 30, 1910, c. 260, 36 Stat. 448, 452 § 11 (art. XI).

[5] Act of August 14, 1894, c. 290, 28 Stat. 286, 326 § 16 (art. XI) (Nez Perce); Act of July 1, 1898, c. 542, 30 Stat. 567, 569 (Seminole); Act of June 6, 1900, c. 813, 31 Stat. 672, 674 (art. VI) (Fort Hall); Act of March 1, 1901, c. 676, 31 Stat. 861, 872 § 44 (Creek); Act of July 1, 1902, c. 1375 32 Stat. 716,727 § 73 (Cherokee); Act of February 20, 1904, c. 161, 33 Stat. 46, 49 (art. V) (Red Lake); Act of April 27, 1904, c. 1620, 33 Stat. 319 (Sisseton); Act of April 28, 1904, c. 1820, 33 Stat. 567 (art. IV) (Grande Ronde); Act of March 3, 1905, c. 1452, 33 Stat. 1016 (art. XI) (Wind River); Act of March 3, 1905, c. 1479, 33 Stat. 1048, 1079, § 6 (art. III) (Port Madison); Act of May 29, 1908 c. 217, 35 Stat. 458 § 7 (Spokane); Act of May 29, 1908, c. 218, 35 Stat. 460,

clauses preserving treaty provisions not "in conflict" or "not affected by" the provisions of the subsequent agreement.[6] Three more had other limited savings clauses, also unlike that in the Yankton Agreement.[7]

---

§ 9 (Cheyenne River and Standing Rock); Act of May 27, 1910, c. 257, 36 Stat. 440, 443 § 11 (Pine Ridge); Act of June 1, 1910, c. 264, 36 Stat. 455, 459 § 14 (Fort Berthold); Act of Feb. 14, 1913, c. 54, 37 Stat. 675, 678 § 10 (Standing Rock).

Among the numerous savings clauses enacted by Congress, the State relies on but two, both relating to the Crow Tribe, Act of April 11, 1882, c. 74, 22 Stat. 42 and Act of March 3, 1891, c. 543, 36 Stat. 989, 1039-42, § 31. Brief of Petitioner State of South Dakota (hereafter "State Br.") at 26-27. Neither of these Acts contains the language included in the Yankton Agreement and Act—as neither provides that all treaty provisions shall be in effect "the same as though this agreement had not been made." Moreover, this Court did *not* rely on or even discuss these provisions in *Montana v. United States*, 450 U.S. 544 (1981), or *DeCoteau*, 420 U.S. 425, the cases cited by the State. Finally, a 1904 Crow Act contains a very different savings clause, preserving earlier treaty provisions "not inconsistent with" the 1904 Act and expressly stipulating that all provisions of earlier treaties "inconsistent herewith are hereby repealed." Act of April 27, 1904, c. 1624, 33 Stat. 352, 355 (art. VI). Whatever the original meaning of the 1882 and 1891 Crow savings provisions, to the extent they purported to preserve reservation boundaries inconsistent with the 1904 Act, those earlier savings clauses have been repealed.

[6] Act of March 1, 1889, c. 317, 25 Stat. 757 (art. V) (Muscogee); Act of March 2, 1889, c. 405, 25 Stat. 888, 896, § 19 (Sioux Nation); Act of June 10, 1896, c. 398, 29 Stat. 321, 353 § 9 (art. IX (Blackfeet); Act of June 10 1896, c. 398, 29 Stat. 321, 352 § 8 (art. VIII) (Fort Belknap).

[7] Act of March 1, 1889, c. 317, 25 Stat. 757 (Creek) ('no treaty or agreement heretofore made and now subsisting is hereby affected, except so far as the provisions of this agreement supersede and control the same"); Act of March 3, 1893, c. 209, 27 Stat. 612, 644 § 12 (Pawnee) (agreement does not "repeal, modify or change any treaty stipulations now in force between the United States and said . . . tribe . . ., except in the manner and to the extent herein expressly or by necessary implication provided for."); Act of February 13, 1891, c. 165, 26 Stat. 749 (art. VIII) (Iowa) ("nothing herein contained shall in any manner affect" claims against the United States, interests in land outside of Indian territory, or annuity payments). The Iowa Agreement called for the allotment and opening to homesteaders of lands of the Iowa Tribe in the Territory of Oklahoma (formerly Indian territory). The savings clause language was limited to land "outside of Indian territory." *Id.* By its terms, the savings clause had no application to the lands being allotted to Indians or opened to settlers.

The Yankton savings clause is thus unique, sweeping and unequivocal. Indeed, as the court below correctly pointed out, *no* other surplus land Act contains language preserving prior rights and interests as "strong" as Article XVIII. *Yankton Sioux Tribe v. Southern Missouri Waste Dist.*, 99 F.3d 1439, 1477 (8th Cir. 1996). Congress could certainly have enacted a more limited savings clause, as it did in numerous other surplus land Acts. Or Congress could have enacted no savings clause at all, as it did in the vast majority of surplus land Acts,[8] including four

---

[8] Act of Jan. 26, 1887, c. 47, 24 Stat. 367 (Iowa); Act of May 1, 1888, c. 213, 25 Stat. 113 (Gros Ventre, Piegan Blood, Blackfeet, and River Crow); Act of July 4, 1888, c. 519, 25 Stat. 240 (Winnebago); Act of Jan. 14, 1889, c. 24, 25 Stat. 642 (Chippewa); Act of Feb. 23, 1889, c. 203, 25 Stat. 687 (Shoshones, Bannocks and Sheepeaters), Act of Mar. 2, 1889, c. 391, 25 Stat. 871 (Flathead); Act of March 2, 1889, c. 405, 25 Stat. 888 (Sioux); Act of Mar. 2, 1889, c. 421, 25 Stat. 1012 (Pipestone); Act of Mar. 2, 1889, c. 422, 25 Stat. 1013 (Peorias, Miamis); Act of Oct. 1, 1890, c. 1271, 26 Stat. 658 (Round Valley); Act of Jan. 12, 1891, c. 65, 26 Stat. 712 (Mission Indians); Act of Mar. 3, 1891, c. 543, 26 Stat. 989, 1026 (Couer d'Alene); Act of Mar. 3, 1891, c. 543, 26 Stat. 989, 1032 (Fort Berthold); Act of March 3, 1891, 26 Stat. 989, 1035 (Sisseton); Act of June 17, 1892, c. 120, 27 Stat. 52 (Klamath); Act of July 1, 1892, c. 140, 27 Stat. 62 (Colville); Act of July 13, 1892, c. 164, 27 Stat. 136 (Spokane); Act of Feb. 20, 1893, c. 147, 27 Stat. 469 (White Mountain Apache); Act of Mar. 3, 1893, c. 203, 27 Stat. 557 (Kickapoo); Act of Mar. 3, 1893, c. 209, 27 Stat. 612, 633 (Puyallup); Act of Mar. 3, 1893, c. 209, 27 Stat. 612, 640 (Cherokee); Act of Mar. 3, 1893, c. 209, 27 Stat. 612, 644 (Tonkawa); Act of Mar. 3, 1893, c. 209, 27 Stat. 612, 644 (Pawnee); Act of Mar. 3, 1893, c. 209, 27 Stat. 645 (Cherokee); Act of Aug. 15, 1894, c. 290, 28 Stat. 286, 320 (Yakima); Act of Aug. 15, 1894, c. 290, 28 Stat. 286, 296 (Sac and Fox); Act of Aug. 15, 1894, c. 290, 28 Stat. 286, 301 (Wyandote); Act of Aug. 15, 1894, c. 290, 28 Stat.

286, 323 (Alsea); Act of Feb. 20, 1895, c. 113, 28 Stat. 677 (Southern Ute); Act of Feb. 20, 1895, c. 114, 28 Stat. 679 (Winnebago); Act of Mar. 2, 1895, c. 188, 28 Stat. 876, 894 (San Carlos); Act of Mar. 2, 1895, c. 188, 28 Stat. 876, 902 (Otoe); Act of Mar. 2, 1895, c. 188, 28 Stat. 876, 907 (Quapaw); Act of Mar. 2, 1895, c. 188, 28 Stat. 876, 895 (Witchita); Act of Mar. 2, 1895, c. 188, 28 Stat. 876, 909 (Potawatomi); Act of June 7, 1897, c. 31, 30 Stat. 62, 87 (Uncompahgre-Utes); Act of June 7, 1897, c. 31, 30 Stat. 62, 92 (Chippewa); Act of June 4, 1898, c. 376, 30 Stat. 429 (Uintah); Act of June 28, 1898, c. 517, 30 Stat. 495 (Choctaw, Chickasaw); Act of June 28, 1898, c. 517, 30 Stat. 495, 500 (Muscogee-Creek); Act of July 1, 1898, c. 545, 30 Stat. 571 (Colville); Act of Feb. 28, 1899, c. 222, 30 Stat. 909 (Pottawatomie, Kickapoo); Act of Mar. 3, 1899, c. 450, 30 Stat. 1362 (Lower Brule, Rosebud); Act of June 6, 1900, c. 813, 31 Stat. 672, 677 (Comanche), Kiowa, Apache); Act of June 6, 1900, c. 813, 31 Stat. 672 (Shoshone); Act of Feb. 11, 1901, c. 350, 31 Stat. 766 (Bad River); Act of May 27, 1902, c. 888, 32 Stat. 245 (Mission Indians); Act of May 27, 1902, c. 888, 32 Stat. 245 (Klamath); Act of May 27, 1902, c. 888, 32 Stat. 245 (Paiute); Act of May 27, 1902, c. 888, 32 Stat. 245, 263 (Uintah); Act of July 1, 1902, c. 1361, 32 Stat. 636 (Kaw); Act of July 1, 1902, c. 1362, 32 Stat. 641 (Choctaw, Chickasaw); Act of Feb. 3, 1903, c. 399, 32 Stat. 795 (Lac Courte Oreille, Lac du Flambeau); Act of Mar. 3, 1903, c. 994, 32 Stat. 982 (Chippewa); Act of Apr. 21, 1904, c. 1402, 33 Stat. 189, 194 (Chippewa); Act of Apr. 21, 1904, 33 Stat. 189, 217 (Ponca); Act of Apr. 23, 1904, c. 1495, 33 Stat. 302 (Flathead); Act of Apr. 28, 1904, c. 1786, 33 Stat. 539 (White Earth); Act of Dec. 21, 1904, c. 22, 33 Stat. 595 (Yakima); Act of Feb. 8, 1904, c. 553, 33 Stat. 706 (Wailaki); Act of Mar. 3, 1905, c. 1479, 33 Stat. 1048, 1069 (Utes); Act of Mar. 3, 1905, c. 1479, 33 Stat. 1071 (Five Civilized Tribes); Act of Mar. 20, 1906, c. 1125, 34 Stat. 80 (Kiowa, Comanche, and Apache); Act of Mar. 22, 1906, c. 1126, 34 Stat. 80 (Colville); Act of Apr. 21, 1906, c. 1645, 34 Stat. 124 (Lower Brule); Act of Apr. 26, 1906, c. 1876, 34 Stat. 137 (Five Civilized Tribes); Act of June 5, 1906, c. 2580, 34 Stat. 213 (Kiowa, Comanche, Apache); Act of June 21, 1906, c. 3504, 34 Stat. 325, 335 (Couer d'Alene); Act of June 21, 1906, c. 3504, 34 Stat. 325, 360 (Sioux); Act of June 21, 1906, c. 3504, 34 Stat. 325, 382 (Stockbridge); Act of June 28, 1906, c. 372, 34 Stat. 539 (Osage); Act of Mar. 1, 1907, c. 2285, 34 Stat. 1015, 1021 (Mogui); Act of Mar. 1, 1907, c. 2285, 34 Stat. 1015, 1042 (Sioux); Act of Mar. 4, 1907, c. 2933, 34 Stat. 1413 (Apache); Act of May 30, 1908, c. 237, 35 Stat. 558 (Fort Peck); Act of June 25, 1910, c. 431, 36 Stat. 855, 861 (Kiowa); Act of Mar. 3, 1911, c. 210, 36 Stat. 1063 (Yuma); Act of Mar. 3, 1911, c. 210, 36 Stat. 1063, 1069 (Kiowa); Act of Mar. 4, 1911, c. 246, 36 Stat. 1345 (Hoh); Act of May 11, 1912, c. 121, 37 Stat. 111 (Omaha).

considered by this Court in prior disestablishment cases.[9] But Congress chose neither such course—instead enacting special language in the Yankton Act.

Precisely because it is different, Article XVIII must not be construed to have the same meaning as narrower savings clauses Congress used elsewhere. As the Court determined in *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 101 (1991):

> [I]t is not our function to eliminate clearly expressed inconsistency of policy and to treat alike subjects that different Congresses have chosen to treat differently. The facile attribution of congressional 'forgetfulness' cannot justify such a usurpation. Where what is at issue is not a contradictory disposition within the same enactment, but merely a difference between the more parsimonious policy of an earlier enactment and the more generous policy of a later one, there is no more basis for saying that the earlier Congress forgot than for saying that the earlier Congress felt differently. In such circumstances, the attribution of forgetfulness rests in reality upon the judge's assessment that the later statute contains the *better* disposition. But that is not for judges to prescribe.

As *Casey* teaches, this Court's role is to give effect to the language Congress enacted, not to presume that differences in related statutes were inadvertent or unintentional. That

[9] *Hagen*, 510 U.S. 399 (1994); *DeCoteau*, 420 U.S. 425 (1975); *Mattz*, 412 U.S. 481 (1973); *Seymour*, 368 U.S. 351 (1962). The presence of a limited savings clause, or no savings clause at all, is not inconsistent with finding continued Reservation boundaries on other grounds. This Court has found Reservations not to be disestablished in both situations. *See Solem*, 465 U.S. 463 (limited savings clause); *Seymour*, 364 U.S. 351 (no savings clause). Here, where Congress enacted an unequivocal savings clause, the basis for finding no disestablishment is all the more clear, as we discuss below.

principle applies here. The Yankton savings clause is plainly different from the savings clauses at issue in, for example, *Rosebud*, and should not be presumed to have the same meaning.[10]

The State argues that Article XVIII merely preserved annuities guaranteed in the 1858 Treaty. State Br. at 21. But Congress knew how to preserve "benefits" from treaties—such as annuities—when that was its objective. *E.g.*, Act of April 23, 1904, c. 1484, 33 Stat. 254, 255 (art. V) (Article V of the September 14, 1901 Agreement, at issue, in *Rosebud*, 430 U.S. 584). That is not what Congress did in Article XVIII.

Moreover, Article XVIII of the Yankton Agreement has two separate clauses, one continuing annuities and the other continuing in full force and effect "all provisions of the said treaty of April 19th, 1858." Thus, the State's position requires this Court to find 1) that Congress in Article XVIII used different language than it used in other savings clauses, but intended no difference in meaning, and 2) that Congress included two clauses in Article XVIII, but intended only one of them (dealing with annuities) to have any meaning at all. This Court should not, we submit, attribute to Congress either an inability to distinguish between various savings clauses it enacts, or an intent to include language devoid of meaning.

Instead, Article XVIII should be construed to do what it says—to preserve the provisions of the 1858 Treaty. To be sure, Articles I and II of the Act provide for the sale of unallotted lands—something not contemplated in the 1858 Treaty. But, apart from these provisions by which Congress *specifically* effected a land transfer, Article XVIII maintains the 1858 Treaty provisions intact. In other words, in the absence of a specific directive by Congress in the Act, Article XVIII should *not* be construed by

[10] *See Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 131-35 (1989) (treaty provision different from related provisions should not be construed as drafting error).

inference or implication to deprive the Tribe of its Treaty protected rights.

Among the core rights protected by the 1858 Treaty is the Tribe's right to its Reservation, within boundaries defined by the Treaty. Since no language in the Act by its terms purports to alter the Reservation boundaries, Article XVIII maintains those 1858 boundaries. This reading of the Act harmonizes its provisions—implementing the specific land purchase provided in Articles I and II, while at the same time giving life to the general principle that Article XVIII preserves the terms of the 1858 Treaty.

2. *The Article I Cession and the Article II Payment.*

Article I of the 1892 Agreement recited that the Yankton Sioux Indians "hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation," 28 Stat. 286, 314. Article II of the 1892 Agreement stipulated that the United States would make a $600,000 lump sum payment for the unallotted Yankton Sioux lands. *Id.* at 315. While this Court has referred to language of cession and sum-certain payment provisions as creating "an almost insurmountable presumption" of disestablishment, it did so in the context of a surplus land Act that did *not* have a broad savings clause like Article XVIII of the Yankton Agreement. *Solem*, 465 U.S. at 470-71 (1984). Article XVIII, by its express terms, makes any presumption of disestablishment unavailable.

In *DeCoteau*, this Court held that an 1889 Agreement containing language of cession and requiring payment of a sum certain by the United States disestablished the Sisseton Wahpeton Reservation. *DeCoteau*, 420 U.S. 425 (1975). A fundamental difference between the 1889 Sisseton Wahpeton Agreement and the 1892 Yankton Agreement is that the Sisseton Wahpeton Agreement had no savings clause, while the Yankton Agreement had an

unequivocal savings clause. The fact that Congress considered these two Reservations so close in time—with the Sisseton Wahpeton Agreement ratified in 1891 and the Yankton Agreement ratified in 1894—underscores the importance of giving effect to the savings clause in the Yankton Agreement. Congress should not be viewed as having disestablished the Sisseton Wahpeton Reservation in 1891, and then be deemed to have added different language, but to have intended the same result, with regard to the Yankton Reservation in 1894. Rather, the inclusion of Article XVIII in the Yankton Agreement indicates a change from Sisseton Wahpeton, and a continuation of the Reservation boundaries at Yankton.

3. *Other Provisions.*

Other provisions in the 1892 Agreement and 1894 Act support continued Reservation status. Article XVII permanently prohibited liquor sales on the lands ceded under the Agreement, or "upon any *other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians* . . . ." 28 Stat. 286, 318 (emphasis added). This language states clearly that the Yankton Reservation was preserved—as the provision refers to the "reservations" [11] and indicates that the lands ceded are included among lands "within or comprising the reservations"—not some category of former reservation land. The Court should not construe Article XVII to delete the word "other"—as the State's position would require. Rather, the clear reference to the continuing existence of the Reservation in the 1892 Agreement and 1894 Act must be given effect.[12]

[11] The reference to "reservations" is to the Yankton Sioux Reservation that is the subject of this case, and the Pipestone Reservation referred to in Article XVI of the Agreement.

[12] The Petitioner argues that Article XVII raises a presumption of disestablishment since making the ceded lands subject to federal liquor laws would be "surplusage" if those lands remained part of "Indian country" and thus already subject to such laws. Stat. Br. at 17-19. But as this Court pointed out in *Solem*, 465 U.S. at 468, at the time of the Agreement Indian country was understood to exclude lands held by non-Indians, even if located within reservation boundaries, so inclusion of liquor controls merely reflected the parties' intent to carry out the Tribe's express wish for continued prohibition throughout the area, whether Indian or non-Indian owned. S. Exec. Doc. No. 27, 53d Cong., 2d Sess. (1894) (hereafter "Negotiations") at 21. In any event, whatever Congress in 1894 understood to be the law regarding liquor in Indian country, certainly it knew what was meant by using the term "reservation" in the Act.

See also Article I (cession of lands "within the limits of the reservation"); Article XIII (assuring peaceable possession of allotments "on the reservation").

Article VIII of the 1892 Agreement provided that "[s]uch . . . lands hereby ceded and sold to the United States, as may now be occupied by the United States for agency, schools, and other purposes, shall be reserved from sale to settlers until they are no longer required for such purposes." 28 Stat. 286, 316. In construing a similar provision in a surplus land Act regarding the Cheyenne River and Standing Rock Reservations, Act of May 29, 1908, c. 218, 35 Stat. 460, this Court stated that "[i]t is difficult to imagine why Congress would have reserved lands for such purposes if it did not anticipate that the opened area would remain part of the reservation." *Solem*, 465 U.S. at 474. Article VIII, therefore, supports the proposition that Congress did not intend in 1894 to abrogate the reservation boundaries.[13]

[13] Similarly, Articles IV and V provided that most of the monies paid to the Tribe should be held in a fund and paid out "for the benefit of the Tribe in such manner as the Secretary of the Interior shall determine," for purposes such as "schools," "courts of justice and other local institutions for the benefit of the Tribe." Article V also provided for congressional appropriations for these purposes of "an amount equal to or greater than" the monies expended from the fund. Article V, Section 2 provided that the fund should be distributed only when the "Indians shall have received a complete (fee) title to their allotted lands." These articles contemplated a continuing federal responsibility, and, like Article VIII, are consistent with continued reservation existence.

The State relies on the provision in the 1894 Act which reserves the 16th and 36th sections in each township for common school purposes, arguing that this provision indicates that the ceded lands no longer were part of an Indian reservation. State Br. at 19-20. If the ceded lands no longer were part of an Indian reservation, however, this provision and, in particular, the clause making the school lands "subject to the laws of the State of South Dakota" would be surplusage since the State already had a right to sections 16 and 36 in each township for school purposes under its Enabling Act of February 22, 1889, c. 180, 25 Stat. 676, and the school lands outside an Indian reservation automatically would be subject to its laws. It should not be assumed that Congress intended a change in reservation boundaries by virtue of a school lands provision that would be superfluous if disestablishment was to occur. In any event, this Court has warned that school lands provisions are "suspect" as "independent evidence of a Congressional intent to diminish." *Solem*, 465 U.S. at 475 n.18.

B. Any ambiguity in the Agreement and Act must be resolved in favor of continued existence of the Reservation.

Assuming *arguendo* that the language of Article XVIII and the 1894 Act as a whole is not clear, it is well settled that when this Court interprets provisions of statutes claimed to alter Indian treaties, it invokes the longstanding rule that "legal ambiguities are resolved to the benefit of the Indians." *DeCoteau*, 420 U.S. at 447; *Hagen*, 510 U.S. at 411; *see also Carpenter v. Shaw*, 280 U.S. 363, 367 (1930). This canon of construction is "rooted in the unique trust relationship between the United States and the Indians." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985); *see also Washington v. Washington Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. 658, 675 (1979). This Court has explained that when considering surplus land Acts, "[d]iminishment . . . will not be lightly inferred," *Solem*, 465 U.S. at 470; *Hagen*, 510 U.S. at 411, and that, in this context, the principle of construing ambiguities for the benefit of the Indians must be given "the broadest possible scope." *DeCoteau*, 420 U.S. at 447.

This canon of construction is not simply a default principle or a tie-breaker rule. Rather, it expresses a powerful rule of public policy central to our political system.[14] Basic to our constitutional system is the principle that government can operate only with consent of the governed. Indians were initially incorporated into the American political system through treaties like the 1858 Yankton Sioux Treaty, in which tribes gave their assent on behalf of their members to that incorporation and to subjecting themselves to the overriding power of Congress.[15] For this reason, treaties like the 1858 Yankton Sioux Treaty are fundamental documents setting forth the terms of the political relationship between tribes and the United States, much like the Constitution sets forth the terms of the political relationship between states and the United States.[16] Thus, this canon of construction expresses the rule that the original intent of treaties by which tribes gave consent to political incorporation into the United States ought to be preserved unless a subsequent statute "plainly" and "unambiguously" altered the treaty. *E.g.*, *Oneida*, 470 U.S. at 247-48.

This principle has been at the heart of this Court's Indian jurisprudence from the beginning. In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) this Court held that the Cherokee Nation's right to self-government was not divested, despite Treaty language giving Congress the right of "managing all their affairs." *Worcester*, 31 U.S.

---

[14] *See generally* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism and Interpretation in Federal Indian Law*, 107 *Harv. L. Rev.* 381, 413-19 (1993).

[15] *See generally* Richard B. Collins, *Indian Consent to American Government*, 31 *Ariz. L. Rev.* 365 (1989).

[16] *See* Frickey, 107 *Harv. L. Rev.* at 413-19, 426-29.

at 553. The Court held that had the Treaty intended the Cherokees to lose their governmental authority, "it would have been openly avowed." *Id.* at 554; *see also Ex parte Crow Dog*, 109 U.S. 556 (1883) (statute authorizing Congress to "secure to . . . [the Tribe] an orderly government" construed not to remove tribal self-government). This principle of safeguarding tribal rights against all but the most explicit actions by Congress "has been recognized, without exception, for more than a hundred years." *Choate v. Trapp*, 224 U.S. 665, 675 (1912).

This Court continues to apply this canon strictly. In *County of Yakima v. Confederated Tribes of the Yakima Indian Nation*, 502 U.S. 251 (1992), Justice Scalia, speaking for the Court, declared:

> When we are faced with these two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: "[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Montana v. Blackfeet Tribe, 471 U.S. at 766. See also McClanahan v. Arizona State Tax Comm'n, 411 U.S. at 174.

Id. at 269; *see also United States v. Dion*, 476 U.S. 734, 738 (1986); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412 (1968).

At a minimum, the Article XVIII savings clause, and the other provisions discussed above, make untenable the position that the 1892 Agreement and 1894 Act constitute "clear," "plain" and "unambiguous" Congressional intent to abrogate Indian treaty rights defining the boundaries of the Yankton Sioux Reservation. So, should this Court see any tension between Article XVIII and other provisions of the 1892 Agreement, the canons of construction mandate that the Agreement be construed to preserve the Reservation's boundaries.

II. EVENTS SURROUNDING EXECUTION AND RATIFICATION OF THE 1892 AGREEMENT SHOW NO INTENT TO DISESTABLISH THE YANKTON SIOUX RESERVATION.

This Court has noted that "[w]hen events surrounding the passage of a surplus land Act—particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress—unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation," the Court has been willing to find that Congress intended to diminish a reservation. *Solem*, 465 U.S. at 471. But, no such unequivocal understanding existed in this case. To the contrary, contemporaneous statements by Congress and the Executive officers responsible for implementing the 1894 Act indicate that the Yankton Sioux Reservation survived unchanged.

A. Congress expressed continued Reservation existence.

As noted above, Congress in the 1894 Act itself referred to the Yankton Reservation as having continued vitality. Congress did so again less than two years later, by enacting a measure granting to "all settlers who made settlement under the homestead laws upon lands *in the Yankton Indian Reservation* . . ." a leave of absence for one year.[17] Act of February 26, 1896, c. 31, 29 Stat. 16 (emphasis added). Moreover, the same 1896 Act, in a separate section, extended for one year the time for proof and payment by settlers under the homestead laws "upon any lands of any former Indian reservation in the State of South Dakota." *Id.* at § 3. Thus, Congress in 1896 both referred to the lands sold by virtue of the 1894 Yank-

[17] By contrast, Congress in a statute enacted one year after the first Rosebud opening statute described the homesteaded lands as "lands which were heretofore a part of the Rosebud Reservation." 33 Stat. 700, quoted in *Rosebud*, 430 U.S. at 603 n.25.

ton Act as an ongoing "Reservation," and used completely different language when referring to lands of any "former Indian reservation." As this Court observed in *Solem*, 465 U.S. at 471, "Congress' own treatment of the affected areas, particularly in the years immediately following the opening," has value in determining Congress' intentions as to disestablishment. The clear statutory references in 1894 and 1896 to the Yankton "Reservation" are significant reflections of Congressional intent.

B. Statements and actions by executive officers contemporaneous with the Agreement and Act support the continued existence of the Reservation.

In his Proclamation of May 16, 1895, 29 Stat. 865, opening the Yankton Sioux Reservation to settlement under the 1894 Act, President Cleveland declared that the lands so opened were described in a "Schedule of Lands *within the Yankton Reservation*, South Dakota . . . ." (emphasis added). By contrast, President Theodore Roosevelt's Proclamation opening the lands in *Rosebud* contained no such reference to the "Reservation," and indeed constituted an "unambiguous, contemporaneous statement by the Nation's Chief Executive of a perceived disestablishment" which strongly evidenced an intent by Congress to change reservation boundaries. *Rosebud*, 430 U.S. at 602-03. President Cleveland's statement regarding the "Yankton Reservation" is likewise persuasive evidence of what Congress intended in the 1894 Act.

Past decisions of this Court which found reservation boundaries to be disestablished have relied on clear statements during negotiations indicating disestablishment. In some instances, the Court has referred to express statements by tribal representatives. *DeCoteau*, 420 U.S. at 433 ("[w]e never thought to keep this reservation for our lifetime"); *id.* at 435 n.16 ("[w]e can buy for ourselves what we need if payment is made in cash, and then we do not care to have an agency here after the surplus lands

have been sold"). The Court in *Hagen*, 510 U.S. 399 (1994), relied upon the explanation made by the negotiator for the United States to the Indians that "congress has provided legislation which will pull up the nails which hold down that [reservation boundary] line and *after next year there will be no outside boundary line to this reservation.*" *Id.* at 417 (citations omitted). The Court viewed this statement as reflecting "the contemporaneous understanding" conveyed to the Indians that the Reservation would be diminished.[18]

There is no evidence in the negotiations with the Yankton of any such contemporaneous understanding. To the contrary, the Commissioners who negotiated the 1892 Agreement for the United States, when forwarding the Agreement to Congress, wrote about "the settlement and improvement *of the reservation* by white people . . . ." Negotiations at 18 (emphasis added). Likewise, John P. Williamson, a missionary and advisor to the Yankton, wrote "I have read the agreement you present the Yankton Indians . . . I can say to the Indians that I believe the terms of this agreement are the most liberal that could be granted them at this time . . . And further there is no cause for apprehension that this agreement will in any way interfere with the treaty of 1858." Negotiations at 84.[19] These statements inform the contemporaneous understand-

---

[18] Similarly, in *Rosebud*, the Government's Inspector McLaughlin, in negotiating with the Rosebud Tribe explained that "'[t]he cession of Gregory County' by ratification of the Agreement, 'will leave your reservation a compact, and almost square tract, and would leave your reservation about the size and area of Pine Ridge Reservation.'" *Rosebud*, 430 U.S. at 591-92. This Court determined that such language created "an unmistakable baseline purpose of disestablishment." *Id.*

[19] The principle that treaties and agreements are to be considered as the Indians understood them is elemental. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942); *Jones v. Meehan*, 175 U.S. 1, 11 (1899).

ing of the 1892 Agreement and stand in stark contrast to the statements made during the negotiations at issue in *DeCoteau*, *Rosebud* and *Hagen*.

C. The legislative history of the 1894 Act shows no intent to disestablish the Reservation.

The legislative history of the 1894 Act is similarly barren of any evidence of intent to change reservation boundaries.[20] When the 1892 Agreement came before Congress for ratification, the House of Representatives initially amended its terms to provide for payment to the Yankton Sioux Tribe only as portions of the unallotted lands were sold to settlers. 53 Cong. Rec. 8268 (1894). The House later reconsidered and withdrew this amendment. *Id.* at 8268-8271. Nothing in the debate gives any indication that any member of the House thought changing the method of payment had anything to do with diminishing the Reservation.[21] Direct discussion of reservation boundaries is entirely absent from the Congressional reports and debates.

---

[20] During the course of debate, two Congressmen referred to placing the surplus lands in the "public domain," but it is not clear that these references were to the Yankton cession and, even if they were, this Court has held that isolated references such as this are "hardly dispositive." *Solem*, 465 U.S. at 475.

[21] Likewise, the negotiations leading to the 1892 Agreement reveal that at the outset both the Tribe and the U.S. treaty commissioners favored a cession through "appraisal and sale"—with the Indians receiving payment only from the actual proceeds. Negotiations at 77-78. The parties ultimately agreed to payment of a fixed price for a variety of reasons including certainty of amount, and ease of resale to settlers. Not a shred of evidence exists in the record of negotiations to suggest that changing from appraisal and sale to a fixed price might also lead to eliminating the Reservation boundaries. Negotiations at 75-78.

CONCLUSION

Where this Court has found that Congress disestablished a Reservation, that finding has been based on a confluence of factors—strong and consistent statutory language suited to disestablishment, surrounding circumstances providing substantial evidence of a contemporaneous understanding of disestablishment, and a pragmatic view that the area in question had in fact lost its Indian character. *See Solem*, 465 U.S. at 470-71.

In this case, none of these factors is present. The 1892 Agreement and 1894 Act contain a unique savings provision (Article XVIII), refer several times to a continuing "reservation" (Articles I, XIII and XVII), and include additional provisions reflective of continued reservation existence (Articles IV, V and VIII). Only by depriving Article XVIII of its plain meaning, and ignoring the force of Congress' own references to a continuing reservation, could the language of the Agreement and Act be viewed as consistent with disestablishment.

Moreover, the negotiations leading to the 1892 Agreement, and the legislative history of the 1894 Act, are completely devoid of the kind of statements regarding reservation boundaries that this Court has relied on in finding disestablishment in other cases. The best evidence of the contemporaneous understanding here is the use of the term "reservation" by Congress itself in the 1894 Act and again in 1896, and by the President in his proclamation opening the lands in 1895.

And finally, at Yankton, the "strong tribal presence in the opened area has continued until the present day," "the seat of the tribal government is now located there" and "most important tribal activities" and the continued operation of federal Indian programs take place there. *Solem*, 465 U.S. at 480. The ongoing presence of a significant number of tribal members and an active tribal government

on the lands at issue further supports continued reservation existence.

In short, particularly since it must "resolve any ambiguities in favor of the Indians" and "not lightly find diminishment" [22] this Court should hold that the 1894 Act did not disestablish the Yankton Sioux Reservation. The decision below should be affirmed.

Respectfully submitted,

REID PEYTON CHAMBERS *
ARTHUR LAZARUS, JR., P.C.
WILLIAM R. PERRY
KYLE T. NAYBACK
SONOSKY, CHAMBERS, SACHSE
& ENDRESON
1250 Eye Street, N.W., Suite 1000
Washington, D.C. 20005
(202) 682-0240
Attorneys for Amici Curiae

* Counsel of Record

---

[22] *Hagen*, 510 U.S. at 411 (1994).